

Gladman Developments Limited

UTILITY LAW SOLUTIONS

**Proposed Development of Land off Duke's
Park, Woodbridge - Foul Drainage Analysis**

November 2015

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Proposed Development of Land off Duke's Park, Woodbridge - Foul Drainage Analysis

A. Executive Summary

Utility Law Solutions (ULS) specialises in water and sewerage law and its application in relation to new development sites. ULS has been appointed by Gladman Developments Ltd to provide advice in relation to foul drainage matters for its proposed development of land off Duke's Park, Woodbridge.

It is proposed that the site will be developed to comprise of up to 215 residential units. All foul flows from the development will be connected to the existing public sewerage network which is owned and operated by Anglian Water (the Sewerage Undertaker).

Following an exchange of information with the Sewerage Undertaker in relation to the proposed development, the detail obtained has been analysed and incorporated into the proposed foul drainage strategy outlined in this report. The Sewerage Undertaker has confirmed that both the public foul sewerage network and sewage treatment works have sufficient capacity to accommodate the new foul flows that will be generated by the proposed development. A copy of the report received from the Sewerage Undertaker is included at Appendix 1.

Within this report the legislative regime pertaining to foul drainage has been set out. The purpose of this report is to avoid any uncertainties in relation to the foul drainage strategy for the development site, to satisfy the planning authority that foul drainage is not a constraint for the development in terms of planning and to set out the responsibilities of sewerage undertakers generally. As detailed within this report, although considered unnecessary, any proposed foul drainage related planning condition must comply with the six tests set out in the National Planning Policy Framework (NPPF) and expanded on in the Planning Practice Guidance (PPG).

It is clear from the analysis set out in this report of both the legal and technical aspects relating to foul drainage, that this development can be effectually drained and will not cause detriment to the existing public sewerage network. The Sewerage Undertaker has statutory duties, requiring it to ensure that its public sewerage and sewage disposal system continues to have the ability to receive and treat the foul flows from this development.

In summary, matters relating to foul drainage have been properly assessed and are comprehensively addressed in other primary legislation, meaning there is no impact which would make the development unacceptable in planning terms in the absence of a condition. Adopting the tests at NPPF para. 206, any condition related to foul drainage would be unnecessary, irrelevant to planning and unreasonable.

B. Drainage Strategy for the Development

- B.1 There are public foul sewers located to the east and south of the development site in Sandy Lane. These sewers can be accessed by means of an offsite sewer constructed in public highway from the south eastern boundary of the development site and the proposed connection point on the public sewer, linking the new onsite sewerage network with the public sewerage system. The developer will be required to serve a notice on the Sewerage Undertaker under section 106 of the Water Industry Act 1991 in relation to the connection to the public sewer.
- B.2 The Sewerage Undertaker has confirmed that a connection can be made to the public foul sewer located in Sandy Lane at manhole reference no. 9701 and that this sewer has sufficient capacity to accommodate the new foul flows that will be generated by the proposed development at a discharge rate of 3.8 litres per second. The Sewerage Undertaker has also confirmed that the receiving sewage treatment works has available capacity to treat these foul flows. The Sewerage Undertakers comments on foul sewerage and sewage treatment capacity are included at Appendix 1 within the Anglian Water Pre-Planning Assessment Report.
- B.3 The proposed sewer connection point as agreed with the Sewerage Undertaker is indicated at Appendix 2 which can be referenced against the Development Framework Plan that forms part of the planning application. The indicative extent of the development is shown edged red on the plan in Appendix 3.
- B.4 In order for foul water from the proposed development to be effectually drained, a new network of foul sewers (both onsite and offsite, as well as a pumping station) will be constructed. This network of new sewers will be connected to the existing public foul sewer network. All sewers will be constructed in accordance with the national industry guidance entitled "Sewers for Adoption" and will be offered for adoption to the Sewerage Undertaker under an agreement pursuant to section 104 of the Water Industry Act 1991. This will ensure the long term maintenance of all new sewers and is the standard practice for new development.
- B.5 The invert level of the public sewer at the proposed connection point is not available, but the manhole chamber has a cover level of 11.976m AOD, as confirmed by the topographical survey. Existing ground levels on the site range between around 29m to 8m AOD with a natural fall in a southerly direction. This indicates that it will not be possible to drain the foul flows from the development under gravity and that an onsite sewage pumping station will need to be constructed to serve at least part if not all of the site. This will

enable the foul flows to be directed to the agreed connection point on the public sewer via a rising main (a pipe under pressure), with a length of new offsite gravity pipework (between the rising main and public sewer) constructed to facilitate the connection itself. The approximate location of the proposed pumping station is noted on the Development Framework Plan that forms part of the planning application. If invert levels on the public sewerage system are of sufficient depth, it may be practicable to drain the foul flows from part of the development by gravity to the connection point at manhole 9701. If this is the case then the rising main that serves the part of the site that drains to the pumping station could be connected to the new onsite gravity network. The most appropriate mix of pumping/gravity foul flows is a matter that will be finalised between the developer of the site and the Sewerage Undertaker, pursuant to the provisions of the Water Industry Act 1991.

B.6 Should outline planning permission for the proposed development be granted, Gladman Developments will be marketing and selling the site to a house-builder, who will then submit the necessary reserved matters application once detailed design for the development has been completed. The following future timescales are envisaged:

- Upon receipt of a valid planning approval, Gladman Developments will begin to market the site in mid-2016.
- Sale of the site is likely to be completed by late 2016.
- The developer will then complete detailed designs for the site and is likely to make a reserved matters application in early 2017.
- Determination of reserved matters may take approximately 3-6 months, i.e. by mid to late 2017.
- Initial on-site works could therefore commence in early 2018 after allowing a few months for enabling works etc.
- Initial occupations (excluding show homes) may commence during mid to late 2018 i.e. by the end of the first full year from when the development commences.
- Development will continue over approximately a 5 to 6 year period with sales/occupations at around 40 dwellings per annum.
- Site completion estimated in 2023/2024

B.7 It is important to note with reference to the above timescales that foul flows from the development are not likely to enter the existing public sewerage network until mid to late 2018. This allows more than two years for the Sewerage Undertaker to monitor additional development which will drain to the same sewer network and sewage treatment works and if necessary, carry out any improvements which may be required to ensure the cumulative foul flows from all development in this area can be accommodated in both the short and longer terms.

- B.8 It is also worth bearing in mind that the need for extra homes is in greatest part not caused by inward migration, but by providing homes for people currently living as two households in one property. Inward migration only tends to account for between 30% and 40% of the need for extra homes. In assessing the impact of a development on the local foul sewerage system, the Sewerage Undertaker should not view this development as generating entirely new additional foul flows, but rather a case of most of the foul flows being existing foul flows simply continuing to discharge within the same local network but from a different home.
- B.9 The above timescales afford sufficient time to the Sewerage Undertaker to ensure it can continue to manage its sewerage network and sewage treatment works (if required), to accommodate new development in this area. Given the fact that the Sewerage Undertaker has a duty to carry out such actions under its statutory duties and that it is funded to do so, it would be inappropriate to prevent this development from proceeding on the grounds of sewerage or sewage treatment capacity or indeed to apply any restrictive planning condition which conflicts with the tests in para. 206 of the NPPF and explained in the PPG.

C. Water Industry Legislative Framework, Duties, Funding and the Planning Regime – ULS Analysis

- C.1 ULS has consistently maintained that foul drainage related planning conditions are unnecessary for new residential development. The actual impact of foul and wastewater drainage from a proposed development on the environment must always be evaluated with due regard to the statutory provisions set out in the Water Industry Act 1991 (WIA1991) and the duties of sewerage undertakers contained therein. Given that the Sewerage Undertaker has confirmed available capacity in the public sewerage system as set out in Section B and Appendix 1, a foul drainage planning condition is clearly not required in light of the statutory regime contained within water industry primary legislation that governs such matters
- C.2 A summary of the relevant sections of the WIA1991 is set out in Appendix 4 together with the full wording of those sections.
- C.3 The proposed development must be considered in conjunction with the six tests set out in the NPPF and expanded on in the PPG. In order for a foul drainage condition to be justified in terms of the guidance in the NPPF and PPG, the condition would have to be shown to be necessary and reasonable.
- C.4 ULS has set out its detailed analysis of the interaction between the water industry statutory framework and the planning regime in Appendix 5.
- C.5 When considering the drainage related aspects of a planning application, the correct approach in law is as follows:
- To have due regard to the rights which the developer would have to connect the development to the public sewerage system and what impact to the environment that would have but also taking into account the general duty imposed on sewerage undertakers under section 94 together with the charging provisions of the WIA1991.
 - To carefully consider whether those impacts would be such as to justify refusing permission, and if so whether they could be mitigated by a planning condition.
 - To carefully consider whether any such condition would meet the policy tests in the NPPF and PPG.
- C.6 Conditions relating to sewerage and sewage treatment must be considered and justified against the tests set out in the NPPF and the PPG. In particular, given the rights and duties in the WIA 1991, careful consideration is required as to the time-scales involved in implementing a permission for residential development. It is reasonable to expect the Sewerage Undertaker to make

provision for the necessary infrastructure so as to avoid adverse effects, and to fund this through the normal means of charges. On the basis:-

- that the Sewerage Undertaker has confirmed that the foul flows from this development can be accommodated in the public sewerage system; and
- given the timescales for the ultimate discharge of foul flows from this development to the public sewerage network, as explained in more detail in Appendix 5;

a foul drainage condition is unnecessary and would therefore fail the test of reasonableness laid out in the NPPF.

