Compulsory adoption of private sewers and lateral drains

Since 2003 there have been consultations about the problem of private sewers and drains in this country. A solution has now been carried into effect by the Water Industry (Schemes for Adoption of Private Sewers) Regulations ("the Regulations"). Private sewers and lateral drains covered by the Regulations will have been transferred to the appropriate Water and Sewerage Company ("WaSC"). The main transfer took place on 1st October 2011 with a secondary transfer taking place later.

The paramount consequence of this transfer is that responsibility for maintenance and repair of the sewers and drains is shifted from the private owners to the WaSCs. Notwithstanding that the consultations have been going on for such a long period it is likely that it was a surprise to many whilst others may be blissfully unaware that their personal position has changed

1. Overview

- Adoption by WaSCs of private sewers and lateral drains covered by Regulations

- Main transfer on 1st October 2011 in relation to eligible sewers and lateral drains which immediately before 1st July 2011 communicated with a public sewer

- Secondary transfer of eligible sewers and lateral drains which connected to public sewer before commencement of section 42 of Flood and Water Management Act ("section 42") no later than six months after commencement of section 42 (which is now envisaged to be 1st October 2013).

- Thereafter sewers and lateral drains connecting to public sewer will be automatically adopted

- Regulations cover private sewers and lateral drains provided that not excluded;

- Exclusion includes private drains within curtilage of building - DEFRA gives a wide meaning to this concept. In its eyes a single curtilage includes caravan sites, shopping malls and some larger commercial and industrial sites.

- Repair and maintenance obligations for transferred sewers and drains shift from private owner to WaSCs

- Pumping stations (including rising mains) are covered by the Regulations but did not transfer on 1st October 2011 or in secondary transfer. They must be transferred separately to WaSCs by 1st October 2016

2. <u>History</u> – There are a large number of authorities towards the end of the nineteenth century and the beginning of the twentieth century relating to sewers and drains. They reflect the tension between local authorities and land owners over responsibility for repairing and maintaining sewers and drains. The details of the cases provide an interesting insight into housing and sanitation arrangements made and being introduced at that time. It was a time when there was a significant increase in the numbers living in metropolitan areas and great efforts were being made to introduce public sanitation. From the facts of some cases it is evident that much building went on then without the approval of the local authority which resulted in strenuous efforts on the part of local authorities to rebut attempts to saddle them with responsibility for defective sewers and drains.

The law regarding ownership of sewers and drains prior to 1st October 1937 has been described as "chaotic".[1] It was governed by a number of statutes and not all had a common approach.

Amongst the earlier statutes were the Sewers Act 1848 (setting out the powers of the Metropolitan Commissioner of Sewers) followed by the Metropolis Local Management Act 1855 (both applying to London). The 1848 Act vested the sewers in the Metropolitan Commissioner of Sewers whilst the 1855 Act provided that "all sewers in any district, except main sewers, are to be vested in the district board" (section 68). The two Acts adopted a similar approach but by using slightly different definitions of drains caused different results when determining whether a pipe was a public sewer or a private drain.

In both Acts sewers included "sewers and drains of every description except drains" as defined in the Act (section 147 1848 Act and section 250 1855 Act). In this period the legislation was not limited to sewers draining a building but extended to all sewers of whatsoever description which, for example, would

[1] Scrutton LJ in Hill v Aldershot Corp. [1933] 1 KB 259 at page 267 stated that the "statutes being difficult to work, the decisions on particular facts are exceedingly chaotic and contradictory."

include the draining of open land. Drains excluded from the definition of sewers remained in private ownership and thus responsibility for repair and maintenance remained with the private owner.

The drains excluded from the definition of sewer in the two Acts differed. In the 1848 Act drains are defined to mean and include "any drain of and used for the drainage of one building only or premises within the same curtilage, and made for the purpose of communicating with a cesspit or other receptacle for drainage or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." In the 1855 Act a defined drain is "any drain of and used for the drainage of one building only…." and any drain for draining a group or block of houses by a combined operation under an order by an appropriate body.

Interestingly the ancient concept of "curtilage" features in the earlier Act but not the later. Under the earlier Act pipes draining two or more buildings are sewers. To return responsibility for their repair to private owners the definition of drain in the 1855 Act excludes combined drainage for groups or blocks of houses if authorised so that they are private sewers and not public as under the 1848 Act.

With both Acts a drain used for the drainage of a single house was definitely a private drain. The other type of drain excluded by the 1855 Act, combined drains, continued in private ownership until 1st October 1937 when all such drains were transferred to local authorities (section 20(1)(a) Public Health Act 1936 ("PHA")).

The Public Health Act 1875 provided by section 13 that all "existing and future sewers within the district of a local authority ……..shall vest in and be under the control of such local authority." There were excluded from this certain sewers such as sewers made by any person for his or a shareholder's own profit; sewers made and used for the purpose of draining land; and sewers vested in an authority responsible for a highway. Subject to those exclusions sewers of every description were still covered. As before a sewer was in substance defined by reference to defined drains which were excluded (section 4). The definition of drain was the same as in the 1844 Act but different from that in the 1855 Act. As with the 1844 Act "curtilage" plays a role which continues even now in the new regulations. It meant that there was still not a common approach as regards drains which were in private ownership.

Further change came with the Public Health Act 1936. By section 20 the ownership of public sewers in local authorities was confirmed and extended to all sewers constructed by them or acquired by them in the future unless for the purposes only of draining property belonging to them. The consequence of this was that a sewer constructed thereafter by a private owner would be a private

sewer and not a public sewer. The fact that the pipe drains more than one house would not be sufficient to cause the pipe to be a public sewer. Further any private sewers constructed before 1st October 1937 could not be acquired by a vesting declaration (section 17 PHA 1936).

It was expected that many of the private sewers built after September 1937 would be adopted but this did not occur so that there is "a legacy of unadopted sewers" since 1937 which is one of the main reasons for this transfer of private sewers into public ownership.

Again there was a slight difference in the definitions used. Section 343(1) PHA 1936 defined a sewer as excluding a drain as defined in that section but save for that included all sewers and drains used for the drainage of buildings and yards appurtenant to buildings. For these purposes a defined drain means "a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage".

This limited public sewers to sewers which drain buildings or yards appurtenant to a building rather than covering sewers of every description. The focus as regards drains was very much on drains serving a single building or buildings or yards within a curtilage.

The upshot is that it has been necessary up until now to consider carefully when a drain or sewer was constructed, by whom and which statutory regime was applicable to it in order to determine whether it is in private or public ownership.

Sewers owned by local authorities were transferred to water authorities on 1st April 1974 and to sewerage undertakers on 1st September 1989.

3. <u>Sewers/drains</u> – drainage can give rise to prickly problems but it is not the intention of this paper to analyse the topic in general. There are three issues from the general law which may be relevant.

