

**REPORT OF THE INDEPENDENT REVIEW OF THE MANAGEMENT BY THE
DEPARTMENT OF THE ENVIRONMENT, COMMUNITY AND LOCAL
GOVERNMENT OF AN APPLICATION BY WICKLOW COUNTY COUNCIL FOR
LOAN APPROVAL IN RESPECT OF THE COMPULSORY PURCHASE OF LAND
AT CHARLESLAND, CO. WICKLOW**

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1. Introduction and Background

1.01 On or about the 31st January 2012 the Minister for the Environment, Community and Local Government, Mr. Phil Hogan T.D., appointed me to carry out an independent review into the management by the Department of the Environment, Community and Local Government (“the Department”) of an application for loan approval by Wicklow County Council (“the Council”) in respect of the compulsory purchase of land at Three Trouts, Charlesland, Greystones, Co. Wicklow. Before setting out the Terms of Reference for the independent review the general background to this matter is as follows.

1.02 The provision of social and, more recently, affordable housing has long been a feature of housing policy at central government level, although it is a matter for individual local authorities to develop housing strategies for their own areas. While decisions on housing strategy are matters for local government, local authorities would have been influenced over the past decade by the general concern to ensure that there was sufficient land in public ownership to underpin the social and affordable investment housing programmes. This general concern is well captured in a report on housing issued by the National Economic and Social Council in 2004 (“Housing in Ireland: Performance and Policy”, Report No. 112, December 2004). At page 171 of that report it is stated as follows:

“In framing their local action plans for the provisions of social and affordable housing, individual local authorities are required to indicate if there is sufficient supply of land in their ownership for future house building requirements. Where land availability arises as a particular constraint to the supply of social and affordable housing, it is recommended that local authorities, in conjunction with central government, should take a more proactive role in setting targets for the acquisition and/or development of land for social and affordable housing including the development of adequate land banks for future supply (including the possibility of rezoning where appropriate). Where significant shortfalls in supply are projected or arise due to scarcity of land, the use of measures such as compulsory acquisition should be considered ...”.

- 1.03 As regards the funding mechanism used to purchase land, in recent years the most common way for local authorities to fund the creation of land banks for social and affordable housing purposes was to obtain loan finance from the Housing Finance Agency. Loans obtained in this way could be redeemed, including the rolled up interest for a period of up to seven years, when the land was later used for a social housing project for which 100% Exchequer funding was normally provided under the Social Housing Investment Programme (“SHIP”). This capital funding was subject to the Department being satisfied with the project brief and having regard to the availability of funding under that programme.
- 1.04 In or about 2004 Council decided to acquire certain land in Greystones for the purpose of accommodating social and affordable housing. On the 6th December 2004 the Council served a Compulsory Purchase Order (“CPO”) on the owner and on the occupier of this land, being 1.4022 hectares of land at Three Trouts, Charlesland, Greystones. This CPO was confirmed, without modification, by An Bord Pleanála on the 25th April 2006. A Notice to Treat was served on the 12th July 2006 on the above parties. The occupier of the land delivered a Notice of Claim on or about the 16th August 2006 giving details of the compensation claimed, and the owner delivered a Notice of Claim on or about the 17th August 2006. Under the relevant legislative provisions, once six weeks had expired from the date of the delivery of a Notice of Claim the local authority were not legally entitled to withdraw the Notice to Treat. Therefore, in the present case, by around the end of September 2006 the Council were legally committed to proceed with the purchase of this land, and had no legal entitlement to withdraw from the compulsory acquisition process, irrespective of any future change in circumstances, including any change in the value of the land. As regards value, in assessing compensation for the acquisition of this land by this CPO, the date of service of the Notice to Treat was the relevant date by reference to which the market value of the property to be acquired had to be assessed.
- 1.05 After September 2006 the compulsory purchase process took its course, with efforts by valuers for both sides to negotiate an agreed amount of compensation. After a lot of discussions between all parties over the years the matter was ultimately referred to the Property Arbitrator, and a hearing was listed for the 1st November 2010 but was

adjourned ultimately to the 24th March 2011, and on that date a settlement was reached whereby the Council agreed to pay compensation of €3m together with costs.

1.06 In the meantime, after September 2006 the Council began to engage with the Department regarding the land which it was now legally committed to purchase, and this engagement arose by way of the Council seeking two separate approvals pursuant to two distinct processes of approval. Firstly, the Council sought approval for capital funding under SHIP for a proposed housing project on the land being acquired, and the first communication from the Council to the Department was dated the 6th December 2006. This approval process took its course until around the middle of 2008, when it was effectively put on hold because of the lack of any further Exchequer funding for new housing schemes, and this process will be discussed further in Chapter 2 below. Secondly, on or about the 19th August 2008 the Council sought the Department's approval to raise a loan totalling €26m for land purchase and other purposes, on foot of a resolution by the Members of the Council dated the 18th August 2008. This application for sanction to borrow was made pursuant to Section 106 of the Local Government Act, 2001 ("the 2001 Act") and the total figure of €26m included a slice of €5m in respect of the CPO land at Charlesland.

1.07 The detailed history of this application for sanction to borrow will be set out in Chapter 2 below, but for the purposes of this introduction the history of same may be summarised as follows. The application for sanction was under consideration by the Department after receipt of the letter dated the 19th August 2008, but was effectively put on hold in late 2008 while the amount of compensation under the CPO process had not yet been agreed. In 2009 the application for sanction was revived and ultimately the Council was granted approval to borrow €5m for the land at Charlesland by letter dated the 29th July 2009. However, the Council did not draw down any such loan from the Housing Finance Agency by the end of 2009 as the CPO compensation amount was still not agreed, and the sanction lapsed at the end of 2009. No fresh application was made for sanction in 2010, but by letter dated the 20th July 2011 the Council made a fresh application to the Department to sanction the borrowing of the sum of €3m for the acquisition of the land at Charlesland, on foot of a resolution of the Members dated the 18th July 2011. In advance of passing that

resolution a number of Council Members expressed certain reservations about the compulsory purchase process, and the amount of compensation payable by the Council to complete the purchase.