C.7 As indicated above, sewerage undertakers are funded to meet their obligations under the provisions of the WIA1991. On this specific development, the addition of 215 new customer households will provide additional annual income to the Sewerage Undertaker. The current average sewerage charge in the Sewerage Undertaker's area is £225.00 per property giving the Sewerage Undertaker an annual income of £48,375.00. Each new dwelling constructed on this development will also be subject to a sewerage infrastructure charge (current rate £351.00 per property). This will generate a further one off payment to the Sewerage Undertaker of £75,465.00. A full explanation of how sewerage undertakers are funded is included in Appendix 5.

D. Summary

- D.1 It is clear from the above analysis of both the legal and technical aspects relating to foul drainage, that there are appropriate options available to ensure this development is effectually drained and does not cause detriment to the existing public sewerage network.
- D.2 In summary:
- The Sewerage Undertaker has confirmed that the foul flows from this development can be accommodated in the public sewerage system.
 - The developer has a right to connect to the public sewerage network at a point of its choosing and the Sewerage Undertaker has a duty to carry out any works necessary to accommodate any resulting foul flows (s106 and s94 of the WIA1991).
 - If the Sewerage Undertaker requires construction of foul drainage works for this site to be carried out in an alternative manner or connect at a different location to that proposed by the developer, it can compel the developer (through s112 of the WIA1991) to carry out the additional works to achieve this and reimburse to the developer any costs over and above those that would have been incurred.
 - Foul drainage matters relating to this development can be satisfactorily dealt with without any requirement for a planning condition which would conflict with the tests in para. 206 of the NPPF and explained in the PPG.
- D.3 We have highlighted the separate legislative regimes that operate within the planning system and the water industry which demonstrate that it would be unreasonable to refuse planning permission for this development on sewerage capacity or sewage treatment grounds and that a foul drainage condition is not required in this instance. Matters pertaining to foul drainage and sewage treatment for this development are fully addressed by water industry legislation.
- D.4 The grant of planning permission for the development will give the Sewerage Undertaker sufficient certainty that it will go ahead and its planning to ensure that its systems can meet the demands of this particular development can continue.

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Utility Law Solutions – Company Overview

ULS is owned and operated by Philip Day and Alex Day and was incorporated in 2007. Since its inception, ULS has provided advice and assistance to developers, landowners and other bodies operating in the house building sector on issues relating to foul drainage, sewage treatment and associated infrastructure matters.

Prior to the formation of ULS Philip Day and Alex Day were both employed in the Water & Sewerage Industry by Severn Trent Water, being one of the largest sewerage undertakers in the UK. Philip and Alex therefore have first-hand knowledge of the operation of sewerage undertakers and how they interact with developers and others in the house building industry.

Before leaving Severn Trent Water to set up Utility Law Solutions, Philip was their Principal Legal Advisor for Asset Management matters. In this role Philip's responsibilities were wide ranging and included the provision of legal advice and support to the business in relation to all asset management issues arising out of the company activities in sewage treatment, water supply and networks (water main and sewerage systems). During his time with Severn Trent Water, Philip was *inter alia* directly responsible for all legal aspects relating to:–

- Advice on the effects of the Water Industry Act 1991 and related legislation
- Obligations of sewerage undertakers in relation to the section 94 duty
- Formulation of policies and procedures in relation to the connection of infrastructure to new developments including resolution of development related problems/disputes
- Sustainable Drainage Systems (SuDS) - Member of the National SuDS Working Group providing legal support which culminated in the Interim Code of Practice for Sustainable Drainage Systems
- Sewers for Adoption – Provision of legal support for Sewers for Adoption 5 and 6, including creating a new national agreement
- Development through Water UK involvement, of water company positions in relation to Private Sewers legislation, New Roads and Street Works and Traffic Management Acts, Environmental Liability Directive, Section 101A (rural sewers) applications and processes and Environmental Information Regulations

Alex was employed by Severn Trent Water in its Developer Services and New Connections department with duties including assessing and communicating the impact of new developments on existing sewerage networks and evaluating sewer designs proposed by developers in accordance with industry standards. Alex worked in close collaboration with the Asset Protection and the Legal departments in Severn Trent providing an important link for his own team to ensure that all activities relating to new development complied with both statutory provisions and protected the technical requirements of the company. Alex also spent 4 years prior to joining ULS working as a consultant to developers providing advice on matters including the impact of proposed developments on sewerage networks and acting as an agent in communicating with sewerage undertakers.

www.utilitylawsolutions.co.uk

Utility Law Solutions Ltd – Registered in England No. 6072562
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Appendix 1

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Pre-Planning Assessment Report

Land off Dukes Park, Martlesham

Section 1: Proposed Development

Thank you for submitting a pre-planning enquiry. This has been produced for Utility Law Solutions. Your reference number is **00009707**. If you have any questions upon receipt of this report, please contact Carl Lee on 01733 414690 or email planningliaison@anglianwater.co.uk.

The response within this report has been based on the following information which was submitted as part of your application:

List of Planned Developments	
Type of Development	No. Of Units
C3 Dwellings	215
A1 Shops	1

The anticipated residential build rate is:

Year	2015	2016	2017
Build Rate	50	100	65

- The grid reference for the site is TM2569147719.
- The site currently does not have planning permission and is located on a greenfield site.

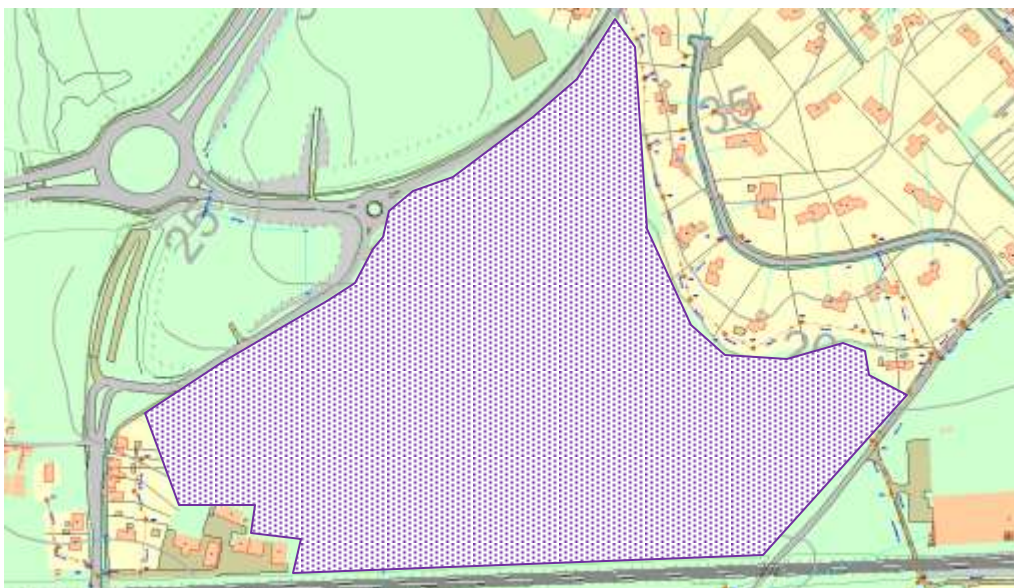


Figure 1: Location of proposed development.

The comments contained within this report relate to the public water mains and sewers indicated on our records. Your attention is drawn to the disclaimer in the useful information section of this report.

