

9 February 2023

Dear Taoiseach,

Following receipt of a request from Joe McHugh T.D. I met with him in my Office yesterday afternoon, 8 February.

In short, as you are well aware, Deputy McHugh has long-standing and well-documented concerns about the remediation scheme provided for householders affected by Mica that is provided for by the Remediation of Dwelling by the use of Defective Concrete Blocks Act 2022.

This will not in any way be news to you in circumstances where Deputy McHugh has resigned the whip and left the Fine Gael parliamentary party over the issue.

I had a very cordial meeting with deputy McHugh who was anxious to transmit his concerns to me. Ultimately they can be boiled down to three different propositions.

Firstly, he believes that the overall cap per property of €420,000 is insufficient in circumstances where construction inflation since that figure was arrived at has significantly reduced the value of work that can be done for that amount of money. He pointed out to me that with professional fees of architects and engineers, work on foundations and demolition work and associated costs of removing existing defective concrete from a demolished existing structure, €420,000 is not as much money as it initially appears.

He made the point to me that at the time that figure was arrived at it was thought that just 18% of householders in Donegal would be affected by that upper cap. He estimated that now up to 50% of householders may face a bill for the demolition and reconstruction of their property that exceeds €420,000. In those circumstances his first request is that the €420,000 cap would be reconsidered.

Unfortunately, as you know, the €420,000 figure is specified in the Act itself and were it to be increased, it would require legislative amendment. You will appreciate that there would be serious consequences from a public finance perspective if the size of the grant was to chase construction inflation over, say, a five year period.

The relevant provision is Section 10(3) which provides that

"a remediation option grant referred to in subsection (1) or, where applicable, the total amount of a remediation option grant and an ancillary grant referred to in subsection (1) and (2), shall not exceed the amount of €420,000."

Deputy McHugh's second concern relates to adjacent ineligible properties in the context of semi-detached houses. What he means by this is that there will be scenarios in which a property is ineligible for remediation because it is owned as an investment property or a holiday home and is not a principal private residence.

In this regard, Section 9(3) of the Act provides that:

“(3) In order to be a relevant owner under subsection (2), the individual referred to in that subsection -

(a) subject to subsections (5) and (6), uses the dwelling as his or her principal private residence, or

(b) was the landlord of a tenancy of the dwelling which stood registered in the residential tenancies register on or before 1 November 2021.”

Similarly, Section 10(7) provides that:

“(7) A relevant owner shall only be approved for a grant referred to in subsection (1) or (2) in respect of -

(a) one relevant dwelling of which he or she is a relevant owner by virtue of section 9 (3)(a), and

(b) one relevant dwelling of which he or she is a relevant owner by virtue of section 9 (3)(b).”

In those circumstances, if the owner is, for instance, living in Derry and using the property only as a holiday home there may in practical terms be no funds available to remediate it. The problem is that even if that limitation is fair and reasonable on the face of it, it will cause a problem for the owner of the adjacent property who may be an eligible applicant for remediation under the scheme but in whose case, remediation may be of limited value if the adjoining property is not at all remediated at the same time.

There are solutions such as creating a partitioning between the parties by rebuilding slightly inside the previous boundary line but none are entirely satisfactory. Deputy McHugh was of the view that Minister O'Brien and the Department of Housing were aware of this issue and that it was possible that some progress could be made on it.

The third issue that deputy McHugh was focused on was the issue of what he describes as *“penalty free downsizing”*.

He gave various examples of older couples in larger houses of 2,500 sq. ft or more who would not wish to reconstruct an identical property in square footage at a particular stage of their lives when their children were no longer living with them and they had “empty nests”.

He gave one particular example of a gentleman who is 65 and whose property is 3,500 sq. ft. That gentleman will face an additional cost of €150,000 over and above the statutory cap of €420,000 that he will have to bear himself. To be fair to that unnamed constituent, Deputy McHugh made the point that he had sufficient funds and was willing and able to cover that shortfall himself but was expressing a concern on behalf of others who would not be so well situated. Under the scheme as it stands there is a pro rata reduction in the financial support that is available if a house is not rebuilt in accordance with the previous specification.

So, to give a simple example, if a house was 3,000 sq. foot but is demolished and 2,000 sq foot house is built in its place only two-thirds of the maximum financial support of €420,000 would be available even if the cost of the project would be €420,000 to reconstruct the property as a 2,000 sq. foot property.

This would appear to be a big issue for Deputy McHugh and is a source of some continuing puzzlement for him in circumstances where he makes the point that a modification to the scheme to permit penalty-free downsizing would be cost neutral from the perspective of the exchequer.

The difficulty with this is that it is a policy position that is expressly legislated for in Section 17(5) of the Act, which provides that:

"(5) Where the approved remediation option is the demolition of the relevant dwelling and the reconstruction of the dwelling, and the remedial works plan provided under subsection (1) indicates that the internal floor area of the dwelling which the relevant owner proposes, subject to subsection (8)(c), to reconstruct is a reduction of the internal floor area of the relevant dwelling demolished, the designated local authority shall reduce the amount of the remediation option grant approved by the Housing Agency under section 16 (4) proportionately."

Legislative change would accordingly be required for this policy to change.

At the end of the meeting I did explore with him the question of what he expected me to do with these issues.

I made the point that a legislative scheme had now been passed as an Act of the Oireachtas and the total projected liability of the State of €2.7 billion in respect of this was by any standards, an extraordinary level of exchequer support. Were any amendments to be contemplated at this point, the State's financial exposure would rise accordingly.

Deputy McHugh accepted all of that and indicated that at the end of the day he was reflecting the views of his constituents, family and friends. He left me in no doubt that the Mica issue remained a politically very sensitive issue in Donegal and he expressed the view that a Mica candidate stood a reasonable possibility of success in the next General Election depending on the reconfiguration of the constituencies after the Electoral Commission has completed its work later this year.

I indicated to him that I would discuss the meeting with him and that I would provide a note to you of our discussion before discussing with you the best way of advancing the resolution of any of his concerns.

I did make the point to him that Minister McConologue sat beside Minister O'Brien at the Cabinet table and that it was likely that he was another conduit for the concerns of Donegal constituents and was passing on similar points.

Deputy McHugh was of the view that Minister McConologue was less emotionally or personally involved in the Mica issue than he was, though he did not completely discount the validity of what I was saying to him.

I am happy of course to discuss this with you at any time of your convenience.

Kind Regards,

Rossa Fanning SC
Attorney General