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Adoption of New Roads in Private Developments and the use of Bonds

1 Background

There are many instances across Northern Ireland where people have purchased and occupied homes in private developments where the roads and footways are left unfinished. The Private Streets (Northern Ireland) Order 1980 was brought in to protect homeowners from such a situation arising by placing a duty on developers to consult with Roads Service on the design of the street and ensure it meets their standards. Developers must also take out a surety bond before they begin construction to ensure Roads Service can complete the works should they be unable to.

2 Adoption of Roads

In each UK region provision is made for the local authorities (England, Wales and Scotland) or Highway authorities (NI Roads Service) to enter into agreements with private developers to adopt streets in new developments (hereby referred to as highways) for future maintenance, provided they are constructed to a prescribed specification. The relevant legislation for each jurisdiction is:

- The Highways Act (England/Wales) 1980;
- The Roads (Scotland) Act 1984; and

- Private Streets (Northern Ireland) Order 1980.

The one significant difference between the Northern Ireland legislation is that Developers have a statutory duty to consult with Roads Service with regards their street layout, design and specification prior to beginning construction, while in GB this is not the case.

In Ireland adoption is known as 'taking in charge'. The regulations are laid out in Section 180 of the Planning and Development Act 2000 which was commenced in March 2002 it is similar in effect to the UK equivalents. There are however, statutory provisions under Section 180 of the Act, empowering residents to compel a local authority to take in charge in cases where this has not happened, after a period of seven years. In this case the policy is to address problem or longstanding cases on a phased basis with priority given to estates that have been left unfinished/not taken into charge for the longest period.

2 Use of Road Bonds

The adoption of a highway relieves the developer from their liability to maintain that highway. Generally fees are required in advance according to the size of the development to cover the costs in preparing the agreement and inspecting the work during construction. A bond is deposited to cover the cost of bringing the highway up to an adoptable standard should the developer become insolvent or is unable to meet their obligation.

A road bond is a type of surety bond which guarantees to a local authority/highway agency that a road, footpath or street lighting will be provided to a standard which they can adopt. Bonds are generally provided by a third party surety company in the form of an insurance bond. Roads Service accepts cash deposits in lieu of a bond, e.g. if a developer has difficulty in securing a bond from a third party. The value of the bond required is determined by the relevant authority and based upon what costs they would incur if required to complete the works.

A developer can request bond reductions on reaching pre-determined stages of construction, this means the developers premium to the surety company is reduced as less default monies are required to be available. The general practice is to consider bond reductions in key stages during construction. Roads Service has four key stages; 90% of the bond is removed at stage 3 when a Preliminary Certificate is issued. Each of the jurisdictions will only completely remove the bond and issue a Completion Certificate & Adopt the highway when the all major milestones have been completed and the street has been properly maintained for one year after issue of Preliminary Certificate.

3 Incomplete development

Many of the relevant highway authorities report some difficulties in completing the adoption process.

- Many developers are finding it difficult to raise the full bond amounts due to on-going financial commitments and there are instances where developers have progressed with developments before securing a bond. Effectively this means that the street will be progressed without the necessary inspections meaning the highway authority will be unable to assess elements of the construction, such as the sub base layers or the drainage.
- In addition to a road adoption, developers must complete a similar process to have the sewers beneath adopted. This also requires a bond and often leads to delays in adoption when the process is not followed.
- Adoption delays can arise in relation to disputes over design checks; supervision fee payments; construction methodology issues; and disputes over long term liability payments;
- A particularly common problem within the current economic climate is that developers can slow down or stop construction part way through phases of construction often waiting to sell a house or houses before progressing. When houses are not selling re-evaluation of house types and numbers are often considered leading to delays in adoption.

4 Invoking a bond

Highway authorities must give careful consideration to invoking a bond and most view it is a last resort. It would appear incumbent upon highway authorities to proceed in these situations with all due diligence and give developers an opportunity to comply. It is in nobody's interest to force the hand of a developer as in many cases the intention to complete the work is there but there may be valid reasons why this is moving slowly. Even in cases where a developer has become insolvent it may be the case that there is a larger holding company or administrator in charge which again means time must be taken to see if sufficient resources will become available to complete the work. It is only at the point when all other avenues have been explored that the bond will be invoked.

5 Alternative measure

An alternative to invoking the bond has been developed by Milton Keynes Council. This requires a cash deposit from developers equal to 10% of the Bond. If for example residents begin to occupy homes before adoption of maintenance is required during the one year period between issue of preliminary and completion the Council gives the developer notice to complete the works. If, after 28 days, they have not been completed, the Council carries out the works itself and recovers the moneys expended from the cash deposit. On the issue of the Final Certificate of Adoption at the end of

the maintenance period the cash deposit or what is left will be refunded to the developer.¹ One difficulty with this requirement is that developers who have insufficient funds may choose to proceed without a bond and therefore remove the need for a deposit, greatly increasing the likelihood of problems during later stages of development.

6 Discussion

The Private Streets (Northern Ireland) Order 1980 was brought in to protect homebuyers being left in a private street with poorly finished roads and footways. Already Northern Ireland is the only part of the United Kingdom where developers have a duty to consult the highway authority prior to building and while this safeguards against bad design, there are still many situations where this is not done. According to Roads Service when the legislation is followed it works well, however, this has not always been the case.

It seems the economic downturn and particularly the Boom-Bust scenario experienced in the housing market is a significant factor with regards to unfinished and un-adopted roads. In the height of the boom housing developers got on with building houses, often without having proper bonds in place; homebuyers queued outside estate agents eager to get a good deal; while conveyance lawyers got on with selling them, without perhaps carrying out all the necessary checks.

The credit crunch left people unable to get mortgages and house prices plummeted. Many developers found themselves in a situation where they could not sell houses and could not finish ones they had started. In order to correct the problem it would seem incumbent to remind consumers to be aware of the buyer beware rule: it is their duty as the purchaser to examine, judge, and test a product they mean to purchase. Where no road bond exists, frontagers could ultimately have to bear the costs of bringing the development roads up to adoptable standards before Roads Service can assume maintenance responsibility.

The practice within Roads Service is to try as far as possible to allow developers to complete works themselves within a reasonable time. Roads Service is not legally responsible for unfinished development roads where the developer has not taken out a bond as required by the current Private Streets legislation. The question is whether the public purse can / should bear the costs of completing development roads where a developer has failed to make adequate provision for this, as required by law.

¹ Milton Keynes Council (2005) Un-adopted Streets Problems and Recommendations [online] available from: <http://nia1.me/jm>