Section 2: Assets Affected

Our records indicate that we have the following types of assets within or overlapping the boundary of your development site as listed in the table below.

Additionally, it is highly recommended that you carry out a thorough investigation of your proposed working area to establish whether any unmapped public or private sewers and lateral drains are in existence. We are unable to permit development either over or within the easement strip without our prior consent. The extent of the easement is provided in the table below. Please be aware that the existing water mains/public sewers should be located in highway or open space and not in private gardens. This is to ensure available access for any future maintenance and repair and this should be taken into consideration when planning your site layout.

Water and Used Water Easement Information		
Asset Type	Pipe Size (mm)	Total Easement Required (m)
Water Mains	300	3.0 m either side of the centre line

If it is not possible to avoid our assets then the water main/sewer may need to be diverted in accordance with Section 185 of the Water Industry Act (1991). We have a duty to divert our sewerage infrastructure if requested to do so although this would be at your expense. You will need to make a formal application if you would like a diversion to be considered. A copy of the section 185 diversion application form can be found at www.anglianwater.co.uk/developers

Due to the private sewer transfer in October 2011 many newly adopted public used water assets and their history are not indicated on our records. You also need to be aware that your development site may contain private water mains, drains or other assets not shown on our records. These are private assets and not the responsibility of Anglian Water but that of the landowner.

Section 3: Water Recycling Services

In examining the used water system we assess the ability for your site to connect to the public sewerage network without causing a detriment to the operation of the system. We also assess the receiving water recycling centre and determine whether the water recycling centre can cope with the increased flow and influent quality arising from your development.

Water Recycling Centre

The foul drainage from the proposed development is in the catchment of Woodbridge Creek Water Recycling Centre, which currently has capacity to treat the flows from your development site. Anglian Water cannot reserve capacity and the available capacity at the water recycling centre can be reduced at any time due to growth, environmental and regulation driven changes.

Used Water Network

Anglian Water has assessed the impact of a pumped solution to the public foul sewerage network. We can confirm that this is acceptable as the foul sewerage system, at present, has available capacity for your site. The connection point will be to manhole 9701 in Sandy Lane at National Grid Reference (NGR) TM2596347747 at a discharge rate of 3.80l/s.

As per the current version of Sewers for Adoption, Anglian Water would wish to see an intermediate manhole constructed no closer than 5 metres from manhole 9701 for pumped connections to allow your flows to gravitate.

Surface Water Disposal

We note that you have not requested a surface water connection therefore an assessment has not been made on this occasion.

As you may be aware, Anglian Water will consider the adoption of SuDs provided that they meet the criteria outline in our SuDs adoption manual. This can be found on our website at <http://www.anglianwater.co.uk/developers/suds.aspx>. We will adopt features located in public open space that are designed and constructed, in conjunction with the Local Authority and Lead Local Flood Authority (LLFA), to the criteria within our SuDs adoption manual. Specifically, developers must be able to demonstrate:

1. Effective upstream source control,
2. Effective exceedance design, and
3. Effective maintenance schedule demonstrating that the assets can be maintained both now and in the future with adequate access.

If you wish to look at the adoption of any SuDs then an expression of interest form can be found on our website at: <http://www.anglianwater.co.uk/developers/suds.aspx>

Trade Effluent

We note that you do not have any trade effluent requirements. Should this be required in the future you will need our written formal consent. This is in accordance with Section 118 of the Water Industry Act (1991).

Used Water Budget Costs

It has been assumed that the onsite used water network will be provided under a section 104 Water Industry Act application. It is recommended that you also budget for both infrastructure charges and connection costs. The 2015/16 charges are:

Infrastructure Charge	£351.00 per connection
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Please note that we offer alternative types of connections depending on your needs and these costs are available in our annual charges booklet, which can be downloaded from www.anglianwater.co.uk/developers/charges.

Section 4: Map of Proposed Connection Points



Figure 1: Showing your used water point of connection at manhole 9701 with a Cover Level of 12.018m, we do not have the Invert Level on record

Section 5: Useful Information

Water

Water Industry Act – Key Water Sections:

- **Section 41:** This provides you with the right to requisition a new water main for domestic purposes to connect your site to the public water network.
- **Section 45:** This provides you with the right to have a connection for domestic purposes from a building or part of a building to the public water main.
- **Section 51A:** This provides you with the right to provide the water main or service connection yourself and for us to vest them into our company.
- **Section 55:** This applies where you request a supply of water for non domestic premises.
- **Section 185:** This provides you with the right to make a reasonable request to have a public water main, sewer or public lateral drain removed or altered, at your expense. Details on how to make an application and the s185 form is available on our website at <http://www.anglianwater.co.uk20/developers> or via our Developer Services team on 08457 60 66 087.

Details on how you can make a formal application for a new water main, new connection or diversion are available on from our Developer Services team on 08457 60 66 087 or via our website at www.anglianwater.co.uk/developers

If you have any other queries on the rights to requisition or connect your housing to the public water and sewerage infrastructure then please contact our developer services team at: Developer Services, Anglian Water, PO Box 495, Huntingdon, PE29 6YY or Telephone: 0845 60 66 087 or Email: developerservices@anglianwater.co.uk

Water pressure and flow rate: The water pressure and consistency that we must meet for your site is laid out in the Water Industry Act (1991). This states that we must supply a flow rate of 9 litres per minute at a pressure of 10 metres of head to the external stop tap. If your water pressure requirements exceed this then you will need to provide and maintain any booster requirements to the development site.

Self Lay of Water Mains: A list of accredited Self Lay Organisations can be found at www.lloydsregister.co.uk/schemes/WIRS/providers-list.aspx.

Used Water

Water Industry Act – Key Used Water Sections:

- **Section 98:** This provides you with the right to requisition a new public sewer. The new public sewer can be constructed by Anglian Water on your behalf. Alternatively, you can construct the sewer yourself under section 30 of the Anglian Water Authority Act 1977.

- **Section 102:** This provides you with the right to have an existing sewerage asset vested by us. It is your responsibility to bring the infrastructure to an adoptable condition ahead of the asset being vested.
- **Section 104:** This provides you with the right to have a design technically vetted and an agreement reached that will see us adopt your assets following their satisfactory construction and connection to the public sewer.
- **Section 106:** This provides you with the right to have your constructed sewer connected to the public sewer.
- **Section 185:** This provides you with the right to have a public sewerage asset diverted.

Details on how to make a formal application for a new sewer, new connection or diversion are available on our website at www.anglianwater.co.uk/developers or via our Developer Services team on 08457 60 66 087.

Sustainable Drainage Systems:

Many existing urban drainage systems can cause problems of flooding, pollution or damage to the environment and are not resilient to climate change in the long term. Therefore our preferred method of surface water disposal is through the use of Sustainable Drainage Systems (SuDS). SuDS are a range of techniques that aim to mimic the way surface water drains in natural systems within urban areas. For more information on SuDS, please visit our website at <http://www.anglianwater.co.uk/developers/suds.aspx>. We also recommend that you contact the Local Authority and Lead Local Flood Authority (LLFA) for the area to discuss your application.

Private Sewer Transfers: Sewers and lateral drains connected to the public sewer on the 1 July 2011 transferred into Water Company ownership on the 1 October 2011. This follows the implementation of the Floods and Water Management Act (FWMA). This included sewers and lateral drains that were subject to an existing Section 104 Adoption Agreement and those that were not. There were exemptions and the main non-transferable assets were as follows:

- Surface water sewers and lateral drains that did not discharge to the public sewer, e.g. those that discharged to a watercourse.
- Foul sewers and lateral drains that discharged to a privately owned sewage treatment/collection facility.
- Pumping stations and rising mains will transfer between 1 October 2011 and 1 October 2016.

The implementation of Section 42 of the FWMA will ensure that future private sewers will not be created. It is anticipated that all new sewer applications will need to have an approved section 104 application ahead of a section 106 connection.

Encroachment: Anglian Water operates a risk based approach to development encroaching close to our used water infrastructure. We assess the issue of encroachment if you are

planning to build within 400 metres of a water recycling centre or, within 15 metres to 100 metres of a pumping station. We have more information available on our website at <http://anglianwater.co.uk/developers/encroachment.aspx>

Locating our assets: Maps detailing the location of our water and used water infrastructure including both underground assets and above ground assets such as pumping stations and recycling centres are available from www.digdat.co.uk. All requests from members of the public or non-statutory bodies for maps showing the location of our assets will be subject to an appropriate administrative charge. We have more information on our website at: www.anglianwater.co.uk/developers/our-assets/

Summary of charges: A summary of this year's water and used water connection and infrastructure charges can be found at <http://www.anglianwater.co.uk/developers/charges/>

Disclaimer: The information provided within this report is based on the best data currently recorded, recorded within the last 12 months or provided by a third party. The position must be regarded as approximate. If there is further development in the area or for other reasons the position may change.