3.1 <u>Meaning of sewer</u> – Under the general law all drainage pipes are sewers. No distinction is drawn between a sewer and a drain. The generally accepted definition of a sewer is that of Buckley J. in Pakenham v Ticehurst (1903) 67 JP 448

> "sewer must be in some form, a line of flow by which sewage or water of some kind, such as would be conveyed through a sewer, should be taken from a point to a point and then discharged. It must have terminus a quo and terminus ad quem."

To be a sewer there must be an outflow and it is not enough that the pipe ends in a pit (Meader v West Cowes Local Board [1892] 3 Ch. 18 pipe ending in cesspit could not be sewer). But channel does not need to be covered. For example, a ditch is capable of being a sewer.[2]

3.2 <u>Distinction between sewer and drain</u> - For the purposes of the legislation a drain will serve only one building or curtilage whilst a sewer is constructed with the intention of serving more than one (subject to the exception under the pre-1936 legislation in relation to combined drains). In consequence if a pipe is constructed for the purpose of serving more than one building it will be a sewer even though it is not connected to any buildings or if only connected to one (Beckenham UDC v Wood (1896) 60 JP 490). Similarly if more than one building is connected but then due to disconnections only one is left connected that will not convert the sewer to a drain.

A pipe running under private ground but receiving drainage from more than one property will be a sewer (Travis v Utley [1894] 1 QB 233). However, a pipe which drains a house and takes surface water from an unadopted highway will not be a sewer if the purpose for which it was constructed was to protect the house (Bradford MDC v Yorkshire Water Services Limited [2002] 1 EGLR 85).

3.4 <u>Unlawful connection</u> – one issue which may need to be faced with the Regulations is whether an unlawful connection as at 1st July 2011 means that the ownership of the unlawfully connected pipe is transferred to the relevant WaSC. This may occur because no planning permission has been obtained or more likely because the requirements of the planning permission have not been complied with.

Under the old legislation a builder who unlawfully connected to a public sewer could not claim that the pipe so connected was a sewer (Kershaw v Smith [1913] 2 KB 455). This estoppel extends to persons claiming through the builder other than as a purchaser for value without notice (Channell J. in Wilson's Music and General Printing Company v Finsbury BC [1908] 1 KB 563 at page 567) although the judge felt that in the future the authorities would go further so that purchasers would also be estopped.

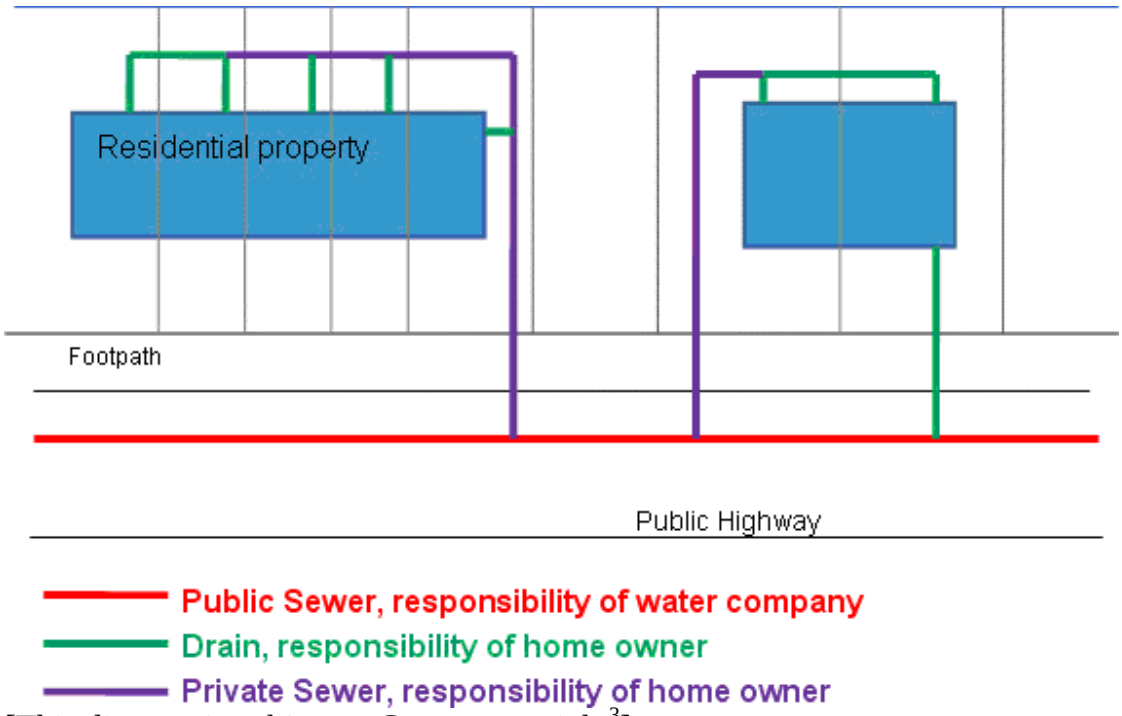
Section 109(2) Water Industry Act 1991 ("WIA") provides that a statutory undertaker may close off an unlawful connection and recover the costs of doing so. It may be that if the WaSC knows of the unlawful connection but does not act then it acquiesces in the connection.

[2] Wheatcroft v Local Board of Matlock 52 LT 356

4. <u>Private ownership</u> – An example of the present ownership of sewers and drains is provided by the diagram below (and also see Appendix A). The residential property will have been constructed after the operation of the PHA 1936.

Each householder will own the drains coloured green running to their property. As regards the private sewer coloured blue this will be the responsible of the private householders and the extent of the responsibility will depend on where any defect or problem in the sewer occurs. If there is a blockage then it is the householders upstream from the problem who are responsible (see Appendix C).

In the event that the sewers and drains were constructed before 1st October 1937 then the sewer coloured blue running from the red sewer is likely to be a public sewer as well and thus not the responsibility of the householders. Private ownership will be limited to the drains serving only one house.



[This diagram is subject to Crown copyright[3]]

5. <u>Problem</u> – It is believed that there are many thousands of kilometres of private drainage and up to ten million households affected. As many as up to fifty percent of properties in England and Wales are estimated to be connected to a private sewer. However, the precise figure is not known.

[3] It is taken from the August 2010 version of the Consultation on Draft Regulations and Proposals for Schemes for the Transfer of Private Sewers to Water and Sewerage Companies in England and Wales.

One estimate puts public sewers at 310,000 kilometres whilst private drains (90,000 kilometres), laterals (36,000 kilometres) and sewers (184,000 kilometres) come to 280,000 kilometres of which 123,000 lie within the boundaries of the property. There are no comprehensive records and so no precision.

In addition it is estimated that there are from 22,000 up to 66,000 private pumping stations to be transferred. Again the available information is very vague and imprecise. In 2002 it was estimated that it would costs £118 million to produce a comprehensive survey which would not cover the condition of the sewers and drains. It has been out at over £1 billion recently.