1.08 Shortly after receipt of the application for sanction to borrow, the Department became aware of these reservations, after it received correspondence in relation to the matter from the Committee of Public Accounts by letter dated the 22nd July 2011. This application for sanction to borrow was then effectively put on hold, pending the receipt of legal advice from the Attorney General's Office. This legal advice was received by the Department in the middle of October 2011, and it confirmed, *inter alia*, that under the CPO legislation one had to assess compensation by reference to the value of the land at the date the Notice to Treat was served, i.e. July 2006, and not by reference to any later date, even if the value of land had fallen sharply since the date of the Notice to Treat. In late October 2011 the Department was considering whether to grant Wicklow County Council the sanction to borrow as sought back in July, but before a decision was made the matter was the subject of representations by three Wicklow public representatives (Councillor James O'Shaughnessy, Councillor Thomas Cullen and Councillor Barry Nevin) to the former Minister for Housing and Planning, Mr. Willie Penrose T.D. The Minister's Special Adviser met with these public representatives at the request of the Minister on the 3rd November 2011, and he was at that meeting given a document dated the 3rd November 2011, which document set out a list of allegations or issues of public concern regarding the manner in which this land acquisition was dealt with by the Council, and also regarding the Department's management of the loan applications by the Council to fund the acquisition. He was subsequently sent a further document dated the 7th November 2011 regarding the CPO and valuation of the land. The two documents from the three Councillors are annexed to the revised Terms of Reference which are attached at Appendix 1 hereto.

1.09 Following receipt of these documents by the Department the Secretary General wrote to the Office of the Attorney General by letter dated the 16th November 2011 and stated that, in light of the serious issues raised in the documents submitted to Minister Penrose, the Department would not be further processing the application for loan

sanction pending an examination of the validity, or otherwise, of the claims made in respect of the actions of the Department and the Council. She stated that independent review of the actions of the Department since the making of the original loan application by the Council was now necessary before final consideration would be given to the current loan application, and such a review should also be enabled to pursue any associated inquiry which might be necessary in respect of the manner in which the Council has itself dealt with this land acquisition. She commented that, in undertaking this review, it would be necessary to address the specific concerns of the public representatives and to consider whether the Department was fully compliant with relevant statutory and public policy obligations. A copy of this letter is attached at Appendix 2 hereto.

- 1.10 After this letter consideration was given to the nature and scope of the proposed independent review, and it was decided to proceed in the first instance with a review of the actions of the Department and to postpone further consideration of any associated review that might be necessary in respect of the manner in which Wicklow County Council dealt with the land acquisition. As stated at paragraph 1 above, I was appointed to carry out the independent review by letter dated the 31st January 2012. The appointment was made with the following Terms of Reference:

“Review by Senior Counsel of the management by the Department of the Environment, Community and Local Government of an application by Wicklow County Council for loan approval in respect of the compulsory purchase of land at Charlesland, Co. Wicklow

Terms of reference

The manner in which this matter has been addressed by both the Department and Wicklow County Council has been the subject of representations by a number of Wicklow public representatives to the then Minister for Housing and Planning. The Minister’s Special Adviser met with these representatives at the request of the Minister on 3 November 2011 and he was at that meeting given the annexed document dated 3 November 2011. He was subsequently sent a further document dated 7 November 2011 (also annexed).

In light of the serious allegations made in these documents, concerning the Department’s management of the loan applications by the Council to fund the compulsory land acquisition, Counsel is requested to:

- I. review the relevant records of the Department in this regard;*

- II. *consult as necessary relevant officers of the Department;*
- III. *establish the process followed by the Department in regard to the loan application and its consistency with the relevant legal requirements and administrative requirements or practices;*
- IV. *identify any deviation from such requirements and practices, and.*
- V. *make such findings and recommendations as may be appropriate in light of this review, including in regard to any shortcomings that may be identified either in regard to the management of the specific loan application or more generally in regard to the processing by the Department of such applications.... ”*

1.11 It should be noted that my appointment was to carry out the independent review on a part time basis, and I began work on the review in early February 2012. In order to ensure that the review was conducted by reference to all relevant materials, copies of the relevant files were obtained from the Department and from Wicklow County Council. I had a meeting with officials of the Department on the 17th February 2012 to clarify certain aspects of the files, and I sought clarification in writing on a number of occasions from Department officials.

1.12 During the course of my review a doubt arose as to whether the Terms of Reference allowed me to fully address the specific concerns of the public representative, insofar as they related to the actions of the Department, and for the avoidance of doubt my Terms of Reference were amended to include the following additional paragraph, whereby Counsel was also requested to:

“IVA address the specific concerns of the Public Representatives in the annexed documents regarding the role of the Department and consult as necessary with these Public Representatives”.

1.13 The revised Terms of Reference are attached at Appendix 1 hereto. Subsequent to the amendment of the Terms of Reference I met with these public representatives on the 5th March 2012 to clarify certain aspects of the concerns raised by them in the annexed documents.

1.14 In conducting this review I did not have the benefit of any statutory powers, whether to compel the production of documents or otherwise. However, it is appropriate to record that I obtained the full cooperation of the Department, and the Council and the public representatives, and I am grateful for the prompt assistance which was given to me.