The accuracy of this report is therefore not guaranteed and does not obviate the need to make additional appropriate searches, inspections and enquiries. You are advised therefore to renew your enquiry should there be a delay in submitting your application for water supply/sewer connection to re-confirm the situation.

Any cost calculations provided within the report are estimated only and may be subject to change.

The responses made in this report are based on the presumption that your proposed development obtains planning permission. Whilst this report has been prepared to help assess the viability of your proposal, it must not be considered in isolation. Anglian Water supports the plan led approach to sustainable development that is set out in the National Planning Policy Framework (NPPF). As a spatial planning statutory consultee, we assist planning authorities in the preparation of a sustainable local plan on the basis of capacity within our water and water recycling (formerly referred to as wastewater) infrastructure. Consequently, any infrastructure needs identified in this report must only be considered in the context of up to date, adopted or emerging local plans. Where local plans are absent, silent or out of date these needs should be considered against the definition of sustainability set out in the NPPF as a whole.

No liability whatsoever including liability for negligence is accepted by Anglian Water Services Limited for any error or inaccuracy or omission including the failure to accurately record or record at all, the location of any water main, discharge pipe, sewer, or drain or disposal main or any item of apparatus.

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Section 4: Map of Proposed Connection Points

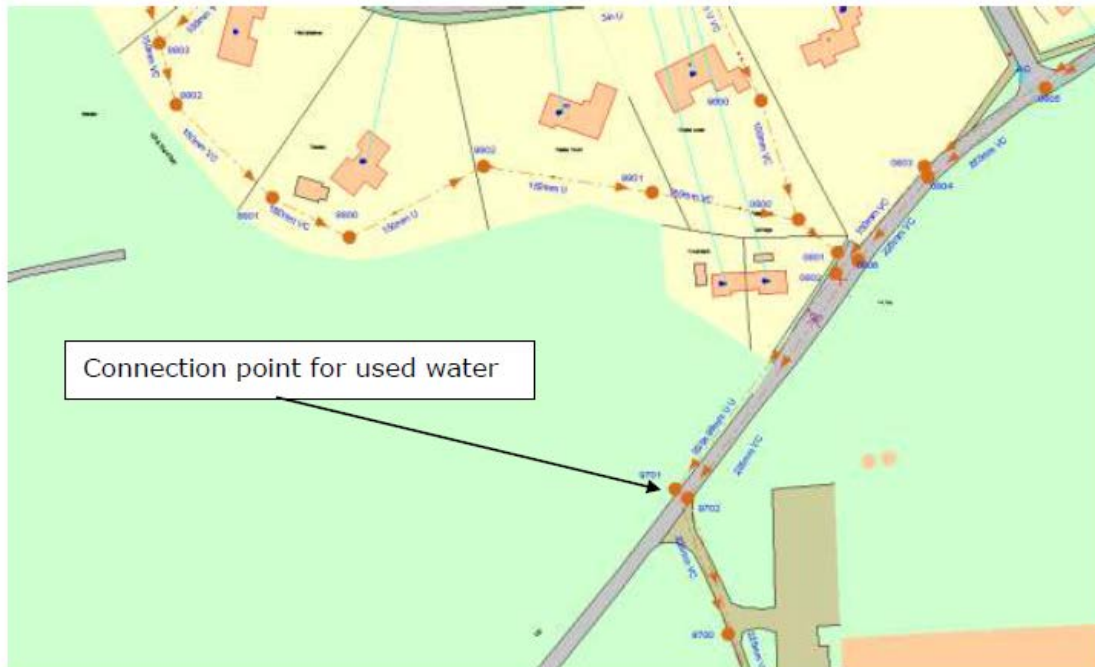
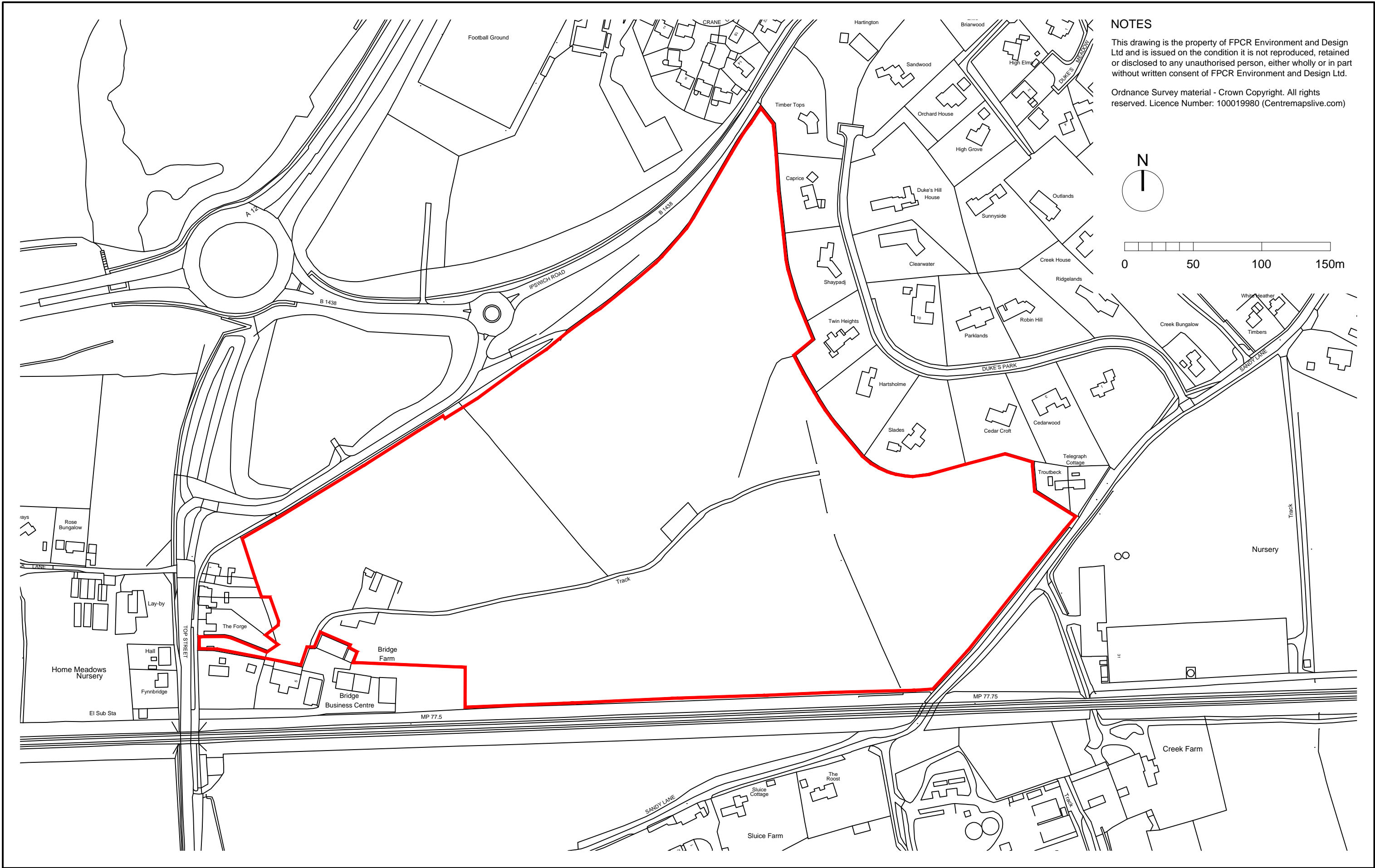


Figure 1: Showing your used water point of connection at manhole 9701 with a Cover Level of 12.018m, we do not have the Invert Level on record

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Appendix 3

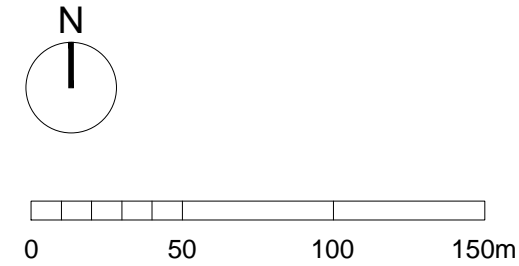
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Water Industry Legislation

Summary

The Water Industry Act 1991 (WIA 1991) provides a full legislative framework which incorporates provisions to ensure that new developments can be effectually drained through the adoption of the new onsite sewers and connection to the existing public sewerage network or, in the case of surface water, discharge into an available watercourse. The WIA1991 also contains sufficient safeguards to ensure that foul flows resulting from new development do not cause detriment to the existing public sewerage network. A duty is imposed on sewerage undertakers by the WIA1991 to take action to carry out any necessary works to accommodate new foul flows into their networks. Where it is perceived that new flows may cause detriment to existing public sewer networks, in addition to its duty to improve/upgrade, a sewerage undertaker also has the ability to compel a developer to connect at a point of adequacy on its system or otherwise alter the proposed drainage arrangements.