As well as not knowing the extent of private sewers and drains there is an absence of information as to their state of repair. From information gathered by Defra it is estimated that there are 2.2 million blockages per year on the private network at a rate of 9 blockages per kilometre of private sewer. As at 2002 it was estimated that the capital cost of the transfer over twenty years was £1.4 billion and the average annual operating expenditure was put at £23 million.

Many private householders will be unaware of the existence of the private sewer or drain or their responsibility. It will not have been raised prior to purchase and their household insurance will not cover it. Hilary Benn whilst Environment Secretary evocatively stated that most "householders are unwittingly sitting on the ticking financial time bomb of private sewers and lateral drains";

Inevitably this lack of knowledge and preparedeness leads to disputes between:-

5.1 private householders and insurers;
5.2 private householders and WaSCs;
5.2 the users of drains particularly if the owner of the land on which the blockage occurs is not affected by it.

It also means that there is a higher risk of a poorer standard of maintenance and repair and an absence of long term planning.

Overall it was perceived that this "disparate ownership, together with a lack of planned maintenance, also means that society does not gain the benefit that integrated management of the sewerage system as a whole would bring, which is increasingly seen as important in ensuring the functionality of the system." (from Statement of information by Welsh Assembly Government 7th March 2011).

6. <u>Consultation</u> - In July 2003 the first consultation paper was published entitled Review of Existing Private Sewers and Drains in order to consider various options to solve the difficulties raised by private sewers and drains. There has been

extensive consultation and as a result it was decided that the preferable solution was to place responsibility for repair and maintenance on WaSCs and to lift it off the shoulders of private householders. This objective is to be achieved by the introduction of the Regulations.

In addition it was decided to increase the guidance given regarding the drainage system.

The cost of this transfer is to be met by an increase in the sewerage element of bills from WaSCs which was estimated as at December 2008 to be between 7.5p and 23p a week. It may be that there will be a reduction in insurance premiums for householders but there is clarity on this.

7. Schemes – the starting point for the operation of the regulations will be the making of two schemes by the Secretary of State and the Welsh Ministers (as appropriate) being the Main Scheme and the Supplementary Scheme..

7.1 Main scheme – by means of the Main scheme private sewers and lateral drains connected to a public sewer immediately before 1st July 2011 (other than those excluded by the Regulations) have been adopted. The Secretary of State made one scheme on 1st July 2011 for the adoption of such private sewers and private lateral drains by every statutory undertaker whose area is wholly or mainly in England and the Welsh Ministers did the same for every sewerage undertaker whose area is wholly or mainly in Wales.

The effect of the Main scheme is that each WaSC was obliged to make a declaration adopting the qualifying private sewers and private lateral drains. These are private sewers and lateral drains which are

(i) situated within the area of the WaSC;

(ii) immediately before 1st July 2011 communicate with a public sewer;

(iii) not exempt; and

(iv) not the subject of a declaration immediately before 1st July 2011.

The Main scheme had to specify that any declaration by a WaSC in relation to such private sewers and private lateral drains

(a) vested them in the WaSC on 1st October 2011 save as in (b) and (c) below;

(b) in relation to a pumping station or rising main vests them not on 1st October 2011 but no later than 1st October 2016;

(c) if an appeal is made against the proposed transfer under section 105B(b) WIA 1991 then Ofwat may fix the vesting date.

7.2 <u>Supplementary scheme</u> – During the passage of the draft regulations through Parliament they were amended so as to include a secondary scheme to be made by the Secretary of State and the Welsh Ministers. This is to be known as the Supplemenatry Scheme. It catches private sewers and lateral drains connected to a public sewer between 1st July 2011 and the commencement of section 42 thereby preventing any such sewers and lateral drains continuing in private ownership. Originally it was anticipated that the commencement date for the section 42 FWMA would be 1st October 2011[4] but that has now changed to 1st October 2013. Once it is in force all sewers and drains connected thereafter to a public sewer will automatically be adopted.

The same private sewers and lateral drains will be eligible as with the Main scheme but the vesting date for the sewers and lateral drains transferred by a supplementary scheme must be a date no later than six months after the commencement of section 42. The same right of appeal on the part of the private owners and users will apply as with the Main Scheme.

8. <u>Declarations</u> – Once the Main or Supplementary scheme has been made in respect of a WaSC that WaSC is under a duty to make a declaration under section 102 WIA 1991 adopting the private sewers and lateral drains covered by the scheme.

Each WaSC has to give notice to the owners of these sewers, drains and pumping stations covered unless, after diligent enquiry, no owner can be traced.[5] Notice need not be given to the users who are not owners.

As much information relating to the location of the private drainage is not known it has not been possible for the WaSC to send out notices identifying what it is proposed ton transfer. In consequence the WaSCs have sent notices to each of their customers which repeats the wording in the regulations and the Main scheme.

In addition the proposed transfers have had to be published in (a) the London Gazette; and (b) as many local or regional newspapers circulating in the WaSC's area as may be required to cover the whole of that area.

[4] Lord De Manley in Hansard House of Lords for 17th May 2011
[5] S.105A(6) WIA 1991 amending s102(4)(a) thereof

9. What is to be transferred

9.1 Private sewers –The definition in the Regulations covers "foul, combined or surface water sewers"[6] which connect to a public sewer. This excludes drains serving a single building or any buildings or yards appurtenant to buildings within the same curtilage (section 219 WIA).

The route of the private sewer will be immaterial. It will be transferred whether it runs under a highway, a third party's land or the curtilage of a building being served by the sewer.

9.2 Private lateral drains – The part of a private drain connected to a public sewer (as opposed to a private sewer) draining a single building which runs outside the building's curtilage is a lateral drain and will pass into public ownership (see Appendix D). The definition is contained in section 219 WIA and is

> "(a) that part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or
>
> (b) (if different and the context so requires) the part of a drain identified in a declaration of vesting made under s 102."

Curtilage is discussed in section 11 below and is an uncertain concept which does not necessarily reflect the boundaries of the property served. There is scope for issues between private owners and WaSCs as to who s responsible for particular stretches of pipe.

For example, in the case of a farm the part of the drain running under the farm's fields should be treated as a lateral drain and, therefore, pass to the relevant WaSC because the fields are not part of the farmhouse's curtilage.

The transfer vested all eligible sewers and drains regardless of

(a) the state of repair of the pipe; or

(b) the character of the building drained by the pipe.

The likelihood is that those private owners who were aware of the proposed transfer will have only dealt with emergencies. Future costs after the transfer will

[6] reg 2

be borne by the relevant WaSC. Those incurred before the transfer will not be borne by the relevant WaSC.

10. <u>What is not included in the transfer</u>:-

10.1 <u>Private drains within a curtilage</u> – A private sewer within the curtilage of a building will pass but not a private drain until outside the curtilage. At this stage a pumping station will not pass at all but in the future will remain in private ownership if it serves only a single building and is within the curtilage of that building.