2 The Relevant Legal Requirements and Administrative Requirements or Practices regarding Loan Approval

The Statutory Framework:

- 2.01 Borrowing of money by a local authority is governed by section 106 of the Local Government Act, 2001 (“the 2001 Act”). Section 106(2) empowers a local authority to borrow money in any manner which it considers suitable for the effective performance of its functions, but section 106(3)(a) then provides that borrowing by a local authority under this section shall only be with the sanction of the appropriate Minister. The appropriate Minister would normally be the Minister for the Environment, Community and Local Government and this was the position in the present case. Section 106(4) provides that any application for the sanction of the appropriate Minister shall be in such format as may from time to time be specified by the appropriate Minister. Section 106(5) empowers the Minister to make regulations in relation to borrowing by a local authority, after consultation with the Minister for Finance, but it appears that no such regulations have been made to date. Section 106(7) provides that a decision to borrow by a local authority is a reserved function, i.e. a function requiring a resolution of the elected members as opposed to an executive function exercisable by the manager of the local authority and those to whom he may delegate. A copy of section 106 is attached at Appendix 3 hereto.
- 2.02 It is noteworthy that Section 106 of the 2001 Act confers a discretionary power on the appropriate Minister, i.e. a power to sanction or not sanction borrowing of money by a local authority, but it fails to lay down any criteria for the exercise of this discretionary power. In my view this is a defective legislative provision, as it is important that the Oireachtas would set out certain criteria to be taken into account by a public body in the exercise of a statutory discretion, so that if necessary one can later review the exercise of any such discretion having regard to the stated criteria. In my opinion it is very unlikely that the Minister could have made valid regulations to cure this lacuna, in the absence of any stated “principles and policies” in the primary legislation. I shall return to this topic in Chapter 5 below.

Administrative Requirements or Practices:

- 2.03 The administrative requirements or practices regarding sanction to borrow were set out in a Department Circular HPS 8/04 dated 23rd July 2004, and in an internal Note issued by the Housing Policy and Supply Section of the Department also dated the 23rd July 2004. As regards the Circular, this was entitled “Borrowing for Housing” and was directed to each housing authority issuing loans and copied to the Housing Finance Agency. The relevant parts of the Circular provided as follows:

“Borrowing for Housing

I am directed by the Minister and Housing and Urban Renewal to refer to borrowing by local authorities for housing purposes.

In the Budget 2004, the Government set a limit on the net General Government Balance for borrowing by the local government sector. Such borrowing includes borrowing by local authorities for land acquisition for social, affordable, voluntary housing and general housing purposes as well as other borrowing; it excludes mortgage type housing loans.

Borrowing for Land Acquisition

As part of the development of multi-annual action plans, local authorities are required to consider the availability of land for housing in their area. Local authorities are therefore requested to indicate their likely borrowing requirements for land acquisition over the next 3 years, 2004 to 2006. It is expected that lands acquired over this period would normally be built out in a 5 to 7 year period.

In seeking approval for loan sanction for borrowing for land acquisition, local authorities should submit their request to ... Housing Policy and Supply Section in the Department The amount of the local to be drawn down in 2004 and in subsequent years (if applicable) should be outlined in the loan request from local authorities. In accordance with Section 106 of the Local Government Act 2001, a copy of the Council’s resolution authorising the borrowing should also be forwarded with the request for sanction as well as a short report on the area of lands involved, its suitability of housing development and an estimate of the number of units likely to be achieved. This will give an indication of the land cost per housing unit. It is also a common practice for local authorities to informally consult with the Department prior to formal bids being made for lands.

Subject to the setting of overall limits by the Government on borrowings by the local government section, it is the Department’s intention to facilitate local authorities continuing to borrow for necessary land acquisitions for the implementation of the various social and affordable housing programmes”.

- 2.04 The internal Note from the Housing Policy and Supply Section dated the 23rd July 2004 was entitled “Borrowing for Housing – Revised Procedures for Sections” and the relevant extracts are as follows:

“Local authorities are being advised in circular HPS 8/04 (copy enclosed) that the Government have set a limit on the net General Government Balance (GGB) for borrowing by the local government section. The circular includes details of the procedures to be adopted by local authorities in borrowing for land acquisition...”

Sections

Housing Management and Affordable Housing Section deal with borrowing for land acquisition for affordable housing and maintenance and improvement programmes, Housing Construction deal with borrowing for land acquisition for social housing and for general housing purposes, Voluntary and Cooperative Housing Unit deal with borrowing for land acquisition for voluntary housing, and Social Inclusion Unit deal with borrowing for disabled persons grants/essential repairs grants...

New Arrangements

Under new arrangements, it has been decided that Housing Policy and Supply Section should coordinate all borrowing requests from local authorities. This Section will consult with the relevant Housing Section and with Local Government Finance Section in advance of approving borrowing. In addition, this Section will monitor and report on borrowing and implications for GGB.

Processing Loan Applications

1. *A local authority requests the Department’s approval for a loan for ... land acquisition for affordable housing, social housing or for general housing purposes. The local authority should send the request to Housing Policy and Supply Section, however, requests may be sent to Local Government Finance Section (who will forward it to Housing Policy and Supply Section). The local authority should provide details of the amount of the loan to be drawn down in 2004 and in subsequent years (if applicable) as well as a copy of the Council’s resolution authorising the borrowing.*
2. *Housing Policy and Supply Section will:*
 - *Consider if the borrowing can be met within the GGB limit;*
 - *Issue the loan request to the relevant housing Section who should review the loan application and notify Housing Policy and Supply Section if the loan request may be approved;*
 - *Seek approval from Local Government Finance Section, as appropriate (borrowing which relates to land acquisition and which is ultimately funded by the Department does not require their approval) to ensure that the finances of the local authority in*

question are likely to be sufficiently robust to enable them to service the borrowing sought;

- Issue a letter of approval to the local authority, as appropriate and provide a copy of the relevant housing Section; and*
- Provide a copy of the letter of approval and the Council resolution to the Housing Finance Agency.*

- 3. The local authority requests the draw down of the loan in full or in stages from the HFA over a period. The HFA subsequently seeks approval from the relevant housing Section to the draw down of the loan. ...*

*Housing Policy and Supply Section
23 July 2004”.*

2.05 As regards the Circular and the internal Note, two comments might be made. Firstly, the Circular indicates that the local authority’s application for loan sanction should include a short report on the area of lands involved, its suitability for housing development and an estimate of the number of units likely to be achieved. On the face of it this seems to suggest that the official in the Department dealing with the application may in some way consider the merits of the land acquisition as a relevant factor in deciding whether to grant sanction for borrowing. However, what the Circular actually states is that this report will give an indication of the land cost per housing unit. Secondly, the internal Note omits this reference to the local authority including a short report, but merely states that the local authority should provide details of draw down amounts, as well as a copy of the Council’s resolution authorising the borrowing. The internal note states that the relevant housing section should review the loan application and notify Housing Supply and Supply Section if the loan request may be approved, but it does not make any reference to any criteria which should be taken into account in reviewing the loan application.

