ANGLIAN WATER SERVICES LIMITED

WATER RECYCLING CENTRE CAPACITY OBJECTIONS

TO NEW DEVELOPMENT

ADVICE

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1. I am asked to advise Anglian Water Services Limited (Anglian Water) about its ability to object to residential development or recommend a pre-occupancy condition in circumstances where there is insufficient capacity to treat the waste water flows from the development at the relevant water recycling centre ('WRC') and, consequently, the lawfulness of a local planning authority refusing planning permission or imposing such a condition in those circumstances.

2. This Advice deals with the above matters generally, but I have been provided with examples of these issues arising in practice within Anglian Water's area and, where appropriate, will use such anonymised examples to illustrate the arguments.

3. The national need over recent years to construct more residential and other development has brought with it unprecedented pressure on the capacity of local waste water facilities. Additional effluent load from new development can cause a number of very real problems.

4. The sorts of problems that the imposition of additional effluent loads can cause fall into the following broad categories.
   a. The load could surcharge the sewerage network. This may manifest itself in different ways:
      i. it may be released into a watercourse by way of a combined sewer overflow, which is in effect a safety valve for the network to avoid the

even more undesirable consequences set out following, although it is one which meets with ever stiffer public disapproval[1];

ii. it may overflow into the built environment, usually streets and gardens (but often worse, such as into buildings) by way of manholes; and/or

iii. it may lead to loss of service to properties.

b. The load could overwhelm the receiving WRC (i.e. the 'sewage treatment works'). This may manifest itself in different ways:

i. the overall increase in volume cannot be treated. The works discharges the excess into the adjacent watercourse through a designed storm overflow or simply by overtopping the infrastructure; or

ii. the overall increase can be treated but the sewerage undertaker exceeds the limits or conditions in its discharge consent[2] either because of the final effluent's constituents or volume.

5. Accordingly, Anglian Water has developed the following strategy to assess these issues and respond to planning applications:

a. it assesses 'headroom' in the 'treatment infrastructure' relevant to the development in question;

b. it assesses 'headroom' in the 'network infrastructure' relevant to the development in question; and then

c. it either makes a positive representation to the local planning authority, recommends refusal of the application, or seeks a pre-occupancy condition based on the assessment.

6. I am instructed that the treatment 'headroom' assessment is established as follows. Anglian Water takes the current Q90 dry weather flow data for the relevant WRC. This is the data provided in its annual regulatory return to the Environment

[1] CSOs are historic pieces of infrastructure, required by the Urban Waste Water Treatment (England and Wales) Regulations 1994 only to be used where (i) the circumstances are *"exceptional",* or (ii) there is no remedial solution best technical knowledge not entailing excessive costs. In my view it is not sustainable to consider too much development as *"exceptional"*.

[2] Required by virtue of the Environmental Permitting (England and Wales) Regulations 2016, because it is a *"water discharge activity"*.

Agency. Projections of the dry weather flow, reflecting new development for which planning permission has already been given, are compared with the discharge consent conditions attaching to the relevant WRC to calculate headroom (if any – it may already be a negative figure). Further additions to the dry weather flow consequent on the development proposed are factored in, resulting in an outcome that is either positive or negative headroom.

7. I understand that headroom within the foul network is evaluated through a multi-factor assessment. This includes consideration of any impacted Combined Sewer Overflows (CSOs), records of existing flooding incidents, the availability and sizing of local sewer infrastructure, and supplementary data such as flow monitoring outputs from within the network. I am instructed that headroom can change locally due to a number of factors including:
   a. weather – principally the duration and intensity of rainfall - and surface and groundwater flows into the wastewater network;
   b. changes in wastewater flows from existing homes and businesses, for example as a result of more home working such as occurred in 2020 and 2021;
   c. new connections resulting from existing commitments - extant planning permissions for residential and non-household growth;
   d. reductions in foul flows as water efficiency measures reduce the amount of water used and then needing treatment;
   e. improved accuracy of data collection as new flow monitors are installed and defective monitors replaced;
   f. changes to permits and wastewater regulations including nutrient removal to technically achievable limits (TAL); and
   g. optimisation and upgrades of existing WRCs, for example, as part of standard maintenance, or through planned works, including improvements paid for by developers for non-domestic flows.