It should also be noted that the Water Industry Act provides for the water industry regulator to arbitrate on disputes between developers and sewerage undertakers on sewer connections and the provision of sewerage infrastructure in the event that such a dispute cannot be resolved between the parties. Involving the planning system in such matters is both unnecessary and has the potential to cause conflicts between the two legislative regimes.

The relevant sections of the WIA1991 which confirm the above statements are set out in full below but for convenience are summarised as follows:

Section 104 – Sewer Adoption Agreements

Section 104 of the WIA 1991 provides for developers to enter into a section 104 sewer adoption agreements in conjunction with exercising rights to connect to the public sewerage network under section 106(1) WIA 1991.

Section 106 – Right to Communicate with Public Sewers.

Developers enjoy a statutory right to connect new sewers to existing public sewers under section 106 (1) of the WIA1991 and sewerage undertakers do not have the ability to refuse a connection on the grounds of capacity in the local sewerage network and/or sewage treatment works.

Section 107 entitles the sewerage undertaker to give notice within 14 days of receipt of a notice under section 106(3) that the undertaker intends to make the communication himself. In that event the developer has to pay the reasonable cost of the work.

The Supreme Court in its recent judgment against a sewerage undertaker upheld this long-standing automatic right of connection to available public sewers (*Barratt Homes Limited (Respondents) v Dwr Cymru Cyfyngedig (Welsh Water) (Appellants)* – paragraphs 23-26, 41, 55).

The following extract from the judgment highlights some of the issues that were considered (with the key parts underlined):

41. The real problem that is demonstrated by the facts of this case arises out of the “absolute right” conferred by section 106 of the 1991 Act on the owner or occupier of premises to connect those premises to a public sewer without any requirement to give more than 21 days notice. While this might create no problem in the case of an individual dwelling house, it is manifestly unsatisfactory in relation to a development that may, as in the present case, add 25% or more to the load on the public sewer. The public sewer may well not have surplus capacity capable of accommodating the increased load without the risk of flooding unless the undertaker has received sufficient advance notice of the increase and has been able to take the necessary measures to increase its capacity.

57. As OFWAT has pointed out, although the 1991 Act affords no such right, there is a case for deferring the right to connect to a public sewer in order to give a sewerage undertaker a reasonable opportunity to make sure that the public sewer will be able to accommodate the increased loading that the connection will bring. The only way of achieving such a deferral would appear to be through the planning process. Some difficult issues of principle arise however:

□ Is it reasonable to expect the sewerage undertaker to upgrade a public sewerage system to accommodate linkage with a proposed development regardless of the expenditure that this will involve?

□ How long is it reasonable to allow a sewerage undertaker to upgrade the public sewerage system?

□ Is it reasonable to allow the sewerage undertaker to delay planned upgrading of a public sewer in the hope or expectation that this will put pressure on the developer himself to fund the upgrading?

A 21 day notice is only exercisable when the sewer that is required to connect foul flows from a new development has actually been constructed (as confirmed by Ofwat in a formal Determination). The development timescales set out in Section B above demonstrate that in reality sewerage undertakers always have significant periods of notice before new foul flows need to be accommodated in the public system.

Section 94 – A Sewerage Undertaker’s General Duty to Provide a Sewerage and Sewage Disposal System

Under section 94 (1) of the WIA1991, sewerage undertakers have a duty to provide, improve, extend and make provision for the emptying of their sewerage systems by effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers that comprise the public sewerage system. The provisions of this section of the WIA1991 relate not only to long term capital works to improve

the sewerage system generally, but also place a duty on the sewerage undertaker to react to changes in the level of discharges into its networks.

Section 94(1) places a duty on sewerage undertakers to plan and implement any works they feel are necessary to ensure their network of sewers (and sewage treatment facilities) continue to operate satisfactorily once they have received notification that a developer intends to exercise the right to connect under section 106(1). In reality, a sewerage undertaker has sufficient certainty (and time as a result of the advance notice they receive) that a development will be proceeding on the grant of planning permission (outline or full) and should consider any necessary actions to comply with its section 94 duty at that stage. Conversely, until a sewerage undertaker has certainty that sufficient development will take place in a particular area, it is unlikely that any investment in sewerage or sewage treatment will be allocated. It is therefore illogical to refuse to grant planning permission for developments on the grounds that no improvement works are planned for a particular area.

Section 112 – An Alternative to Works Under the Section 94 Duty

Whilst all developers and landowners have an absolute right to connect to the public sewer nearest to their premises, in some circumstances it may be the case that the sewerage undertaker requires drainage systems to be constructed in a manner which better protects the existing public sewerage and/or sewage treatment systems. It may for example be beneficial for a sewerage undertaker to require that a developer connects at an alternative location which constitutes a point of adequacy or provide onsite attenuation to ensure that new flows are only discharged at a specific rate or during certain times until any deficiencies in its systems have been resolved. Given the rights and duties under section 106 and 94 of the WIA1991, it would not however be appropriate to expect a developer to pay for any additional works. Section 112 of the WIA1991 provides a mechanism for sewerage undertakers to compel a developer to carry out alternative works (s112 (1)), but with the difference of cost being met by the sewerage undertaker (s112 (6)).

Clearly if compelling alternative works would be more cost effective for a sewerage undertaker than implementing sewer or sewage treatment improvement works under its section 94 duty or would allow extra time to carry out such works, this option is both viable and useful to ensure that a development can be effectually drained.

Section 104 - Agreements to adopt sewer, drain or sewage disposal works, at future date

(1) Subject to subsection (7) and section 146(3) below, a sewerage undertaker may agree with—

(a) any person constructing or proposing to construct -

- (i) any sewer;
- (ii) any drain which is intended to communicate with a public sewer vested in that undertaker; or
- (iii) any sewage disposal works; or

(b) any person at whose expense the undertaker is, by virtue of an agreement under section 160 below, to carry out work in connection with the construction of such a drain or sewer,

that, if the sewer, drain or sewage disposal works is or are constructed in accordance with the terms of the agreement, the undertaker will, upon completion of the work, at some specified date or on the happening of some future event, declare the sewer or such part of the drain as constitutes the lateral drain or the works (as the case may be) to be vested in that undertaker.

(2) A person mentioned in paragraph (a) or (b) of subsection (1) above may make an application to a sewerage undertaker requesting the undertaker to make an agreement under this section.

Section 106 – Right to Communicate with Public Sewers

(1) Subject to the provisions of this section -

- (a) the owner or occupier of any premises, or
- (b) the owner of any private sewer which drains premises,

shall be entitled to have his drains or sewer communicate with the public sewer of any sewerage undertaker and thereby to discharge foul water and surface water from those premises or that private sewer.

(1A) In this section, and in sections 107 to 109, 111, 113 to 116, 118, 119, 124, 127, 139 and 146 below -

- (a) references (however expressed) to a public sewer include a public lateral drain which satisfies sewer standards; and
- (b) for the purposes of paragraph (a) above

- (i) a “public lateral drain” is a lateral drain which either belongs to the sewerage undertaker or is vested in the sewerage undertaker by virtue of a declaration made under section 102 above or under an agreement made under section 104 above; and
 - (ii) “sewer standards” means such standards of construction and repair as the undertaker would require if the public lateral drain or part of it were to become a public sewer.

(2) Subject to the provisions of Chapter III of this Part, nothing in subsection (1) above shall entitle any person -

- (a) to discharge directly or indirectly into any public sewer -

- (i) any liquid from a factory, other than domestic sewage or surface or storm water, or any liquid from a manufacturing process; or
 - (ii) any liquid or other matter the discharge of which into public sewers is prohibited by or under any enactment; or

- (b) where separate public sewers are provided for foul water and for surface water, to discharge directly or indirectly -

- (i) foul water into a sewer provided for surface water; or
 - (ii) except with the approval of the undertaker, surface water into a sewer provided for foul water; or

- (c) to have his drains or sewer made to communicate directly with a storm-water overflow sewer.