2.06 As regards the facts that might be taken into account by Housing Construction Section in reviewing an application for sanction to borrow, the Department officials have advised me that these have tended to be of a very general nature, such as whether there is a demand for social housing in an area, or whether there is a view that a general area has already too much social housing for “sustainable communities” reasons, which is an issue that might arise in a large regeneration area. These very general factors might be taken into account in the context of the section having to prioritise between different projects within a given year, in order to keep within the

GGB limit for that year. As regards prioritising, consideration would be given to achieving a regional balance, and also to the circumstances of purchase, including whether there was a binding commitment to purchase resulting from a CPO. The Department officials have also advised me that it would have been very rare for the Housing Construction Section to advise against an application for sanction to borrow. It appears that during 2008 11 applications for sanction to borrow were received from local authorities and that nine applications were approved and two applications were not approved, and also not refused, but were carried into 2009 including the application the subject of this review which was subsequently approved in 2009.

3. The Process followed by the Department in regard to the Loan Application and its consistency with the relevant legal requirements and administrative requirements or practices

3.01 In my Terms of Reference I have been requested to establish the process following by the Department in regard to the loan application and its consistency with the relevant legal requirements and administrative requirements or practices, and also to identify any deviation from such requirements and practices. The relevant legal requirements and administrative requirements and practices have been set out in Chapter 2. It is now necessary to set out the process followed by the Department in regard to the loan applications, and it is necessary to examine separately the 2008 application and the 2011 applications.

The 2008 Application:

3.02 The Department's file shows the following recorded history of the 2008 application for sanction to borrow. The Council applied by letter dated the 19th August 2008 for sanction to borrow a total sum of €26m for various land purchase purposes, and attached a resolution of the Members in accordance with Section 106 of the 2001 Act. The application was sent into the Local Government Finance Section of the Department, who appear to have forwarded it to the Housing Policy and Finance Section, formerly known as the Housing Policy and Supply Section, on or about the 21st August 2008.

3.03 The Local Government Finance Section indicated that they had requested further information from the Council, and that they would send their observations when this information was received. The application for sanction was then coordinated by the Housing Policy and Finance Section, as per the 2004 Note, and the official dealing mainly with the matter was Ms. Niamh Redmond, a Higher Executive Officer in that Section.

3.04 After receiving the application for sanction directly the Local Government Finance Section began to assess the application, in order to consider whether to furnish

approval on the basis that the finances of the Council were likely to be sufficiently robust to enable them to service the borrowing sought. The Council was asked to provide further information regarding the loan, by way of completion of a loan application template. This loan application template was subsequently returned, and it included the information that provision would be made by the Council in their Budget 2009 and subsequent budgets for full year loan repayments. The official dealing mainly with the matter in the Local Government Finance Section was Ms. Ruth Nolan, a Higher Executive Officer, and Ms. Nolan has informed me that in dealing with such applications her Section would also look at a Council's recent financial outturn, as to whether it is in surplus, breaking even, or in deficit. In the present case, Wicklow County Council's financial position had remained in deficit over a number of years but the Council had been successful in slowly reducing this deficit year on year since 2002. Given the continuing reduction in deficit and the Council's commitment to budgetary provision for the full amount of loan repayments for Budget 2009 and subsequent budgets, the loan was considered affordable to the Council and no objection from a financial viewpoint were raised by her Section. Ms. Nolan wrote to Ms. Redmond by letter dated the 9th September 2008 and indicated that the Local Government Finance Section raised no objection from a financial viewpoint to the sanction of borrowing of €26m by Wicklow County Council.

- 3.05 At this stage Ms. Redmond sought further details from the Council by email dated the 11th September 2008 asking where the land would be purchased, how much of the €26m was required, and what the proposed drawdown schedule was. She referred to the issue of the overall GGB limit. The Council replied by letter the 19th September 2008 and indicated that one of the parcels of land was the CPO lands at Charlesland. The letter stated that the Notice to Treat had issued on the 12th July 2006, and that the valuers for both sides were negotiating at present with the expected valuation amount being over €5m. The Council were not exactly sure as to the drawdown schedule but anticipated that the full amount would be required before the end of the year.
- 3.06 At the end of October 2008 the Council sent an email to the Department stating that the Charlesland CPO was still under negotiation, with the Notice to Treat having issued but the amount having not yet been agreed. As a result the issue of sanction for

borrowing was put on hold or parked until 2009, when a new GGB limit for overall borrowing by the local government sector would become applicable.