This exclusion could give rise to significant issues in respect of the larger sites comprising a number of units. If each unit is a single curtilage then a drain serving only that unit will pass into public ownership even if on the site to the extent not within the curtilage of the unit. However, if the site is treated as a single curtilage then it will only be pipes outside the site which pass into public ownership unless the pipe serves buildings other than the site.

As stated above DEFRA adopts a wide view of curtilage. It considers caravan sites, traveller's sites, airports, railway stations, ports, some shopping malls and some commercial and industrial sites as single curtilages. This has been confirmed by the provisional guidance given by DEFRA in July 2011.

10.2 <u>Drainage not connecting to a public sewer</u> – A private sewer or drain must connect with a public sewer if it is to be adopted under these Regulations.

Therefore, drainage of surface water to a soakaway or watercourse will not be covered. In deciding to those which do not connect to a public sewer one factor taken into account was that there are arrangements for the surface water drainage element of sewerage charges to be discounted where surface water does not flow into a public sewer.

Self-contained private drainage systems which do not connect to a public sewer will not be covered. This is so even if they connect direct to a public treatment works. They have been excluded because they pose greater practical difficulties if transferred. Additionally, it is felt that the private owners will be aware of their responsibilities and will not be paying a sewerage charge. The owners may apply for the system to be adopted under WIA.

10.3 Highway drain or sewer – Expressly excluded. A drain or sewer which is constructed for the purpose of carrying away surface water from a road[7] is expressly excluded[8].

10.4 Land drainage systems – unless a drain or sewer drains a building or curtilage it will not be covered by the Regulations.

10.5 Appeals – A successful appeal to Ofwat against a proposed transfer of private sewers or lateral drains will prevent the WaSC becoming the owner (see section 14 below as regards appeals)

10.6 Railway undertakers - sewers and lateral and drains owned by a railway undertaker[9] are exempt.[10] It was considered preferable to leave these with the undertaking for operational reasons. After consideration it does not, however, extend to canals or other similar undertakings.

10.7 Private pumping stations and pumping mains – these will not transfer under the Main scheme or the Supplementary scheme as they are intended to be transferred at a later date which will not be later than 1st October 2016 provided that they are not within the curtilage of a property. Pipes either side of the pumping station or pumping mains will if they otherwise qualify have been transferred on 1st October 2011. It had been suggested that pipes upstream of a pumping station would be excluded from transfer as these will inevitably create more practical difficulties for a WaSC but this has not been accepted. Any appeal in relation to a pumping station must be now and not later.[11]

10.8 Crown land - Sewers and lateral drains situated on or under Crown land (which includes not only land belonging to the Queen in right of the Crown but also land belonging to a government department[12]) are excluded if written notice has been given to the WaSC in whose area they are situated by the appropriate authority that the sewers and lateral drains should be exempt. In the case of land belonging to the Queen in right of the Crown the appropriate authority is the Crown Estate or other government department managing the land[13]. In the case of land belonging to a government department it is the department.[14] Such a notice had to be given before 1st July 2011 in the case of sewers and laterals drain

[7] Section 100 Highways Act 1980
[8] Reg 2.
[9] Defined by section 219(1) WEA 1991
[10] Reg. 5(1)
[11] As regards appeals see section 14 below.
[12] Reg. 5(4)
[13] Reg. 5(5)(a)
[14] Reg. 5(5)(b)

covered by a Main scheme[15]and the date section 42 commences if covered by a supplementary scheme[16].

11. <u>Curtilage</u> – The concept of curtilage has always played a role in determining the boundaries between public and private sewers and drains. This role is continued by the new regulations. There is no certain and precise definition of what is a "curtilage". On the contrary the Courts have considered it ill-advised to attempt to provide a comprehensive definition.[17] Inevitably when an issue arises in a case consideration of the term goes back to the fifteenth century and there is the citation of numerous definitions from dictionaries starting with the Oxford English Dictionary.

In Sheppards Touchstone it is defined (page 94) as a "little garden, yard, field, or piece of void ground, laying near and belonging to the messuage and house belonging to the dwelling-house and the close upon which the dwelling-house is built at the most"[18]. It indicates that there has to be a connection with the "messuage" but it is no more than a starting point and does not tackle a number of the issues which have been raised subsequently or the complexity of the factual matters that the Courts have had to consider.

Apart from having a role in the determination of the ownership of sewers and drains the concept is also relied on in other statutory areas concerning property. Changes within a curtilage may not require planning permission or listed building consent when they would if outside the curtilage. A property will be exempt for unoccupied property rates if part of a listed building. A tenant's right to buy under the relevant Housing Acts may be excluded if within the curtilage of a building used for purposes other than housing. An application for enfranchisement will cover everything within the curtilage of the dwelling. Although the statutory contexts are different the decisions as to whether or not buildings or land are within the curtilage of another building have been accepted as being relevant when the issue arises in the context of a different statute.

It is clear that the concept has changed. Originally it was a small area enclosed by walls or buildings but over time the need for physical enclosure has disappeared.[19] However, the same degree of connection has been retained albeit not requiring physical enclosure. Buckley LJ stated that "one must be as intimately associated with the other as to lead to the conclusion that the former in truth forms part and

[15] Reg. 5(2)(b)
[16] Reg. 5(3)(b)
[17] Sir David Croom-Johnson in Barwick v Kent CC [1992] 24 HLR 341 at page 346
[18] Vol. 1 94
[19] Nourse LJ in Dyer v Dorset [1989] 1 QB 346 at page 358.

parcel of the latter".[20] Similarly, Sir Richard Tucker stated that to be within a curtilage "connotes a building or piece of land attached to a dwelling-house and forming one enclosure with it. It is not restricted in size but it must fairly be described as being part of the enclosure of the house to which it refers."[21] They must constitute an integral whole.

In determining whether there is a sufficient degree of connection between a building and another building or piece of land a number of points arise from the numerous decisions on the subject:-

11.1 <u>Fact</u> - The issue is one which is a factual question in each case and is heavily dependent on the individual facts;

11.2 <u>Not limited to house</u> - It is permissible to refer to the curtilage of a building and not just a house.[22]

11.3 <u>Ancillary</u> – To be within the curtilage of a building the other building or land must be ancillary to it and not independent of it. The House of Lords emphasised this in Debenhams plc v Westminster[23]. The case involved Hamley's toy shop which is a listed building. Exemption from unoccupied property rates was claimed for a building on the opposite side of a street to it on the basis of it being fixed to the listed building. Previously the two buildings had been linked by a bridge at second floor level and a tunnel at basement level. The other building was held not to be within the curtilage of Hamley's because it was not ancillary to the toy shop. This was contrasted with the terrace of cottages being ancillary to the mill in the Calderdale case (see 11.4 below) although Lord Mackay did say that the Calderdale case was a very special case. It was not overruled but it was said that the width of the judgment of Stephenson LJ was not accepted.