(3) A person desirous of availing himself of his entitlement under this section shall give notice of his proposals to the sewerage undertaker in question.

(4) At any time within twenty-one days after a sewerage undertaker receives a notice under subsection (3) above, the undertaker may by notice to the person who gave the notice refuse to permit the communication to be made, if it appears to the undertaker that the mode of construction or condition of the drain or sewer –

- (a) does not satisfy the standards reasonably required by the undertaker; or
- (b) is such that the making of the communication would be prejudicial to the undertaker's sewerage system.

(5) For the purpose of examining the mode of construction and condition of a drain or sewer to which a notice under subsection (3) above relates a sewerage undertaker may, if necessary, require it to be laid open for inspection.

(5A) Where the sewer or drain satisfies the standards reasonably required by it, a sewerage undertaker may, as a condition of permitting the communication to be made, require that the sewer or that part of the drain forming the lateral drain be vested in it by virtue of a declaration under section 102 above.

(6) Any question arising under subsections (3) to (5A) above between a sewerage undertaker and a person proposing to make a communication as to -

- (a) the reasonableness of the undertaker's refusal to permit a communication to be made; or
- (b) as to the reasonableness of any requirement under subsection (5) [or (5A) above, may, on the application of that person, be determined by the Authority under section 30A above (and, accordingly, section 105 above shall not apply to any requirement under subsection (5A) above).

(7)

(8) Where a person proposes under this section to make a communication between a drain or sewer and such a public sewer in Greater London as is used for the general reception of sewage from other public sewers and is not substantially used for the reception of sewage from private sewers and drains -

- (a) the grounds on which a sewerage undertaker may refuse to permit the communication shall be such grounds as the undertaker thinks fit; and
- (b) no application to the Authority may be made under subsection (6) above in respect of any refusal under this subsection.

(9) In this section "factory" has the same meaning as in the Factories Act 1961.

Section 94 - General Duty to Provide Sewerage System

(1) It shall be the duty of every sewerage undertaker -

- (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and
- (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

(2) It shall be the duty of a sewerage undertaker in performing its duty under subsection (1) above to have regard -

- (a) to its existing and likely future obligations to allow for the discharge of trade effluent into its public sewers; and
- (b) to the need to provide for the disposal of trade effluent which is so discharged.

(3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above -

- (a) by the Secretary of State; or
- (b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Authority.

(4) The obligations imposed on a sewerage undertaker by the following Chapters of this Part, and the remedies available in respect of contraventions of those obligations, shall be in addition to any duty imposed or remedy available by virtue of any provision of this section or section 95 below and shall not be in any way qualified by any such provision.

(5) In this section "trade effluent" has the same meaning as in Chapter III of this Part; and, accordingly, section 139 below shall have effect for the purposes of this section as it has effect for the purposes of Chapter 3 of this Part.

Section 112 – Requirement that Proposed Drain or Sewer be Constructed so as to Form Part of General System.

(1) Where -

(a) a person proposes to construct a drain or sewer; and

(b) a sewerage undertaker considers that the proposed drain or sewer is, or is likely to be, needed to form part of a general sewerage system which that undertaker provides or proposes to provide, the undertaker may require that person to construct the drain or sewer in a manner differing, as regards material or size of pipes, depth, fall, direction or outfall or otherwise, from the manner in which that person proposes, or could otherwise be required by the undertaker, to construct it.

(2) If any person on whom requirements are imposed under this section by a sewerage undertaker is aggrieved by the requirements, he may within twenty-eight days appeal to the Authority.

(3) On an appeal under subsection (2) above with respect to any requirements, the Authority may either disallow the requirements or allow them with or without modification.

(4) It shall be the duty of a person on whom requirements are imposed by a sewerage undertaker under this section to comply with those requirements.

(5) The duty of any person by virtue of subsection (4) above to comply with the requirements of a sewerage undertaker shall be owed to the undertaker; and any breach of that duty which causes the undertaker to sustain loss or damage shall be actionable at the suit of the undertaker.

(6) A sewerage undertaker which exercises the powers conferred on it by this section shall -

(a) repay to the person constructing the drain or sewer the extra expenses reasonably incurred by that person in complying with the undertaker's requirements; and

(b) until the drain or sewer becomes a public sewer, from time to time repay to that person so much of any expenses reasonably incurred by him in repairing or maintaining the drain or sewer as may be attributable to the undertaker's requirements having been imposed and complied with.

(7) Nothing in this section shall apply in relation to so much of any drain or sewer as is proposed to be constructed by any railway undertakers or dock undertakers in or on land which -

(a) belongs to them; and

(b) is held or used by them for the purposes of their undertaking.

Appendix 5

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Water Industry Legislative Framework, Duties, Funding and the Planning Regime – ULS Analysis

The Planning Tests

The following statements are pertinent and should be applied by the local planning authority when considering proposed development in conjunction with the six tests set out in the National Planning Policy Framework (NPPF) and expanded on in the Planning Practice Guidance (PPG):-

1. The actual impact of foul and wastewater drainage from a proposed development on the environment must always be evaluated with due regard to statutory provisions set out in the Water Industry Act 1991 and the duties of sewerage undertakers contained therein.
2. In considering any foul and wastewater drainage matters, the planning authority must take into consideration the fact that the developer has an absolute right to connect to the public sewerage system under section 106 of the Water Industry Act 1991 (the WIA1991), whether or not this would give rise to adverse effects e.g. increased flooding or environmental harm due to a restricted capacity in the sewerage and sewage treatment system.
3. The planning authority must also consider the following matters:
 - a) Section 94 of the WIA1991 imposes a continuing duty on all sewerage undertakers to provide, maintain and where necessary improve its systems for collecting and treating foul and wastewater drainage so as to effectually drain its area and effectually deal with the contents of its sewers;
 - b) a sewerage undertaker is provided with the means of funding the cost of fulfilling the above duty within the WIA1991 through sewerage and infrastructure charges; and
 - c) the WIA1991 clearly sets out that the costs of meeting the above duty are required to be borne by the sewerage undertaker, not the developer, save in one limited case where a new sewer is requisitioned by the developer (normally in cases where access to a public sewer is across intervening third party land) and where the charges for its use would not cover the cost of borrowing to provide it.
4. ULS does not believe that foul drainage related planning conditions are necessary for new residential development. In order for any such condition to be justified in terms of the guidance in the NPPF and PPG, the condition would also have to be shown to be necessary and reasonable. It would not be reasonable if it imposes an unjustifiable burden on the developer. Nor would it

be reasonable if the condition had the practical effect of forcing the developer to fund any inadequacies in sewerage or sewage treatment because the sewerage undertaker was not prepared to fulfil its statutory obligations in a timely manner i.e. within the reasonable timescales indicated within this report which estimate when the development would start to produce meaningful foul flows. In theory a negative “Grampian” style condition could as a matter of law be imposed to restrain the occupation of development until satisfactory arrangements are made to deal with the sewage and wastewater generated. However, in practice it is clear that such a condition would fail when set against the tests in para. 206 of the NPPF and explained in the PPG on the basis that there is normally sufficient time for the sewerage undertaker to fulfil its statutory duties as set out below or there is manifestly negligible impact on the sewerage and sewage treatment system.

5. When considered properly in the light of the structure and intentions of the WIA1991, current deficiencies in sewerage and sewage treatment provision would not in themselves justify refusal of permission or a Grampian condition. A planning authority must take into account the reasonable timescale when foul flows from the development would start to discharge into the public sewerage and sewage treatment system, the undertaker’s duties and whether such deficiencies would reasonably be expected to be addressed by the time the development imposes an additional burden on the system.
6. As alluded to in 4. above, the precise potential effect of a drainage condition needs to be clearly addressed. In particular, whether the practical effect would be to impose pressure on a developer to contribute to the cost of works which should properly be funded by the undertaker through the charging system contained within the WIA1991, or to give the undertaker an incentive to delay in the hope that the developer will do so. Such a condition would be unreasonable.
7. The same applies to a condition which has the effect of compelling the developer to undertake attenuation works on site or elsewhere to alleviate the impact of foul flows from the development on the sewerage and sewage treatment system. This is because section 112 of the WIA1991 provides a means for the sewerage undertaker to require such works as part of the private sewerage system serving the development, but on condition that the additional cost is borne by the undertaker, not the developer.
8. Finally, it is important to consider the differences between the provision of sewerage and sewage treatment and other infrastructure such as roads, schools, GP surgeries etc. It is clear that a development may need to be phased to ensure that such infrastructure is available with the necessary contributions made by developers to the cost of its provision. This is not the

case with sewerage and sewage treatment provision as there is a statutory duty and statutory mechanism for financing it. Conversely no person has a statutory duty to provide roads, schools, GP surgeries etc. to serve developments and there is no means of covering its cost by charging users.