3.07 As the matter went into 2009 it appears that the Housing Policy and Finance Section had not yet issued the loan request to the relevant Housing Section for their approval. However, as mentioned in Chapter 1, that section would have been aware of the CPO land for sometime in the context of a separate process of approval. The Council sought approval for capital funding under the Social Housing Investment Programme (“SHIP”) for a proposed housing project on the lands being acquired, and the first communication from the Council to the Department was dated the 6th December 2006, enclosing preliminary plans or drawings for the proposed scheme. The Council wrote to the Department by letter dated the 18th March 2008 seeking approval in due course, and enclosing a completed budget application form together with a cost plan and drawings. The Social Housing Section replied by letter dated the 11th April 2008, and requested the Council to submit a comprehensive project brief setting out various detailed information, and stated that the Department would give further consideration to the proposal upon receipt of the requested information. The Council submitted a detailed project brief by letter dated the 10th June 2008. As regards access, the project brief stated that the site could be accessed in a particular manner and later stated that there were two locations to obtain access, both of which would be acceptable to the Roads Engineers. As regards flooding issues, the project brief stated that part of the site was in the catchment area for the Three Trouts Stream, and that land nearby was flooded during Hurricane Charlie. It referred to a report having been commissioned, and that the main recommendation affecting the subject site by JB Barry Consulting Engineers was that floor levels should be raised to development nearby. It referred to the estimated land cost per housing unit. It set out the demand for social housing and affordable housing in the area. It stated that demand for housing was strong in the northern half of the county while land was expensive to obtain, and suggested that the site was suitable for development.

3.08 After receipt of the project brief an Architect Advisor in the Housing Inspectorate of the Department, Mr. Paul Altman, reverted to the Council with a number of remaining queries by email dated the 27th June 2008. The Council was asked to advise, in view

of access and flooding difficulties, why this site was identified for purchase when there appeared to be a considerable extent of lands zoned R1 and A located much closer to town centre facilities. The Council was asked whether a recent independent valuation of the lands could be submitted, whether it was possible to firm up on the likely all in costs, and whether when combined with Burnaby Lawn the proposal represented an over concentration of social housing. It appears that a draft reply was prepared by Wicklow County Council on or about the 7th July 2008 but that this reply was never sent to the Department. The reason appears to have been that it became clear around this time that the scheme was not likely to proceed in the near future because of the collapse of the national finances and the lack of any further funding for new social housing projects in the near future. On this basis the proposed scheme was effectively “mothballed” and a more minor application was later made to the Department in August 2009 for recoupment of design fees which had been incurred. However, the remaining queries raised by Mr. Altman in June 2008 remained outstanding on the SHIP file in the context of a proposed social housing project which was very unlikely to proceed in the immediate future because of absence of funding. There are certain additional matters which corroborate the suggestion that the application for capital funding under SHIP had gone into abeyance some time in 2008, and that it therefore became somewhat academic to be providing the additional information sought by Mr. Paul Altman of the Department on the 27th June 2008. The person dealing mainly with the matter in the Housing Construction Section of Wicklow County Council was a Mr. Derek Hennessy, and it was Mr. Hennessy who prepared the draft reply dated the 7th July 2008 which was never finalised and sent back to the Department. I have been advised by the Council that Mr. Hennessy left the Council in September 2008 to take up another appointment, and that he was not replaced as the position had now become surplus to the Council’s requirements, in the absence of available exchequer funding for new housing projects. This is also borne out by the minutes of the Housing Action Plan meeting between the Department and the Council on the 12th March 2009, which record the Chairman opening the meeting by stating that further cuts in funding were expected due to the current economic climate and the fall in exchequer funding, and which also recorded the fact that the Council was told that the project at Charlesland would not start.

3.09 While the application for capital funding under SHIP had gone into abeyance by early 2009, the application for sanction to borrow remained live, albeit somewhat on hold pending an allocation of loan finance for the housing area with what was likely to be a stricter GGB borrowing limit for the entire local government sector in 2009. By early June 2009 a phase 1 allocation of €13m had been approved for loan funding in the housing area. Ms. Niamh Redmond sent an email to some colleagues on the 10th June 2009, looking for their views on how the €13m would be “spent”, i.e. how sanction to borrow should be dealt with in the context of a number of different applications for sanction and a cap of €13m. Ms. Redmond referred to the fact that there was €11.1m in CPOs (Bray T.C. and Wicklow), which included the application by Wicklow County Council for sanction to borrow €5m in respect of the acquisition of the land at Charlesland. The matter was considered by Siobhán Nic Thighearnáin, formerly a Higher Executive Officer in the Housing Construction Section up to April 2008, but now assigned to the newly styled Housing Division Project Unit. On receipt of Ms. Redmond’s email Ms. Nic Thighearnáin sent on an email to certain colleagues and commented that “given Wicklow and Bray’s CPO position there is little option but to approve these two”. Following further consultation, Ms. Nic Thighearnáin later emailed Ms. Redmond and indicated the advice of the Social Housing Section as to how sanction for borrowing should be granted within the €13m of loan finance available, and this advice did not include sanction for the Charlesland CPO land. However, she added as follows:

“For phase 2, just to note we would seek to progress the Greystones CPO (€5m). The current position on that is that the land owner has died and the matter is now with Council’s Law Agent. However, the executor/family are pushing for early resolution”.

3.10 The advice from Ms Nic Thighearnáin was regarded by Ms. Redmond as the equivalent of a notification from the relevant Housing Section that the loan request from the Council for the Charlesland CPO could be approved, as per the terms of the 2004 Note. The advice of Ms. Nic Thighearnáin was approved the next day by Mr. Philip Nugent, Principal Officer and ultimately by Mr. John McCarthy, Assistant Secretary. The advice was to grant sanction to borrow when the phase 2 allocation of loan finance became available, and ultimately when this occurred Ms. Redmond issued a letter to the Council dated the 29th July 2009 granting the Council approval to

raise a loan totalling €5m for the purchase of land at Charlesland. However, the proposed loan was not drawn down from the HFA by the end of 2009 as the amount of compensation to complete the Charlesland CPO was not yet agreed, and the sanction to borrow therefore lapsed at the end of that calendar year.

