

6 Land Swap Arrangement in the Provision of Affordable Housing

- 6.1** In July 2012, the High Court awarded €32.6 million to a firm of house builders in a case taken against the Minister for the Environment, Community and Local Government arising from a land swap agreement for the purpose of supplying affordable homes to eligible home buyers in the private market.¹ The State was unable to deliver a site situated at Harcourt Terrace in accordance with the land swap agreement. In addition to the amount of the award, court interest of €192,850 arose. The final bill for the firm's legal costs is awaited.
- 6.2** This report outlines the background to the land swap which was the subject of the court award.

Project Timelines

- 6.3** The Affordable Homes Initiative formed part of the 2003 national agreement with the social partners, Sustaining Progress. Under the initiative, some 10,000 social and affordable housing units were to be provided partly through the use of surplus public lands. As part of its remit, the Affordable Homes Partnership (AHP) undertook at the request of the Minister for the Environment, Community and Local Government the project planning and procurement of affordable homes on surplus State lands in the greater Dublin area.²
- 6.4** In 2004, the Government decided to pursue a land swap option as part of the initiative whereby high value land in State ownership would be exchanged with a developer in return for the delivery of affordable housing on a site or combination of sites owned by that developer. Being already zoned residential and serviced, the developer's sites would effectively be 'ready-to-go'.
- 6.5** The deal provided that the successful firm would deliver 215 housing units in the Dublin area within the time frame required by AHP in return for a site owned by the State. The discounts on the 215 housing units were valued at €31.2 million. Figure 6.1 outlines the key dates in the project.
- 6.6** The site involved in this case was at Harcourt Terrace, Dublin. It was owned by the Office of Public Works (OPW) and occupied by a Garda station and the Irish Film Censors Office. The successful bidder offered a price considerably in excess of other bids. The firm concerned already had control of an adjoining site, which it had previously purchased from the State.

¹ Affordable housing is housing that is made available for home buyers to purchase at a discount to the market price.

² AHP was established under the Affordable Homes Partnership (Establishment) Order 2005 to enable the provision of affordable homes to the public. It was dissolved at the end of 2010 and its assets, liabilities and outstanding litigation transferred to the Department.

Figure 6.1 Timelines for Harcourt Terrace land swap

2006	AHP engage architects to carry out feasibility study for developing the Harcourt Terrace site. AHP decide that land swap offers best opportunity to deliver affordable housing. AHP publicly advertise site and decide on the successful bidder.
2007	Agreement signed on 7 December between AHP and successful firm setting out terms of the swap. 215 affordable housing units provided by the successful firm by the year end.
2008	Vacant possession of Harcourt Terrace site to be provided to the firm by the year end. This was not achieved.
2009	Agreement in principle reached with the firm with a view to the site being transferred to the firm and the firm leasing it back to the OPW for a maximum period of 5 years.
2010	Legal documentation to formalise the transfer and lease back is not completed. The firm serves a completion notice on AHP and seeks payment of purchase price. In December, National Asset Loan Management Limited acquired the loans secured on the Harcourt Terrace site from AIB in accordance with the provisions of the National Asset Management Agency Act 2009. ¹

Managing the risks in completing the deal

- 6.7** One of the perceived advantages in the approach taken by AHP to securing affordable homes was that it transferred development activities and risks to the firm. However, the deal was not risk free - difficulties were identified in relation to delivering vacant possession of the Harcourt Terrace site. This was raised in May 2006 when OPW wrote to the Department of the Environment, Community and Local Government (the Department) stating that
- It had reservations about the proposed timescale suggesting that it could take three years to relocate the Garda station to a proposed larger building on State owned lands adjacent to the current Kevin Street station.
 - It believed that the existing Garda station should not be closed until sufficient permanent accommodation and facilities were available elsewhere to avoid impairment of Garda operations.
- 6.8** To address the concerns raised by OPW, the tender documentation for the site had specified that freehold title for the site would transfer to the successful bidder once all affordable units were received, subject to a requirement that the site would be leased back to the State until the end of 2008 at a nominal rent of €1.
- 6.9** At the end of 2008, the Garda station continued to be occupied, due to delays in delivering the planned alternative accommodation at a new station on Kevin Street. As a result, OPW was not in a position to provide vacant possession to the firm by the agreed date.
- 6.10** To address the matter, negotiations commenced in early 2009 with the firm in order to put a further transitional arrangement in place. The Irish Film Censors Office vacated its part of the site in March 2009 when it moved to new premises at Smithfield, Dublin.

¹ National Asset Loan Management Ltd. is a special purpose vehicle established by the National Asset Management Agency (NAMA) for the purpose of acquiring, holding and managing assets from participating banks.