Given this analysis, planning authorities should not be refusing planning permission or imposing foul drainage conditions on developers as a matter of course or routinely, without addressing the above.

It is possible to interpret some passages in the PPG as if they were suggesting that foul drainage conditions should be imposed routinely, or that it is acceptable for a developer to be required to fund or to contribute to the cost of new sewerage infrastructure. This is misleading as conditions relating to sewerage and sewage treatment must be considered and justified against the tests in para. 206 of the NPPF and explained in the PPG. In particular, given the provisions laid down by Parliament in the WIA1991, careful consideration will be required as to whether such a condition is necessary and whether it is reasonable. Having regard to the nature of the plan-led system and the time-scales involved in implementing a permission for residential development, it is entirely reasonable to expect a sewerage undertaker to make provision for the necessary sewerage and sewage treatment infrastructure so as to avoid the adverse effects that may or may not be caused by new development and to fund this through the normal means of charges.

The analysis outlined above has recently been supported during the course of a planning appeal (Appeal Decision APP/Y2810/A/14/2228921). Although the planning authority concerned has subsequently challenged the decision of the Inspector, the subject of the challenge is in respect of planning policy and is not related to foul drainage.

The Planning Inspector considered both positions on this matter, having received the analysis of ULS as set out in this section and also representations from a sewerage undertaker requesting that a foul drainage planning condition was imposed. The full comments of the Inspector are set out below:-

Appeal Decision APP/Y2810/A/14/2228921

77. Anglian Water sought a condition requiring on- and off-site mains foul sewage infrastructure works prior to occupation. This would prevent any new connection overloading the sewer. However, the appellant has argued that this would be unreasonable, citing case law that: *a sewerage undertaker has no right to ... refuse a developer the right to connect with a public sewer ...*⁸. I acknowledge that if only 21 days' notice was given (being all that is required under the Water Industries Act 1991) then there would be the potential for a serious problem. However, as Anglian Water replied to statutory consultation

in July 2014, and as it is likely to be at least 2 more years before any houses would be occupied, it would have adequate time to take the necessary measures. The proposed condition would therefore be unreasonable.

⁸ *Barratt Homes Limited v Dwr Cymru* [2010] Env. L. R. 14, 253, paragraph 59

This decision is clearly a material consideration in the planning authority's determination of planning applications, if there is a potential requirement for the Sewerage Undertaker to provide additional sewerage and/or sewage treatment capacity to treat foul flows from a development. Case law has set a precedent relating to the consistency of decision making by planning authorities or inspectors, confirming that whilst a decision maker can depart from a previous decision which considered the same or similar facts, they must fully justify the reasons for doing so. (Fox Vs SoS [2012] EWCA Civ 1198).

Adopting the tests at NPPF para. 206 and following the approach taken in Appeal Decision APP/Y2810/A/14/2228921, conditions relating to foul drainage would be unnecessary and/or unreasonable. A sewerage undertaker will often suggest that detriment may be caused to the public sewerage system by the foul flows from a development unless a condition is imposed. It is understandable that this would be of concern to a planning authority and this is no doubt the reason that planning authorities have tended to routinely apply planning conditions put forward by sewerage undertakers. However, in reality, the "risk" is not created by the development itself and would only occur if a sewerage undertaker failed to undertake its statutory obligations as detailed in this report to fund and carry out improvements to the sewer and/or sewage treatment systems if any are required, in a timely manner. The fact that a sewerage undertaker requests development to be delayed until it is prepared to make the necessary investment (for which it is already funded), means that a private company is in effect seeking to dictate when homes which are required to meet housing need, can be delivered. This is not a practice that should be perpetuated within the planning system.

The Sewerage Undertaker's Duties

It is the opinion of ULS that sewerage (the piped network) or waste water treatment capacity for a development should be made available by the incumbent sewerage undertaker on the basis that reasonable notice of a proposed development has been provided by a developer or landowner. Where the impact on the sewerage system is negligible no additional capacity will be required and no action by the sewerage undertaker would be necessary. As such, foul drainage does not generally represent a constraint in planning terms to development. There is a separate statutory regime in place which adequately addresses foul drainage matters. Should a development, such as the one proposed, be granted outline planning permission, the Sewerage Undertaker has sufficient time and has the knowledge and expertise to fully assess

the potential impact on its sewerage network and implement any necessary improvement works that may be required to accommodate new foul flows.

If following further investigation the Sewerage Undertaker considers that improvement works are required to its sewerage network or sewage treatment works, the Sewerage Undertaker is funded to ensure that such improvements are made in order to comply with its statutory duty to “provide, improve and extend” its network. It would therefore be unreasonable to delay the start or progress of this development once planning permission has been granted. Imposition of a foul drainage planning condition, the effect of which is to impose pressure on a developer to contribute to the cost of works which should properly be funded by the sewerage undertaker, would be unreasonable and consequently conflict with some or all the six tests as set out in the PPG.

With regard to sewage treatment, each Waste Water Treatment Works (WWTW) in a sewerage undertakers operating area has a consent to discharge treated effluent to a body of water (typically a watercourse/river). Such consents are issued by the Environment Agency (EA) and incorporate a number of parameters in relation to both biological load (quality of effluent discharge) and dry weather flow (quantity of discharge). A WWTW is required by the EA to operate within these consent parameters.

The quality and quantity of effluent discharged from a WWTW is measured by the sewerage undertaker responsible against its consent parameters, typically on a monthly basis giving 12 reports per year to the EA confirming whether or not the WWTW is operating within its consent. Clearly as a particular works approaches the limits of its consent parameters, a sewerage undertaker must give regard to the likely level of growth in the catchment area of the WWTW and look at what investment may be required, either by installing new plant or altering the operation of existing plant, to ensure any new flows can be accommodated without exceeding the limits imposed by the EA. Any sewerage undertaker which does not take such action for works approaching capacity is failing in its statutory duty under section 94 as outlined above. How the quality and quantity of discharge from a WWTW is measured varies from specific monitoring devices within a works to estimates based on the size of the population for the contributing catchment area.

Should a particular WWTW fail to meet its consent parameters on two or more occasions within a twelve month period, discussions will be held between the EA and the sewerage undertaker as to what improvements can be made to bring discharges back within the set limits. During such discussions, the consent parameters may be tightened or amended to suit the facts of the case and to ensure water quality in the receiving body is protected. In reality, because of the gradual nature of growth in any particular area, even where a works is deemed to have failed against its consent parameters, this is only likely to be by a very small amount and provided appropriate

action is taken by the sewerage undertaker, an agreement can be made with the EA as to how the WWTW can be managed to ensure it operates within its consent (whether or not this is amended).

Where a WWTW is close to or has failed to meet its consent parameters, it is often possible to implement temporary measures (in operational procedures or provision of additional storage/treatment apparatus) to mitigate against the immediate small exceedance in quality or quantity while funding is allocated and feasibility studies carried out to allow a long term solution to be implemented to ensure that future additional growth can be catered for.

It is a matter for any sewerage undertaker to manage its consents with the EA and ensure that its WWTW's stay within their consent parameters. This is an ongoing process and it is unreasonable to suggest that a specific development, particularly one which is modestly sized in comparison to overall catchment population, will have a significant and unmanageable influence on a WWTW and its ability to operate within limits set by the EA. This is not a matter which can be influenced by a developer and as such to prevent or delay a development from proceeding because a sewerage undertaker may be forced to take action and fund improvement works to comply with its statutory duties is unreasonable.

The Sewerage Undertaker's Funding

In order to fund its obligations under the WIA1991 as set out above, sewerage undertakers have two basic funding streams which are summarised below.