Compliance with the Relevant Legal Requirements and Administrative Requirements or Practices:

- 3.11 In my view the process followed by the Department in regard to the 2008 loan application complied in all material respects with the relevant legal requirements and administrative requirements or practices. The application was made by the Council and processed by the Department in accordance with the provisions of Section 106 of the 2001 Act. At the outset there may be a question as to whether there was strict compliance with Section 106 (4) of the 2001 Act, which provides that an application for sanction shall be in such format as may from time to time be specified by the appropriate Minister. On the face of it the format for an application for sanction was specified in Circular HPS 8/04, which provided that a copy of the Council's resolution authorising the borrowing should be forwarded with the request for sanction as well as a short report on the areas of lands involved, its suitability for housing and an estimate of the number of units likely to be achieved. In the present case no such report appears to have been forwarded by Wicklow County Council with the application for sanction to borrow. However, a number of observations can be made in connection with this apparent omission. Firstly, it may well be the case that a short report on the lands was not in practice required as part of an application for loan sanction, and it can be noted that no such requirement was referred to in the 2004 Note setting out the revised procedures for Sections in the Department dealing with applications for sanction. I have reviewed another file for comparison purposes dealing with an application by another local authority for loan sanction in 2008, and no such report on the lands was forwarded as part of the application in that case. In any event, it seems to me that the absence of such a report for sanction would have had no material impact upon the Department's management of the loan application in the overall circumstances. This is because the same information was already available to the Department, as part of the parallel file dealing with the earlier

application by the Council for capital funding under SHIP. Insofar as relevant to the application for sanction to borrow that information could be taken into account in the context of that latter application.

- 3.12 In my opinion all of the administrative requirements or practices set out in the 2004 Note were complied with by the Department officials in their management of the loan application. The Housing Policy and Finance Section sought and received the necessary approval from the Local Government Finance Section. The Housing Policy and Finance Section properly considered if the borrowing could be met within the GGB limit. The Housing Policy and Finance Section sought the view of the relevant housing Section as to whether the loan request might be approved, and it appears the relevant housing section was previously the Housing Construction Section but by June 2008 was now the Housing Division Project Unit within the Housing Division as a whole. One question which does arise is whether Ms. Nic Thighearnáin and other officials, in their review of the application for sanction on the 10th June 2009, should have taken into account the fact there were a number of outstanding queries on the parallel file relating to the SHIP application, which included reference to requiring additional information in the context of access and flooding difficulties etc. At first glance one might think that the outstanding response to these queries should have been taken into account, in the interests of joined up thinking in the Department. However, it seems to me that this initial instinct is misconceived upon further reflection. When Ms. Nic Thighearnáin and other officials were considering the application for loan sanction in June 2009 the proposed social housing project on the CPO lands to be acquired had gone into abeyance, because of the lack of exchequer funding and this was likely to remain the position in the immediate future. For that reason the remaining queries raised by the Department in Mr. Altman's email dated the 27th June 2008 had now become moot and academic for the moment. However, the Council remained legally committed to purchase the CPO land at Charlesland, whether it liked it or not, and therefore the net issue came down to the mode of payment of the compensation to be agreed or determined, and whether the Council had to pay the compensation from their own resources or whether they were to be granted sanction to borrow. In my opinion the Department officials appear to have dealt with the application for sanction to borrow in a proper and reasonable manner.

The 2011 Application:

- 3.13 The Department's file shows the following recorded history of the 2011 application for sanction to borrow. The Council applied by letter dated the 20th July 2011 for sanction to borrow the sum of €3m for the acquisition of the land at Charlesland, and attached a resolution of the Members in accordance with section 106 of the 2001 Act. Shortly after receipt of this application the Department became aware of issues concerning this land acquisition, after it received correspondence in relation to the matter from the Committee of Public Accounts by letter dated the 22nd July. At the end of July 2011 the Department decided to seek legal advice from the Office of the Attorney General in relation to certain questions, and this process was put in train in early August 2011. At the same time Ms. Niamh Redmond began to process the application for sanction, and she issued the application to the relevant housing Section on the 2nd August 2011 and requested their observations in favour of or against providing sanction. In early August 2011 the Council requested the Department to furnish a decision on sanction, on the basis that the matter was very urgent as the agreed compensation figure of €3m had to be paid by the 31st August 2011. However, the decision of the Department in relation to sanction was then effectively put on hold, pending the receipt of legal advice from the Attorney General's Office. This legal advice was received by the Department in the middle of October 2011 and it confirmed that the Council had been legally obliged to complete the CPO process since 2006, and that they were stuck with having to pay compensation by reference to the market value of the property as of July 2006. After receiving this legal advice the Department began to consider the application for sanction to borrow again, and an official in the Social Housing Supply Section sent a memo up the line dated the 26th October 2011 recommending that the Department should approve the application to borrow as the Council was legally required to pay the agreed compensation of €3m under the existing legislation. Before the matter was dealt with any further the Department received the two documents from the three Councillors setting out a list of allegations or issues of public concern, and the application for sanction was again put on hold, pending this review.

Compliance with the Relevant Legal Requirements and Administrative Requirements of Practices:

- 3.14 It is clear that the Department's management of the 2011 loan application is incomplete, and has been suspended pending this review. As regards the management of the application which has occurred to date, I do not think there has been any material deviation from any relevant requirements or practices. As regards the format of the application for sanction, the same point could be made about the absence of a short report on the lands as was made above in connection with the 2008 application, but my conclusion would be the same as to how this may not have been a requirement in practice, and as to how any such omission did not affect the management of the loan application.
- 3.15 As regards any outstanding administrative requirements or practices, I note that Ms. Redmond copied her minute dated the 2nd August 2011 to the Local Government Finance Section, and presumably that Section will consider the issue of approval from a financial view point in due course in the event that the Department resumes processing this application for sanction to borrow.

4. The Specific Concerns of the Public Representatives regarding the Role of the Department

- 4.01 In the revised Terms of Reference I have been requested to address the specific concerns of the public representatives in the annexed documents regarding the role of the Department and to consult as necessary with these public representatives. While many of their concerns relate to the Council, the specific concerns of the public representatives regarding the Department's role appear to be those concerns or questions set out at paragraphs 2, 3, 4, 5, 11, 13 and 15 of their document dated the 3rd November 2011, under the heading "Issues of Public Concern", and same will be addressed individually below. As mentioned at paragraph 1.13 above I met with these public representatives on the 5th March 2012 to clarify certain aspects of the concerns raised by them in the annexed documents, and this meeting was also attended by Councillor Irene Winters who also has concerns about this matter.