- 6.11** The broad shape of an agreement was reached in late 2009 with a view to transferring the site to the firm and the firm leasing the property back to OPW for a five year term from January 2009 with a break clause at year 3, in the event the new Garda station was completed. The total rental cost for the five years was estimated at €3.5 million. The Department provided funding of €950,000 to AHP in late 2009 for onward payment to OPW in order to pay the firm under the deal. The funding of €950,000 was retained by AHP pending the conclusion of the deal.¹
- 6.12** In 2010, a difficulty arose as to whether stamp duty should apply to the transaction. Although the tender advertisement stated that stamp duty was not payable on the conveyance of the land at Harcourt Terrace, the OPW was concerned about the corporate structure being used by the firm in the transaction.² Ultimately, OPW withdrew their objection but at that stage the firm had served a completion notice on AHP under the terms of the contract. As the State was unable to deliver vacant possession, the firm demanded payment of the sale price together with €4.2 million for penalties under the terms of the contract. The State did not accept the claim. The firm instituted legal proceedings in the High Court to secure the payment of the purchase price.
- 6.13** In a judgment delivered in July 2012, the High Court made an award to the firm of €32.588 million comprising
- €31.243 million in respect of the discount given on the purchase price of the affordable homes
 - agreed damages of €562,539 being the costs incurred by the firm in contemplation of carrying out the development
 - interest of €782,491 representing the cost of the firm's borrowing between the date planning permission was obtained and the expiration of the completion notice.

Court interest of €192,850 was also applied to the award from the date of the court judgement to the date of payment of the award.

- 6.14** In addition, it was agreed to make a payment of €861,000 for the firm's legal costs with the final bill expected to be submitted before the end of 2013. Costs of €131,000 were incurred by the Chief State Solicitors Office (CSSO) in relation to the matter.

Accounting for the payments

- 6.15** The Department and OPW agreed an apportionment of the costs of the award. They also agreed a schedule of payments over a five year period to be paid through the Housing and Sustainable Communities Agency to NAMA as secured lender of the firm. €11.3 million was paid in 2012 as follows
- €5.664 million paid by the Department
 - €5.38 million paid by OPW
 - €0.28 million paid by Housing and Sustainable Communities Ltd from the funding of €950,000 received by AHP in 2009.

In addition, OPW and the Housing and Sustainable Communities Ltd paid €0.86 million towards the firm's legal costs. The firm's final legal costs remained to be quantified.

- 6.16** The liabilities, excluding the outstanding legal costs, of the OPW and the Department at the end of 2012 were €13.6 million and €7.6 million respectively.

¹ After the dissolution of AHP, the funding was passed to a company called the Housing and Sustainable Communities Ltd which commenced operations in 2011. The company's main functions were to assist the Department and local authorities in policy implementation in developing sustainable communities and to undertake such regulatory and other services as requested by the Department. In 2013, the Housing and Sustainable Communities Agency was established under the Local Government (Miscellaneous Provisions) Act 2012 and took over the main activities of the company.

² Instruments made by, to or with the OPW are exempt from stamp duty under section 113 of the Stamp Duties Consolidation Act 1999.

- 6.17 The effect of scheduling payments over five years is that the Exchequer does not need to finance the full payment immediately. However any finance costs borne by NAMA will ultimately reduce any surplus arising to the Exchequer from NAMA's operations.

Views of Accounting Officers

- 6.18 The Accounting Officer of the Department of the Environment, Community and Local Government stated that the failure to close the original agreement was a direct consequence of the inability to provide vacant possession of the site. Notwithstanding this, all parties had agreed the broad outline of a lease agreement by the end of 2009. She said that this arrangement had still not been finalised by September 2010 and the firm eventually served a completion notice on the AHP who, in turn, served a completion notice on OPW. She stated that both the AHP and her Department made repeated requests to the OPW to finalise the wording of the transfer deed and made clear the potential costs to the State for the failure to close the negotiations.
- 6.19 The Accounting Officer of the OPW stated that OPW had engaged in extensive dealings in attempting to bring a satisfactory outcome to the transfer of the property in Harcourt Terrace to the firm and in the putting in place of a lease agreement between OPW and the firm for the period following the transfer. She stated that OPW had at all times acted in good faith, having regard to the advices it received and in a manner that was both prudent and expeditious. She stated that during discussion on the vacating of the Harcourt Terrace Garda station, OPW were informed that it was one of the busiest in the Dublin area and that a commitment had been given that the station would not close until the new Kevin Street station was constructed. She stated that the station was occupied until 2012 when it was closed as part of the general nationwide closure of certain Garda stations.
- 6.20 The Accounting Officer of the CSSO stated that while agreement had been reached in principle in late 2009 to the outline terms of the sale and leaseback arrangement, it took several months for the detailed terms to be finalised at which point the firm refused to complete the deal. She stated that correspondence between the parties had continued throughout this period and noted that the length of time taken to reach agreement on the terms was not unusual for a transaction of this complexity.

Conclusion

- 6.21 As a result of the inability to complete the transfer of the Harcourt Terrace site, the High Court awarded €32.6 million to a firm of house builders together with court interest of €0.2 million and the firm's legal costs which remain to be assessed. The Department and OPW have agreed to apportion the payments with 60% being charged to Vote 13 Office of Public Works and the remainder being charged to the Interim Housing and Sustainable Communities Agency subhead in Vote 25 Environment, Community and Local Government. However, in effect the payment relates to the provision of affordable housing which in the normal course would have been expected to be charged in full to the relevant subhead in Vote 25 Environment, Community and Local Government.
- 6.22 By agreement with NAMA, the award is being paid over a period of five years commencing in 2012. Both Vote accounts recognise the liability to meet the balance of the award in future years.