11.4 <u>General factors</u> - Three general factors are of particular importance when considering the issue. In the Calderdale case they were spelt out by Stephenson LJ[24] and have been followed in later cases

(i) physical layout;
(ii) ownership past and present;
(iii) use or function of the property past and present

[20] Methuen-Campbell v Walters [1979] 1 QBD 525 at pages 543/544
[21] Lowe v First Secretary of State [2003] 1 PLR 81 at para 21
[22] Nourse LJ in Dyer v Dorset CC supra at page 358
[23] (1961) 178 EG 221
[24] A-G ex. rel. Sutcliffe v Calderdale BC (1982) 37 PCR 399 at ages 406/407

The decision in the Calderdale case was unusual and surprising. When the facts are considered it illustrates how easily disputes could arise over ownership of sewers and drains dependent on the approach which WaSCs adopt. The context it arose in was whether the Secretary of State's consent was required before a terrace of cottages could be demolished. The specific issue was whether the terrace was within the curtilage of a mill which was a listed building. The mill had been built in 1820 and the terrace in 1870 to house the mill workers. The terrace was connected to the mill by a bridge which provided access to three cottages and the only means of access to one. The first cottage was used for storage and offices. The mill was listed in 1971. Subsequent to that all but one of cottages were conveyed to the housing authority. Notwithstanding the severance of ownership and of use, as the cottages were not occupied by mill workers, it was held that the terrace was still within the curtilage of the mill as the terrace remained "so closely related physically and geographically as to constitute single unit"[25]. The substantially unchanged layout of the area was considered to be the strongest indication.

Were this decision to be applied in the context of the ownership of sewers and drains it would mean that all the drains serving only the mill and terrace would remain in private ownership until they left the curtilage. It is obviously a decision which favours WaSCs.

11.5 <u>Ownership</u> - The expectation would be that the curtilage of a property would not exceed the property's boundaries but might be smaller. The Calderdale case shows that, surprisingly, curtilage can straddle different ownerships albeit that it will be much less easy to find that properties within different ownerships are within the same curtilage.[26] In those case where is arises it will mean that ownership may be vested in more than one property owner which will leave plenty of scope for disputes between them.

11.6 <u>Separation</u> - If the physical circumstances are such as to suggest that the two are separate from each other then they will not be part of the same curtilage.

This can be illustrated by what is within the curtilage of a country house which has featured regularly in the decisions because of their conversion to other uses. Nourse LJ regarded such a curtilage as including stables, outbuildings, gardens up to the ha ha but not the surrounding park land.[27] In Dyer v Dorset CC a college lecturer had applied to enfranchise a cottage on the boundary of an agricultural college which had previously been a manor house in a park. It was held that the cottage was not within the curtilage of the manor house or any other building and

[25] Stephenson LJ at page 409
[26] Stephenson LJ at page 408
[27] Dyer v Dorset CC supra at page 358

so could be enfranchised. The park and any building within it was not part of the main house's curtilage.

Sir Richard Tucker in Lowe v First Secretary of State supra stated that the curtilage of a country hall would include stables, outbuildings, gardens (whether walled or not) and accommodation land such as a small paddock close to the hall but would not include the whole of the parkland setting or a driveway. In that case a chain link fence had been erected along a 650 metre drive to the hall. The hall was listed and if this was within the curtilage consent was required. It was held that it was not. The reason for the fence, to define the boundary, and the drive being in common ownership was held to be irrelevant. However, when a wall is erected to bring more land into the garden of a house then that additional land and the wall will become part of the curtilage of the house[28].

In Skerritts of Nottingham v Secretary of State for the Environment[29] the issue was whether the stables of a country house converted to a hotel which was a grade II listed building were within the curtilage of the hotel. Double glazing windows had been installed in the block and if within the curtilage of the hotel consent was needed. It was held that the curtilage of a substantial listed building is likely to extend to what are or have been in terms of ownership and function ancillary buildings but that such satellite buildings are bound to be relatively limited.

A similar approach to that in Dyer v Dorset CC was adopted with regard to houses built near a fire station to accommodate firemen. The houses were separated by a wall from the fire station and had their own addresses and own access to the public highway. It was held that the houses were not within the curtilage of the fire station building.[30]

With less grand buildings it is a question of looking at the particular layout to see whether there are physical features separating or connecting the two. A tennis court in a field 100 metres from a house and separated by an area of undergrowth and grassland was not within the curtilage of the house.[31] There was no appearance of close association nor were they in the same enclosure. A paddock at a lower level than the house's garden and separated from the garden by a post and wire fence was not within the curtilage of the house for the purposes of an application for enfranchisement.[32] An old barn was held not to be within the curtilage of an old farmhouse because it "turned way" from the farmhouse and

[28] Sumption v Greenwich LBC [2008] 1 PCR 336
[29] 4th June 1999 – CO/1912/98
[30] Barwick v Kent CC [1992] 24 HLR 341
[31] James v Secretary of State for Environment and Chichester DC (1990) 61 PCR 234
[32] Methuen-Campbell v Walters supra

was separated by a wall. There was an outhouse between the two.[33] It was considered by Sullivan J not to be enough that the barn would have been a constituent part of the farming enterprise as the question was whether it was within the curtilage of the farmhouse and not the farm. A distinction had to be made between the part of the farm which was principally concerned with residential use and the part concerned with agricultural use. A similar result was reached in Morris v Wessex CBC[34] where there was no ready access between the two buildings and a brick wall separated them.

11.7 Facilitation - It is not enough that it is convenient to have a building or land for use of the main building or that it is a valuable amenity to come within the curtilage of the main building. It must facilitate occupation of the main building.[35]

11.8 Which building - It is important to determine accurately by reference to what building the curtilage is to be determined. In Dyer v Dorset the question was whether the cottage was within the curtilage of the main college building or any other building and not the whole college. Similarly, in Barwick v Kent CC the question was whether the house was within the curtilage of the fire station building and not the whole fire station. The fire station building included the garages and the yard but not the houses. A similar distinction has to be drawn with farmhouses as opposed to the whole farm.

11.9 Size - It has been argued based on the judgments in Dyer v Dorset CC that a curtilage can only be a small area. This was rejected in the Skerritts of Nottingham case and it was stated that smallness was not material.

11.10 Automatically pass with conveyance - One test as to whether land or a building is within the curtilage of another building is whether a conveyance of the principal building would automatically carry the land or other building without there being a specific mention in the conveyance.[36]

11.11 Boundary - As is apparent from the above the extent of the curtilage is not identical to the boundary of a property. Confusingly although the legislation refers to curtilage when this topic is discussed boundary is often substituted for curtilage as in the debates in the House of Lords on 17th May 2011. This is not the case as the curtilage may be significantly smaller in area than the area owned and in a few cases might be larger.