Issues of Concern Regarding the Department's Role:

- 4.02 The first stated concern which is relevant to this review was as follows:

"(2) In 2008, the Department of the Environment sanctioned a loan approval of €5m for the purchase of this land. However, the Department had initially expressed in writing to WCC their serious concerns at this funding application and have raised issues surrounding the price being paid and the requirement of the Council to purchase this land when they had an adequate stock of a land bank for social housing that remained unused in the area. Who in the Department overruled these initial well founded concerns by the Department and sanctioned the provision of the €5m being the fund requested?"

The files provided to me by the Department and by the Council do not appear to contain any document containing any such expression in writing of "serious concerns" by the Department, or even raising issues in precisely the same terms as stated by the Councillors in the above paragraph. The document which goes closest is the email from Mr. Paul Altman of the Department to Mr. Derek Hennessy of the Council dated the 27th June 2008 raising "a number of remaining queries", as discussed in Chapter 3 above. In order to ensure that I had sight of all potentially

relevant documents I sought a copy of the Council's file relating to the SHIP application and that file contained a memorandum from Ms. Catherine Halligan, Senior Executive Officer in the Council, to Mr. Michael Nicholson, Director of Services in the Council dated the 25th July 2008. In that memorandum Ms. Halligan states that she has not been dealing with the technical advisors in the Department with regard to this CPO but they have asked a Senior Engineer in the Council to explain why we did this CPO as the Council had land next to this, and that the amount of the claims are also a big concern. Assuming this is the document being referred to, or even on the assumption that there exists a similar but missing document using the phrase "serious concerns", it seems to me that the question raised is based upon a false premise. It seems to me that the Department officials who sanctioned the borrowing of €5m in July 2009 were not in any way overruling any concerns previously expressed by any other Department official in the context of the earlier funding application under SHIP. As set out in Chapter 3 above, my conclusion is that any such concerns or outstanding queries were not material to the issue of sanction for borrowing for the cost of acquisition of the land, irrespective of what use might later be made of the land and what capital funding might or might not be provided for any such use, for the reasons set out in Chapter 3 above.

4.03 The second relevant concern was stated as follows:

"(3) Having been sanctioned as requested the €5m to purchase these lands, WCC did not drawdown this funding before the expiration date of 31/12/09. Why was this? Did the Department have contact with WCC as to why there was no drawdown of these funds at a time of major difficulties in public financing?"

The Council did not draw down the approved loan finance of €5m before the end of 2009 because the amount of compensation under the CPO process had not yet been agreed. The Department did not have contact with the Council as to why there was no drawdown, but no such contact was necessary as the Department was well aware from previous contact with the Council that the issue of agreeing the compensation was on going and the Department could draw the obvious conclusion that same had not been completed by the end of 2009.

4.04 The third relevant concern stated by the Councillors was as follows:

“(4) Have WCC ever declared to the Department of Environment the revised valuation report of Donal O’Buachalla of August 2010? What valuation report have WCC relied upon when seeking the €3m loan approval from the Department in July 2011?”

The Council do not appear to have furnished the Department with a revised valuation report of Donal O’Buachalla of August 2010 or to have relied upon any valuation report when seeking the €3m loan approval from the Department in July 2011. The Council simply stated in an email dated the 5th August 2011 that a settlement figure for compensation of €3m had been agreed between the parties in March 2011, and that the money had to be paid by the 31st August 2011. In my opinion the Department would not normally have to look behind such a statement from a local authority when dealing with an application to sanction borrowing, and would not require sight of a valuation report underlying a purchase price or settlement figure.

4.05 The fourth relevant concern was stated as follows:

“(5) Have WCC ever made available to the Department the information in their possession with regard to the serious flood plain difficulties on this site and if they did so, who in the Department gave sanction for the funding of the land in question with such knowledge?”

As described earlier in Chapter 3, the Council made available to the Department certain information with regard to flooding issues, in the context of the application for capital funding under SHIP. The Department officials who gave sanction for borrowing for the cost of acquisition of the land are identified in Chapter 3 above. These officials may have had access to some knowledge of certain flooding issues affecting the land, but in my opinion this knowledge would not have been a material factor in deciding on sanction to borrow, for the reasons outlined above.

4.06 The fifth relevant concern was stated as follows:

“(11) In the formal response to Notice to Treat compensation claims, the Council’s Law Agent valued the lands in question at €600,000. In a written report planning officials state that .53 hectares of this site cannot be built on due to flooding concerns and in another report from a housing perspective the land is deemed useless. Has WCC made this information available to the Department in their consideration of loan approval?”

It does not appear from the files that the Council made any of this information available to the Department in their consideration of loan approval, but this is probably because neither the Council nor the Department would have regarded any such information as particularly relevant in the context of an application for sanction to borrow the cost of acquisition of the land. Any earlier valuation of the land had now been over taken by the agreed compensation figure, and the Department had no reason to go behind the agreed figure as conveyed by the Council. As regards any report dealing with problems with future use of the land, irrespective of same the Council were still obliged to proceed with the purchase for the agreed figure and the net issue then related to the mode of payment, i.e. whether the Council should be required to pay the price for the land out of its own resources or whether it should be allowed to borrow to pay for this land, and this was so no matter what issues arose about future use of the land.

4.07 The sixth relevant concern was stated as follows:

“(13) It now appears that WCC have an existing land bank of 16 acres in the Greystones area which could be used in part or all for the provision of social housing without the requirement to purchase this landlocked and flood plain site. Would it not have been more reasonable to obtain Departmental sanction of funding to construct social housing on these existing Council lands as was suggested by the Department in 2008?”