8. Using all this data, Anglian Water responds to planning applications and pre-planning enquiries from developers in three ways:

a. it responds positively where the outcome is a positive headroom amount;
b. it objects to the development on the grounds of environmental damage and risk to existing customers where the outcome is a negative headroom amount and there is no identified capital growth scheme in Anglian Water's Asset Management Plan (currently AMP8 for 2025-2030); or
c. it seeks a pre-occupation condition where the outcome is a negative headroom amount, but the planned delivery of a capital growth scheme within the current Asset Management Period, AMP8 (2025-2030) at the relevant WRC will bring the outcome to a positive headroom amount in time – this is intended to restrain occupation of the development (and therefore discharge) until the scheme provides additional capacity at the WRC.

9. Anglian Water has, however, had several challenges to its approach to both WRC and network capacity and it is in this context that my advice is sought.

10. Before turning to types of points raised by residential and other developers I will consider two points of principle. First, I will deal with the issue of whether a lack of capacity in the sewerage system to take additional load is a 'material consideration' in any planning decision and then, secondly, whether a water company has a right to object to a planning application where there is insufficient foul water recycling capacity and the lawfulness of the local planning authority refusing planning permission or imposing an appropriate pre-occupancy condition on such grounds.

11. For the avoidance of doubt, all emphasis in the quotations in this Advice has been added, unless stated otherwise.

The materiality of sewerage capacity in an application for residential or other development.

12. The effect of new development on sewage infrastructure is unquestionably a material consideration in determination of planning applications. This is made clear in policy, including the NPPF (Dec 2024, amended Feb 2025) paragraph 187(e)

which states in terms that policies and decisions should *"contribute to and enhance the natural and local environment"* by (inter alia) *"preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution…"*.

13. Most local Plans also have policies and supporting text to similar effect. For example:

    a. Policy 92 (Flood Risk) of the Bedford Local Plan 2030 (a policy proposed to be 'saved' by the draft Local Plan 2040) also states that *"In considering new development water management, quality and flood risk must be addressed by: … iii.* ***Demonstrating that suitable infrastructure capacity is present or can be provided to serve the development"*** Supporting text paragraph 12.46 states that *"****The Council will consider whether suitable infrastructure capacity, including sewerage and sewage treatment infrastructure, is present or can be provided by statutory undertakers to serve the development****."*

    b. Paragraph 6.29 of the Leicester Local Plan 2020-2036 (Reg 19 submission January 2023) supporting Policy CCFR06 (Managing Flood Risk and Sustainable Drainage Systems) states that: *"There must be sufficient wastewater (including sewage treatment capacity) and water supply infrastructure available to serve all existing and proposed development.* ***As a consequence of an increased population there may be a requirement for the expansion and/or upgrading of current sewage treatment works. Appropriate infrastructure should be put in place to effectively transfer and treat any increase in wastewater prior to development.*** *Growth should not cause a deterioration in water quality or Water Framework Directive (WFD) status and must prevent deterioration in the status of aquatic ecosystems. Growth should not result in increasing the frequency or duration of spills within the network from Combined Sewer Overflows (CSOs) which would impact upon the water quality of watercourses. …"*

14. These are just examples, but reasonably typical of policies and supporting text in Local Plans.

15. There is in my view no doubt, therefore, that the capacity of local WRCs and the sewerage network generally to accommodate additional effluent flows from new residential and other development is relevant to a local planning authority's determination of a planning application for such development.

16. This brings me to the second point of principle.

A water company's right to object to a planning application where there is insufficient foul water recycling capacity at a WRC or capacity within the network generally and the ability of the local planning authority to refuse planning permission or impose an appropriate pre-occupancy condition on such grounds

17. A useful starting point will be to briefly summarise the Supreme Court decision in Barratt Homes v Welsh Water [2009] UKSC 13 (*Barratt*).

18. *Barratt* was a case about the 'point of connection' of a private housing development into the water company's public sewer system. That is not the issue that I am asked to consider here, but the Supreme Court then went on to identify and deal with what it called *"the real problem"*. This is clearly *obiter dicta*, but also clearly a very persuasive legal analysis.