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[33] R v Taunton Deane BC [2008] EWHC 2752
[34] [2001] EWHC 697
[35] Barwick v Kent CC supra; and Buckley LJ in Methuen-Campbell v Walters supra at page 543 stated that test is not whether enjoyment of one is advantageous or convenient or necessary for full enjoyment of other.
[36] Buckley LJ in Methuen-Campbell v Walters supra at page 543

The point at which a drain running to a sewer in public highway leaves the curtilage of an ordinary house was raised in the House of Lords debates on 17th May 2011 and Lord De Manley stated that the point would be the back end of the pavement running along the street. It must obviously depend on the precise physical layout. In some case there may be a significant distance between the boundary wall of the house and the pavement. What will be disregarded is any soil up to the mid point of the public highway within the ownership of the house abutting on the road.

Lord De Manley also indicated that the approach will be the same if the road is not a public highway but remains unadopted.

12. <u>Single building</u> – In addition to the issue as to what is comprised in the curtilage of a building is the issue as to what constitutes a single building. This is material when determining whether a drain serves one or more buildings and in turn whether it is in private or public ownership. In the older authorities the curtilage issue and this issue sometimes run together.

As with curtilage the decisions on this issue are such that there will be scope for uncertainty even after the new regulations have been carried into effect and the transfer has taken place. The expectation will be that drains remaining in private ownership will be vested in one property owner only. That expectation will not always be correct. In some cases it will be necessary to divide ownership between different properties.

12.1 <u>Semi-detached houses</u> – In some cases semi-detached houses have been treated as one building for the purposes of determining whether a drain serving both remains in private ownership or is a public sewer[37]. In each case it is a factual question whether they seem a single or separate building[38]. In Humphrey v Young supra it was held that a pair of semis with gardens at front and rear separated by a fence and occupied by different tenants were separate buildings. It is to be expected that most semi-detached houses will be treated as separate and not single buildings.

[37] Hedley v Webb [1901] 2 Ch. 216; Cook v Minion (1978) 37 PCR 58 even though structurally separate with different floor levels and party wall going to roof; Kershaw v Taylor [1895] 2 QB 208 drainage of two sets of semis met and ran to public sewer. Held each set of semis a single building and so drains of each set a private drain until junction with drains of other set of semis and then public sewer from there until connection with main public sewer.

[38] Humphrey v Young [1903] 1 KB 44.

12.2 <u>Terrace of houses</u> - The same issue is less likely to arise with a terrace as opposed to a pair of semis[39]. In the House of Lords in Weaver v Family Housing Association (York)[40] it was argued that a terrace of houses fronting a public street was a single building or within the same curtilage. Reliance was placed on the structural unity of the terrace; common ownership until 1957 and the comprehensive drainage system. As against this each had its own access to the street; the outside facilities were peculiar to each; there was no internal or external communications between them; each was intended to be occupied separately; and each was a separate dwelling. Lord Simon of Glaisdale considered that little weight could be placed on the nature of the drainage system. Single buildings might have more than one drainage outlet whilst separate buildings might have a common drainage system. He considered structural unity a factor but not conclusive. What was decisive was that to get from one to another it was necessary to go out on to the street so that the terrace was neither a single building nor a single curtilage.

12.3 <u>Residential Blocks</u> – The position is surprising in the context of apartment blocks and could lead to disputes after the transfer. In Pilbrow v Vestry of Parish of St. Leonards[41] it was held that the drains serving two blocks of 46 apartments linked by a causeway and sharing a common courtyard were not a sewer because the two blocks comprised one curtilage. An important feature was that access to one block was across the causeway and there was no direct access to the public highway. If applied now it would mean that the drains remain in private ownership until the connection with the main public sewer and the apartment owners will remain responsible for the drains with plenty of scope for disputes.

The decision is not as wide in application as this decision might suggest. In Harris v Scurfield [1904] KB 974 two sets of back to back houses were constructed around a court. They comprised 18 dwellings. The Court of Appeal held that this combination of houses could never be within the one curtilage. Phillimore LJ stated that two separate houses occupied by two different sets of people so as to be separate and independent dwellings cannot be premises within the same curtilage.

12.4 <u>Arcade</u> - In Vestry of the Parish of St. Martins-In-The-Fields v Bird[42] it was argued that drains serving 25 shops and houses either side of a central passage with gates which closed over night and on a Sunday were in private ownership on the grounds that the arcade was a single building or they were all within the same curtilage. The arcade was wholly in the Defendant's ownership and the units let to different people. The Court of Appeal rejected these arguments on the basis that

[39] Hill v Aldershot Corp [1933] 1 KB 259 – drains serving terrace of fifteen houses held to be sewer.
[40] (1976) 74 LGR 255
[41] [1895] 1 QB 33
[42] [1895] 1 QB 428

the arcade comprised a clear number of buildings held by different people and was not a single building. As regards the contention that it comprised one curtilage Lord Esher MR stated that if there was any curtilage it must be the passage only. The general view of the Court of Appeal was that the houses and shops fronted the passage and did not form part of it. The drain running down the passage was, therefore, a public sewer.

This decision will be particularly material as the DEFRA guidance will indicate that a shopping mall in common ownership is to be treated as within the same curtilage. This will have a significant impact as regards the ownership of sewers and drains serving such a mall.

13. Timetable –

13.1 1st October 2011 - Originally it had been anticipated that the regulations would come into force on 1st April 2011. The first draft of the regulations was amended and the timing of the approval of the regulations slipped. They have now taken effect on 1st July 2011 retaining the transfer date of 1st October 2011.

13.2 New built sewers and drains – One of the changes made to the draft regulations is to ensure the vesting of sewers and drains connected to a public sewer after the 1st July 2011. There will now be a secondary transfer to mop up these new built sewers and drains as well as a mainstream transfer in relation to those existing prior to the coming into force of the regulations.

13.3 Automatic adoption of sewers and lateral drains – From the commencement of section 42 all sewers and lateral drains to be connected to a public sewer will be automatically adopted to avoid the creation of a legacy of unadopted sewers as occurred with the PHA 1936. Originally it was anticipated that the commencement date would be 1st October 2011 but it is now 1st October 2013.

14. Appeals – There is a right to appeal to Ofwat against the proposed transfer which is provided by section 105B 1991 Act but due to the tight time limits it is likely that there is little scope now for the making of a fresh appeal.

14.1 Grounds - The principal grounds are:

14.1.1 the sewer or drain does not satisfy the criteria for a scheme. This is unlikely to give rise to appeals as the declarations made by the WaSCs have followed the general wording of the Regulations and the Main scheme; or

14.1.2 the transfer would be seriously detrimental to the interests of a person affected by the scheme. An example of this could be if there was an ability to have the course of the sewer or drain moved at the cost of the sewer owners and this would be lost upon the transfer.

It has been said that if there is a comprehensive arrangement in place for the management of sewers on a discrete site that will be a ground for appeal because the necessary maintenance is being carried out. This does not seem to fit in with the specified grounds for an appeal.