I have not had sight of any document whereby the Department suggested that the Council should construct social housing on other existing lands of the Council in the Greystones area. The email from Mr. Altman of the Department to Mr. Hennessy of the Council dated the 27th June 2008 does not appear to contain such a suggestion, although Ms. Halligan’s memorandum dated the 25th July 2008 could perhaps be construed as recording a suggestion along these lines. Even if there was an issue about

providing capital funding for an alternative social housing project on other Council land, this did not affect the fact that the Council was legally committed to complete the purchase of the land at Charlesland since 2006 and did not have any material bearing upon the application for sanction to borrow the cost of acquisition of these lands.

4.08 The seventh relevant concern was stated as follows:

“(15) Following the initial Council meeting in July where serious concerns were expressed by a number of Councillors about the price being paid for this land, an urgent meeting was arranged to seek loan approval for the land purchased with the Minister for Housing, Mr. Willie Penrose T.D. Without consultation or explanation delegates from the Labour Group (the second largest group on WCC) were not notified of this meeting and were excluded along with a Sinn Fein delegate. Why were the representatives of both these parties not allowed to meet Minister Penrose? Was this decision at the behest of the Department or WCC?”

The files provided by the Council do not support the statement that an urgent meeting was arranged to seek loan approval for the land purchased with the Minister for Housing, following the initial Council meeting in July. The file contains the minutes of the meeting which was held between the Minister for Housing and Planning and a delegation from Wicklow County Council on Monday the 11th July 2011, but the minutes record that the meeting was arranged to discuss the Differential Rent Scheme but the Cathaoirleach, Councillor Sylvester Bourke, used the opportunity to raise the CPO issue at the end of the meeting. As regards the composition of the delegation from Wicklow County Council, the files provided to me did not record how this was decided upon, and I sought clarification from the Council during the course of my review. The Director of Services in the Council, Mr. Michael Nicholson, has furnished a report on the matter which has been provided to me. This report states that the Minister’s Private Secretary stipulated that the delegation from the Council was to be limited to four, due to pressure on space, and that the Director of Housing was expected to be one of the four. Mr. Nicholson states that he then phoned the Cathaoirleach and they agreed that the best possible delegation would be him as Cathaoirleach, Mr. Nicholson as Director of Housing, Councillor Nicky Kelly as

Chairman of the Housing S.P.C. and Councillor Pat Casey as Leas-Cathaoirleach of the Council. On the face of it there does not appear to have been any attempt by the Department or by Council staff to exclude any particular Councillor or political grouping from attending the meeting with Minister Penrose, and the decision as to composition of the delegation appears to have been taken by Mr. Nicholson and the Cathaoirleach on the grounds of restriction on numbers due to pressure on space. Notwithstanding same Councillor Cullen and Councillor Nevin asked me to record in my report that they felt they were excluded from attending the meeting. A copy of Mr. Nicholson's report is attached at Appendix 4 hereto.

Other Issue:

- 4.09 In the last paragraph of their document dated the 3rd November 2011 the Councillors state that it is of the most important public duties of elected representatives that public funding must be transparent and above reproach, and that there be no hidden agendas or special relationships. This reference is somewhat unclear, but following my meeting with them on the 5th March 2012 the Councillors sent me a note of the points raised and discussed, and included the specific question as to what role, if any, did the Secretary General Ms. Geraldine Tallon have in this whole matter. There is no evidence on the file or otherwise that the Secretary General had any role in processing either loan application, or indeed in processing the application for capital funding under SHIP. Her only involvement in the file appears to have been a very limited indirect involvement in the 2011 loan sanction file, whereby she requested that the legal advice of the Attorney General's Office should be sought after the correspondence from the Committee of Public Accounts to her dated the 22nd July 2011 and whereby a few documents were later sent up the line to her for her information or consideration, leading ultimately to her letter dated the 16th November 2011 to the Attorney General's Office seeking an independent review of the entire matter. It is not surprising that the Secretary General appears to have had no role in deciding whether or not to sanction borrowing by the Council, as the applications for loan sanction appear to have been treated as matters of routine correspondence by the Department officials responsible for the management of same.

5. Conclusions and Recommendations

- 5.01 In conclusion, I have set out in Chapter 3 the process followed by the Department in regard to the management of the loan applications by the Council to fund the compulsory land acquisition at Charlesland, Co. Wicklow. In my opinion, for the reasons set out in Chapter 3, there was no material deviation by the Department from the relevant legal requirements and administrative requirements or practices.
- 5.02 As regards making any recommendations, in the revised Terms of Reference I was requested to make such recommendations, as may be appropriate in light of this review, including in regard to any short comings that may be identified either in regard to the management of the specific loan application or more generally in regard to the processing by the Department of such applications. As referred to in Chapter 2, I think that Section 106 of the Local Government Act, 2001 is a defective provision in that it fails to set out any criteria for the exercise of the discretionary power conferred on the appropriate Minister, i.e. the power to grant or not to grant sanction to borrow. Consideration should be given to amending Section 106, so as to set out the relevant criteria. As referred to in Chapter 2, I do not think that the Minister could make any valid regulations to fill this lacuna, in the absence of stated “principles and policies” in the primary legislation.
- 5.03 In addition to considering possible amendment of the legislation, the Department should also review and update Circular HPS 8/04, so as to clarify the format of an application for sanction. In the same way the internal Note dated the 23rd July 2004 setting out the revised procedures for sanction should also be reviewed and updated.

6. Table of Appendices

Appendix

- Appendix 1 Revised Terms of Reference with annexed documents.
- Appendix 2 Letter from Ms. Geraldine Tallon, Secretary General of the Department of the Environment, Community and Local Government to Mr. Liam O'Daly, Director General, Office of the Attorney General dated the 16th November 2011.
- Appendix 3 Section 106 of the Local Government Act, 2001.
- Appendix 4 Memorandum of Mr. Michael Nicholson, Director of Services, Wicklow County Council dated the 5th March 2012.