- General Sewerage Charge - An annual charge levied by the sewerage undertaker whilst ever a property remains connected to the public sewerage system.
- Sewerage Infrastructure Charges – Each new dwelling constructed on a development, together with any associated commercial/social/educational premises, which connect to a sewerage undertakers' sewer for the first time have a charge levied upon them by the relevant sewerage undertaker (i.e. one sewerage infrastructure charge is paid by the developer for each new property constructed and connected or the equivalent number of charges in the case of commercial/social/educational premises). Infrastructure charges are designed to meet the costs of local system enhancements that are incurred by sewerage undertakers when new developments are connected to their network. The water industry regulator, Ofwat, has issued guidance to this effect (in - RD 2/95).

Funding for improvements to the sewerage network and the sewage treatment activity, including improvement works required to accommodate new foul flows from a development is funded through general sewerage charges.

Sewerage Undertakers are financed in 5 yearly cycles (AMP periods) and have flexibility in the way that such funding is applied. It is clearly not possible at the beginning of a 5 year period to plan for all works which may be required for its duration, particularly given the changing nature of development activities and the planning process. Therefore, in addition to funding for individual capital projects identified in a sewerage undertaker's business plan, Ofwat, in determining price reviews at the start of an AMP period, also allows an amount for general funding to spend on non-specific growth. This general growth pot is clearly intended to cater for new developments where potential upgrades may be required.

Sewerage Undertakers have flexibility in how they allocate the funding they receive for general growth and need to apply it to areas in which improvement works are required on a priority basis. How any sewerage undertaker allocates funding within its business is a matter for it to manage, but it must do so in a manner which allows it to comply with its statutory duties at all times. It is not appropriate for a sewerage undertaker to use the planning system to seek additional income from developers because it has either failed to secure sufficient funding in its current AMP period, or is unwilling to allocate sufficient funds to carry out duties it is required to perform under its governing legislation.

In addition to the general sewerage charge, each new dwelling constructed on this development will be subject to a sewerage infrastructure charge. Infrastructure charges are designed to meet any costs that are incurred by sewerage undertakers in relation to local system enhancements required to sewerage networks when new developments are connected to its network. It is also important to note that while in all cases infrastructure charges are levied for properties constructed on new developments, not all sites will give rise to the need for local system enhancements. The result being that all sewerage undertakers have a funding pot of collected infrastructure charges which can be allocated to where spending is required within its operating area.

Where connection is made to a public sewer under section 106 of the WIA1991, there is no statutory mechanism within the WIA1991 to allow sewerage undertakers to secure additional funding from developers to supplement their general sewerage and infrastructure charges and to do so would be inappropriate.

In light of the above analysis which evidences that sewerage undertakers are funded to improve public sewer networks and sewage treatment facilities, it is inappropriate to seek any further financial contributions from developers through use of the planning system. To do so would result in a form of double charging. It is for this reason that any condition which could specify that a development is not commenced or occupied for a certain period of time unless additional funding is secured from a developer is inappropriate, unreasonable and in direct conflict with the water industry's governing legislation.

Summary

Unless sewerage undertakers have certainty that sufficient development will take place in a particular area, it is unlikely that any investment in sewerage or sewage treatment will be allocated. In the event that the Sewerage Undertaker considers that it has hydraulic or capacity issues with its sewerage and sewage treatment systems for this and other development in the area, it would be unreasonable and illogical to refuse planning permission on the grounds that no sewerage or sewage treatment improvement works are planned for the network to which this development will discharge foul flows. Only granting planning permission for developments without foul drainage planning conditions will ensure that the Sewerage Undertaker fully considers the current drainage network and systems in line with its statutory duties. This will provide a benefit not only to this new development, but also potentially the existing settlement.

Because of the rights and duties outlined above, where a sewerage undertaker perceives there to be a potential inadequacy in its sewerage or sewage treatment systems to accommodate new foul flows, it will often make representations to planning authorities recommending that planning conditions relating to foul drainage are imposed. The typical conditions suggested by many sewerage undertakers commonly have the effect of compelling the developer to meet the cost of improving the public sewerage system or sewage treatment works or else face a long (sometimes indefinite) delay before the sewerage undertaker itself will carry out any necessary work.

The point of principle is that as a matter of law, the WIA1991 expressly places a duty on sewerage undertakers to provide, improve, extend and maintain a system of sewers and sewage treatment facilities so as to ensure that their area is and continues to be effectually drained. The WIA1991 then gives domestic owners and occupiers an absolute right to connect into the public system (subject only to their private drains being of proper construction and condition). To apply planning policy so as to relieve the undertakers of that duty and negate the rights of owners and occupiers conflicts with primary legislation which already protects both new developments and existing property owners. This is unreasonable where matters relating to foul drainage can be suitably addressed through the appropriate statutory regime which governs the water and sewerage industry.

In our experience, planning authorities often impose a planning condition in relation to foul drainage on the advice of sewerage undertakers without proper consideration of not only how this impacts on effective and economic development, but also whether it conflicts with statutory rights and duties imposed by water and sewerage industry primary legislation.

When considering the drainage related aspects of a planning application, the correct approach in law is as follows:

- To have due regard to the rights which the developer would have to connect the development to the public sewerage system and what impact to the environment that would have but also taking into account the general duty imposed on sewerage undertakers under section 94 together with the charging provisions of the WIA1991.
- To carefully consider whether those impacts would be such as to justify refusing permission, and if so whether they could be mitigated by a planning condition.
- To carefully consider whether any such condition would meet the policy tests in the NPPF and PPG.

Sewerage undertakers often claim that funding cannot be allocated to plan and implement improvement works (and in some cases to assess whether such works are required) to ensure new foul flows can be accommodated in the public sewer network/treatment facilities. It is important to bear in mind that sewerage undertakers are commercial organisations (and not statutory consultees for planning applications). Imposing a planning condition allowing one commercial operator (the sewerage undertaker) to compel another (the developer) to meet the cost of providing the infrastructure the sewerage undertaker has a statutory duty to provide is unreasonable. It also has the potential to impose unnecessary costs on an industry (house building) which is important to the economy of the United Kingdom and does not promote effective and economic development. If the cost of upgrades to the public sewerage network, which in any case should not be met by the developer, is disproportionate to the proposed development, the effect is to prevent that development from proceeding, even though in planning terms it is otherwise acceptable, and may be highly desirable.

It is also important to note that at least three out of the ten sewerage undertakers do not currently seek financial contributions from developers and will work with them to ensure that any necessary upgrades to their networks are implemented in a timescale to suit the development regardless of whether it was in a local plan or not. This evidences that sewerage undertakers are funded to enable them to carry out their statutory duties outlined above, but many are unwilling to allocate the necessary funds to support house building in this country.

It is clear that any planning condition relating to foul drainage is unnecessary and unreasonable as it would duplicate matters which are already satisfactorily dealt with under a separate statutory regime. Unless there is clear evidence that to fail to impose a condition would have a detrimental effect which cannot be avoided through appropriate action by a sewerage undertaker in a reasonable timeframe, connections to the local public sewerage system should be dealt with via the legislative

framework contained in the Water Industry Act 1991 (as amended) rather than planning legislation. Imposing a condition without proof that detriment would be caused which cannot be mitigated against through action by the sewerage undertaker in pursuance of its statutory duties is unreasonable and would fail some or all of the 6 tests in the NPPF. The corresponding advice in the PPG explains in more detail these six tests. The detail included in para. 206 of the NPPF and explained in the PPG verifies that most foul drainage planning conditions fail the following tests:

- Necessity – There is no definite planning reason for such drainage conditions to make for acceptability in planning terms. All relevant matters are suitably addressed by water and sewerage industry legislation.
- Relevance to planning – Again all foul drainage matters are already addressed by separate primary legislation
- Enforceability – The upgrade of a sewerage undertaker's sewerage network or sewage treatment works is a matter over which the applicant has no control.
- Reasonability – A foul drainage condition could place an unjustifiable and disproportionate burden on the applicant, by either delaying the development due to a lack of action by a sewerage undertaker (by failing to comply with its statutory duties), or by forcing the applicant to provide funding for works which the sewerage undertaker is already suitably funded by statutory provisions.

Conditions relating to sewerage and sewage treatment must be considered and justified against the tests set out in the NPPF and the PPG. In particular, given the rights and duties in the Water Industry Act 1991, careful consideration is required as to the time-scales involved in implementing a permission for residential development. It is reasonable to expect the sewerage undertaker to make provision for the necessary infrastructure so as to avoid adverse effects, and to fund this through the normal means of charges. A foul drainage condition for developments would therefore fail the test of reasonableness laid out in the NPPF, given the timescales for the ultimate discharge of foul flows from the development to the public sewerage and sewage treatment system.