14.2 Third parties – If a person is affected by the proposed transfer but is not the owner or one of the owners of the sewer then there will be a right of appeal if the person is affected by the transfer. At present a third party has no such right of appeal in respect of an adoption of an existing sewer or drain but has such a right in respect of the moving of pipes to enable land to be improved.

14.3 Time limits - An appeal must be made within two months of (i) service of notice of the proposed adoption on the owner or (ii) publication of the proposed adoption or (iii) if both occur whichever is the later (s.105B 1991 Act). In respect of the first batch of transfers the time limit expired long ago.

This applies not just to sewers and lateral drains but also to pumping stations notwithstanding that the vesting date for them will not be 1st October 2011. There is obviously the potential for this being overlooked and no appeal being made in time.

14.4 Manner – The appeal process will not be triggered as with an application to adopt by a notice identifying the precise sewer or drain. Instead the published notice will be in general terms. It will be for the person making the appeal to indentify the sewer or drain involved.

Once the appeal is made the usual procedure adopted by Ofwat is to invite written submissions from all involved in the appeal. Once these have been considered then Ofwat may seek clarification or additional information including requests to others who may have such information. A draft determination is then produced on which comments are invited. A final determination is then issued taking into account the comments.

14.5 Conditions - When determining an appeal Ofwat can impose conditions including payment of compensation. With an appeal on the ground of potential detriment a condition that compensation be paid may be one possible outcome.

15. Current arrangements – The general policy is to replace current but uncompleted arrangements with regard to sewers and drains by the transfer.

15.1 Proposed declarations under section 102(4) WIA 1991 – In the event that there was a proposal to make a declaration immediately prior to 1st July 2011 in the case of a private sewer or lateral drain which will have been transferred on 1st October 2011 or immediately prior to the commencement of section 42 FWMA 2010 in the case of one which will otherwise be transferred pursuant to a supplementary scheme then

15.1.1 the proposal is treated as withdrawn[43]; and

15.1.2 any appeal outstanding immediately before 1st July 2011 or the commencement of section 42 FWMA (as appropriate) is discontinued[44].

In the event that any sewer or drain would be transferred later than 1st October 2011 or the supplementary adoption date[45] (as appropriate) due to a declaration then that earlier date will be the effective date for vesting.[46]

15.2 Outstanding appeals – Any outstanding appeal under section 105(1)(b) WIA 1991 immediately before 1st July 2011 or the commencement date (as appropriate) in respect of a sewer or lateral drain which will transfer in accordance with a main or supplementary scheme will be discontinued.[47]

15.3 Application for section 104 agreements – In the event that any application for an agreement to adopt a sewer or drain which will otherwise transfer pursuant to either a main or supplementary scheme is outstanding as at 1st July 2011 or the commencement date (as appropriate) then

15.3.1 the application will be treated as withdrawn;[48]

15.3.2 any appeal under section 105(2)(b) is discontinued.[49]

15.4 Section 104 agreement – If there is a section 104 agreement relating to a sewer or lateral drain due to transfer pursuant to a main scheme or supplementary

[43] Reg 7(2)(a)
[44] Reg 7(2)(b)
[45] Which is the date six months after the commencement date for section 42 FWMA 2010.
[46] Reg 7(3) and (4)
[47] Reg. 8
[48] Reg. 9(2)(a)
[49] Reg. 9(2)(b)

scheme immediately before 1st July 2011 or the commencement date (as appropriate) then

15.4.1 in the event that any sewer or lateral drain would be transferred later than 1st October 2011 or the supplementary adoption date (as appropriate) due to such an agreement then that earlier date will be the effective date for vesting;[50]

15.4.2 the section 104 agreement will terminate on the vesting of the sewer or lateral drain save as regards property which has not been transferred;[51]

15.4.3 the relevant WaSC will continue to benefit from any provision in the agreement for security for the discharge of obligations in connection with the sewer or lateral drain recompensing for expenditure incurred prior to the vesting in relation to works carried out by the WaSC prior to that date or contracts entered into by the WaSC with another party to carry out the works.[52]

16. <u>Consequences of transfer</u> – The regulations do not spell out what are the consequences of the transfer of the sewers and lateral drains to the relevant WaSC. The consequences will be determined by virtue of the sewers and lateral drains being adopted and such consequences will be the same as with an earlier adoption under section 102 WIA 1991.

16.1 <u>Vesting</u> – The transfer will vest in the relevant WaSC as illustrated in the diagram in Appendix B. As a result the relevant WaSC will be entitled to the freehold estate in the sewers and lateral drains and the enclosed space and not just to an easement in relation to them[53]. This will affect the extent of the ownership of the person through whose land the sewers and lateral drains run.

16.2 <u>WaSC's ancillary rights</u> – There is no express conferment of ancillary rights in relation to the sewers and drains transferred. There will be the statutory powers conferred on WaSCs in relation to public sewers and public lateral drains. In addition I would expect each WaSC to have such ancillary rights as are necessary to enable the WaSC to carry out its statutory powers and duties. This is the case when a highway is adopted.[54] It will, for example, confer a right to subjacent support but probably not lateral support.[55]

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[50] Reg 9(4)(a)
[51] Reg. 9(4)(b)
[52] Reg 9(4)(c)
[53] See, for example, Ungoed-Thomas J. in Radstock Co-Op v Norton-Radstock UDC [1967] 1 Ch. 1094 at page 1110.
[54] Lord Herschell in Tunbridge Wells Council v Baird [1896] AC 434 at page 442
[55] Re Dudley Corporation (1881) 8 QBD 86

16.3 Existing easements – I consider that rights to use the transferred sewers and lateral drains immediately prior to the transfer will not be extinguished. Section 102(6) WIA 1991 provides that a person so entitled shall continue to be entitled to use it or any substitute "to the same extent as if the declaration had not been made." It means that the private property through which the transferred sewers and lateral drains run will continue to be subject to existing easements. This could give rise to future difficulties. For example, if the route of a public sewer is altered to enable development of the land that may not also divert the route of the private easement. The easements will remain on the title which could prejudice a proposed development.

16.4 Liability to contribute to WaSC's costs – The WaSCs will not be entitled to recover the costs of any works carried out to transferred sewers and lateral drains from the previous private owners or users of the sewers and lateral drains.[56] There is no longer any statutory right to require a contribution as section 24 PHA 1936 has been repealed.

17. Issues – The government has decided to address a number of the issues raised during the consultation in the published guidance rather than in the regulations. It is hoped that these will now not be provided when the regulations come into force. Amongst the issues which will arise are:-

17.1 Curtilage – As discussed above the operation of these provisions places reliance on the long used conveyancing term "curtilage". It has not been defined but guidance is to be provided although it is admitted that the scope of the concept is uncertain. It introduces a significant element of uncertainty and with some sites the application of the term may be important. There will be at least two issues arising from the use of the term "curtilage"

17.1.1 Sewer or drain? – One issue will be whether pipes on a site serving only the site are private sewers (which transfer to a WaSC) or private drains which remain with the owner. If the site is treated as a single curtilage then the later will be the case. There may then be problems as between different owners on the site.