19. At paragraph 23 of the judgement Lord Phillips summarised the effect of s.106 of the Water Industry Act 1991 (WIA 1991) as follows:

"The right to connect to a public sewer afforded by section 106 of the 1991 Act and its predecessors has been described as an "absolute right". The sewerage undertaker cannot refuse to permit the connection on the ground that the additional discharge into the system will overload it. The burden of dealing with the

consequences of this additional discharge falls directly upon the undertaker and the consequent expense is shared by all who pay sewerage charges to the undertaker."

20. He then deals with the issue of *"the precise point of connection"* before turning to *"the real problem"* from paragraph 41. In that paragraph he states that:

"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."

21. At paragraph 43 he summarises the position of the Court of Appeal, thus:

"The Court of Appeal suggested that the practical answer to this problem lies in the fact that the building of a development requires planning permission under the Town and Country Planning Act 1990. ***The planning authority can make planning permission conditional upon there being in place adequate sewerage facilities to cater for the requirements of the development without ecological damage. If the developer indicates that he intends to deal with the problem of sewerage by connecting to a public sewer, the planning authority can make planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load****. Such conditions are sometimes referred to as Grampian conditions*** *after the decision of the House of Lords in Grampian Regional Council v Secretary of State for Scotland [1983] 1 WLR 1340.* ***Thus the planning authority***

has the power, which the sewerage undertaker lacks, of preventing a developer from overloading a sewerage system before the undertaker has taken steps to upgrade the system to cope with the additional load."

22. And at paragraph 45 he adds:

"*If conditions of planning permission are to provide the answer to the problem of the connection of private sewers to public sewers which are not adequate to bear the additional load,* ***it would seem essential that there should be input to planning decisions from both the relevant sewerage undertaker and OFWAT***."

23. This is exactly the dilemma that Anglian Water faces with many residential and other developments where the current (and possibly future) capacity at the relevant WRC is insufficient to accommodate the addition effluent load. Under section 106 of the WIA 1991, Anglian Water has no right to refuse to permit a connection to its system on the grounds of lack of capacity. It has, therefore, to follow the only approach open to it, which is to object to the grant of planning permission either recommending refusal or (where appropriate) the imposition of a pre-occupancy condition pending the necessary upgrades to the system. This is entirely consistent with decisions of the Court of Appeal and the Supreme Court in *Barratt*.

24. In my view, therefore, Anglian Water is perfectly entitled to object to applications for residential development on the grounds that the relevant WRC is unable to accept the additional effluent flows. Furthermore, in my view it would be perfectly lawful for a local planning authority to refuse planning permission or impose a pre-occupancy condition and Anglian Water's grounds of objection, properly justified, would be a compelling reason for so doing.

25. I turn now to four arguments that have previously been raised against Anglian Water suggesting that it would be unlawful for a local planning authority to refuse planning permission or impose a pre-occupancy condition on the grounds of incapacity at the relevant WRC.

Argument 1: The decision in *Gateshead* and the regulatory regime for waste water

26. Argument 1 is that s.94 of the WIA 1991 contains a general duty to provide a sewerage system and that s.94A imposes an obligation on sewerage undertakers to prepare and maintain drainage and sewerage management plans. These duties on sewerage undertakers, together with the duties under s.98 (duty to comply with sewer requisition) and s.101A (further duty to provide sewers), and the right under s.106 (right to communicate with public sewers) are said to found the proposition that a local planning authority *"has no basis on which to consider that the regulatory regime governing wastewater pollution will not operate to ensure that there is sufficient capacity to sustain the gradual increases in wastewater as the Site becomes occupied"*.

27. Whilst it is absolutely correct that Anglian Water has a general duty to provide a public sewer system, s.94 is clearly not a requirement to provide sufficient sewerage capacity within a timescale that can accommodate the proposed build out rate of any particular proposed housing development.

28. Furthermore, the general duty to provide a public sewerage system in s.94 is only enforceable by the Secretary of State or Ofwat (s.94(3)), not a private developer. Contravention of this duty is dealt with by the Secretary of State under ss.95 and 96. Furthermore, the s.94 and related duties are clearly not a 'pollution control regime' for the purposes of paragraph 201 of the NPPF. That paragraph provides that:

"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to ***separate pollution control regimes****). **Planning decisions should assume that these regimes will operate effectively**. Equally, where a planning decision has been made on a particular development, the*

planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

29. The WIA 1991 provisions referred to above are part of the general regulatory framework under which water companies are required to provide sewerage systems, but they are not a 'control pollution' regime (i.e. they do not 'control' foul water discharges); that is a matter for the Environmental Permitting regime. This is an important distinction in the context of the *Gateshead* decision that is sometimes relied upon.

30. In Gateshead MBC v Secretary of State [1995] Env LR 37 (*Gateshead*) at pp.43-44 the Court held that it is *"not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies ... Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."* First, the WIA 1991 duties to provide a sewerage system are not a 'pollution control regime' within the meaning of the decision in *Gateshead* but, secondly, and in any event, Anglian Water's typical proposed pre-occupation condition does not seek to 'duplicate' any 'pollution controls' that are the responsibility of some other body with such statutory responsibility (e.g. the EA); the typical proposed condition seeks to control the delivery of housing development until the relevant WRC upgrade is in place. Reliance on the *Gateshead* decision is, therefore, simply misplaced.

31. Argument 1 has no merit and is not a proper reason for a local planning authority not to either refuse planning permission or, indeed, impose a pre-occupancy condition where appropriate.

Argument 2: Anglian Water is phasing the delivery of its upgrades to the relevant WRC and/or its waste water network generally for its own financial reasons

32. Argument 2 runs broadly as follows: *"it appears to be Anglian Water's position that, for financial reasons, its investment will be phased in such a way so that the planned capacity for the* [XXX] *WRC will not be forthcoming until later on. That is to abdicate its statutory responsibilities under the WIA 1991."* Insofar as this suggests that the phasing of Anglian Water's asset upgrade system is arbitrary or an 'abdication' of its statutory responsibilities, that it clearly wrong.

33. Anglian Water is utility company regulated by Ofwat that has to prepare business plans for successive asset management periods (AMPs). Ofwat has approved funding for the upgrade of a number of Anglian Water's WRCs and other assets during AMP8 (2025-2030). I understand that Anglian Water has some 63 named WRC upgrade schemes to complete by the end of AMP8, or it will face financial penalty. Furthermore, it has to report back to Ofwat every 6 months on its programme. For both practical and, indeed, financial reasons Anglian Water has to phase its upgrade programme throughout the asset management period. The upgrade to any particular WRC will usually be discussed with the EA before going to detailed design. An upgrade may well require planning permission and, indeed, may also require the acquisition of additional land. Following the grant of planning permission, and any land acquisition, Anglian Water will have to start construction and then commission the upgrade but, with some 63 projects to complete, the timing of these activities themselves depend on a number of issues, including those relating to Anglian Water's supply chain. Thus, the phasing of any particular upgrade work within the AMP8 (2025-2030) period is not capricious, but depends on a number of interrelated issues, including the need to upgrade other assets. Reference to Anglian Water's various duties under the WIA 1991 does not alter that practical reality.

34. Argument 2 also has no merit and is not a proper reason why a local planning authority should not refuse planning permission or, indeed, impose a pre-occupancy condition where appropriate.

Argument 3: The necessity for, and reasonableness of, a pre-occupancy condition has not been demonstrated

35. I note, first of all, that a pre-occupancy condition is only contemplated by Anglian Water in the circumstances identified in paragraph 8(c) above; namely, where a 'headroom' assessment negative, but the planned delivery of a capital growth scheme within the current Asset Management Period at the relevant WRC will bring the outcome to a positive headroom amount in time.

36. It is, of course, axiomatic that *"Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects."* (NPPF para 57).

37. Argument 3 suggests, in effect, that *"the necessity for, and reasonableness of, this condition has not been demonstrated"*. Clearly this relates to the justification that Anglian Water may put forward for urging a local planning authority to impose (where appropriate) a pre-occupancy condition.

38. I have, however, outlined above the detailed methodology that Anglian Water goes through to identify capacity in the system and the availability of any required 'headroom' either currently or following any programmed upgrade works. I would expect Anglian Water to set out in any representations to a local planning authority, its justification for recommending the imposition of a pre-occupancy condition.

39. For a Grampian-style condition to be 'reasonable' there does also have to be some prospect of sufficient water recycling capacity being provided within the time limit imposed by the condition (normally three-years: see Town and Country Planning Act 1990 (TCPA), s.91(1)(a) and (5)(a), but may be longer). Thus, the Planning Practice Guidance (PPG) states that:

"Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result ***using a condition worded in a negative form*** *(a Grampian condition) –* ***ie prohibiting*** *development authorised by the planning permission or other aspects linked to the planning permission (eg* ***occupation of premises****)* ***until a specified action has been taken (such as the provision of supporting infrastructure)****.* ***Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission."*** Paragraph: 009 Reference ID: 21a-009-20140306. Revision date: 06 03 2014

40. A pre-occupancy condition should not amount to an effective moratorium on development that has been granted planning permission and, if there were no prospect of sufficient WRC capacity being provided within the time-limit imposed by the planning permission, then in my view the logical conclusion is that planning permission should be refused (see para 8(b) above). That question – whether or not there is a prospect of sufficient WRC capacity being available within the time-limit of the condition – is a matter on which Anglian Water would have to advise the local planning authority and the developer and, in my view, is a matter to be determined at the time of any grant of planning permission.

41. I note that the PPG appears to contemplate that there must be a 'prospect' of the 'action in question' (in this case the provision of sufficient water recycling capacity) being performed *"within the time-limit imposed by the permission"* and this implies within the (normally) three-year period for the development to be begun. Whilst it is certainly arguable that it would be reasonable to impose a pre-occupancy condition where the prospect of WRC capacity being available would be (say) four-years after the grant, on the basis that the planning permission could be implemented within three-years and so would remain extant, it may be safer in such circumstances for the local planning authority to extend the period within which the development may be begun (pursuant to TCPA s.91(1)(b)) to match the period when

sufficient WRC capacity is expected to become available. It is also worth adding, that whilst TCPA s.73 cannot be used to extend the time within which development must be started (see s.73(5)), it could be used to vary or discharge a pre-occupancy Grampian condition relating to the provision of additional STW capacity.

42. Subject to the necessary justification being provided, however, I consider that the imposition of a pre-occupancy condition would be both lawful and justified. I suggest that the wording of an appropriate pre-occupancy condition might read as follows:

"Condition: No occupation of the development is hereby permitted until written confirmation has been provided to the Council by Anglian Water confirming that there is sufficient headroom at the [XXX] *water recycling centre to accommodate the foul flows from the development site.*
Reason: ..."

43. In my view this condition satisfies the tests in paragraph 57 of the NPPF and, in particular, it would have been shown to be necessary and reasonable.

44. Again, Argument 3 is without merit.

Argument 4: It has not been demonstrated that this is the least onerous way in which to impose a condition

45. Argument 4 runs along the following lines: *"it has not been demonstrated that this is the least onerous way in which to impose a condition"* and that a less onerous condition might be: *"there should be a foul water strategy in place prior to the occupation of any housing units on site."* Argument 4 might suggest that Anglian Water's position *"could lawfully mean that the entire development is held up in order to accommodate a regime which is regulated outside the planning system."*

46. As set out above, however, the NPPF paragraph 187(e) makes clear that policies and decisions should *"contribute to and enhance the natural and local environment"* by (inter alia) *"preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution…"*.

47. Furthermore, again as above, local plan policies often require 'suitable' waste water infrastructure to be in place before residential development is occupied. In that context, it would in my view be entirely lawful for the local planning authority to refuse planning permission, or impose an appropriate planning condition, where there is not 'suitable' sewerage treatment infrastructure in place to accommodate the foul water flows from a development.

48. As to the suggestion that it would be less onerous to impose a pre-occupation condition that a 'foul water strategy' be in place, it is not at all clear what this means. Certainly, any 'foul water strategy' that allowed discharges from the proposed development before adequate capacity to treat it had been provided would appear not meet the NPPF objective that decisions should *"contribute to and enhance the natural and local environment"* by *"preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of … water … pollution…"*.

49. Argument 4 is again not a proper reason for not imposing an appropriate pre-occupation condition.

Conclusions

50. In conclusion, in my view it would be perfectly lawful for a local planning authority to refuse planning permission for residential or other development, or impose a suitably worded pre-occupation condition, where the effluent flow from that development could not be accommodated at the relevant WRC and/or within the foul network generally either currently or until some planned upgrade had been completed.

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