17.1.2 Lateral drain or drain within curtilage – As indicated above there are likely to be cases in which the application of the DEFRA guidance may result in issues as to whether the extent of a lateral drain going into public ownership is correct. This will be particularly the case with commercial or industrial sites.

[56] Poole v Blake [1956] 1 QB 206 and Fulham Board v Good win (1876) 1 Ex D 400 which concerned the replacement of a sewer.

17.2 Title – The vesting of sewers in the relevant authority has caused problems in the past and care will need to be taken for some time now as a result of this transfer into public ownership. In Pemsel & Wilson v Tucker [1907] 2 Ch. 191 two houses which had been constructed by the vendor were being sold under an open contract. There was a drain under them which two adjoining houses drained into. The drain was held to be a sewer and vested in the local authority and not the vendor so that the vendor did not own all that was selling. It was not just that the sewer belonged to the authority but that it had substantial rights which interfered with the enjoyment of the purchaser's land. In consequence the vendor had not proved good title.

Care will need to be taken to ensure that

17.2.1 the terms of any contract to sell land do not include in the land to be transferred any sewer or drain which has vested in the relevant WaSC; and

17.2.2 the continuation of easements existing at the time of the transfer are taken into account.

17.3 Absence of access chambers – Establishing the boundaries of responsibility in cases where there are no access chambers may give rise to problems and guidance is to be provided on this.

17.4 Ancillary rights in relation to pumping stations and pumping mains – No new statutory rights are to be given to ensure the continued operation and maintenance of such stations and mains. Reliance will have to be placed on the existing statutory rights of WaSCs. There must be a real risk of problems when flooding occurs and it is due to a defective private pumping station with the pipes downstream and upstream from the pumping station owned by a WaSC. Those served by the pipes will look to the WaSC to resolve the problem.

17.5 Attempts to block transfer – A minority of those affected by a transfer may seek to block the transfer. Guidance was to be given as to how such a problem was to be addressed but has not been given so far as I am aware..

17.6 Development of land – Private land through which a transferred sewer or drain runs will become subject to restrictions. In particular any building work over a drain or sewer which is shown on any map of sewers will need to comply with the building regulations.[57] If the route of the sewer or drain is to be moved then this will have to be in accordance with section 185 WIA 1991 which operates only if the land is to be improved.

[57] Para. H4 Schedule 1 Building Regulations 2010 (SI 2010/2214).

17.7 Loss of control over third party connections – The transfer of a drain or sewer from private ownership will mean that some control over connections may be lost and will now be governed by section 106 1991 Act.

17.8 Cost sharing – The incidence of costs relating to the repair or maintenance of previously shared private sewers and drains may be altered by the transfer of ownership of part leaving individual owners responsible for private drains within the curtilage. Will an existing obligation to share costs survive the transfer?

17.9 Negligence claims – No additional defences will be given to WaSCs to meet claims in relation to defective sewers and lateral drains transferred. The question will be how much account is taken by the Courts of the problems faced by WaSCs in establishing what has actually been transferred and in what condition.

17.10 Records – Section 199 WIA 1991 imposes the duty on WaSCs to keep records of all public sewers and drains vested in them save for those laid before 1st September 1989 which was when public sewers were vested in them. At present no additional exemption is proposed

18. Action – Following the approval of the regulations and the publication of DEFRA guidance it will be necessary in relation to properties and sites to:-

18.1 assess the drainage and categorise it into private sewers, lateral private drains, private drains under a curtilage and other parts of the drainage system not qualifying for transfer. On this the consideration in para.18.4 below may be relevant.

18.2 determine whether there are any good reasons for objecting to a transfer; and

18.3 if there is then ensure an appeal is made within the prescribed time limit although little time left. It will have to be borne in mind that any appeal regarding private pumping stations must be made now and not later when they actually vest in the relevant WaSC. It would be sensible to put in an appeal even though the owner has not received a notice from the WaSC.

18.4 consider whether any issues arise as to

18.4.1 the cost of maintaining, repairing or insuring retained drains;

18.4.2 the computation of service charges;

18.4.3 a site constituting one or more curtilages or a single or more buildings.

18.5 consider the operation of the transitional provisions if appropriate such as outstanding appeals or existing adoption agreement.

19. Right to connect – Although not part of the proposed transfer the right to connect to a public sewer is an allied topic which will in practical terms be significantly affected as there will be a substantial increase in the number of public sewers to connect to.

19.1 Absolute right to select point of connection – The absolute nature of the right to connect to a public sewer conferred by section 106 WIA 1991 was confirmed by the Supreme Court in Barratt Homes Limited v Welsh Water [2009] UKSC 13. It is for the developer seeking to connect to choose the point at which connection is to be made and it is not open to the statutory undertaker to object and require connection at a different point. In that case Welsh Water objected to the point selected by Barratts at which to connect the drainage from a new residential development because there was insufficient capacity as it would overload the system upstream. Barratts succeeded and was held to be entitled to connect at the point selected by it.

There may be a discretion to move the connection a small distance. Pills LJ stated that there was in the Court of Appeal but without giving any justification. Lord Phillips suggested that the ability could arise from the powers conferred on a superintendant pursuant to section 108 WIA 1991in relation to the carrying out of the works (para. 39).

The most that is possible if there is concern over the connection is to seek a deferment condition when planning permission for the proposed development is being sought.

19.2 Limitations on right to connect – Although the developer can select the point at which connection is to be made there are some limitations on the ability to connect. These are

19.2.1 Discharge - No liquid from a manufacturing process or from a factory, other than domestic sewage or surface or storm water, can be discharged.[58]

19.2.2 Separate public sewers – If there are separate foul and surface water sewers then foul water cannot be discharged into a surface water sewer and vice versa.[59]

[58] s.106(2)(a)(i) WIA 1991
[59] s.106(2)(b) WIA 1991

19.3 <u>Vesting in statutory undertaker</u> – In respect of sewers and lateral drains constructed after the commencement of section 42 FWMA 2010 there must be an agreement pursuant to section 104 WIA 1991 ensuring that the drain or sewer is constructed to a proper standard and that it will be automatically adopted[60].

19.4 <u>Scheme of legislation affecting developer</u> – Lord Phillips described the scheme of the legislation as

19.4.1 when connection of development to public sewer requires consequential works to accommodate increased load then the cost of the works falls on the undertaker;

19.4.2 when works are done by or one the requisition of the developer that will be used exclusively by the development then the costs of such works fall exclusively on the developer;

19.4.3 when the undertaker is entitled to require the developer to carry out works differently or to alter works already carried out the undertaker has to bear the costs.

19.4.4 costs borne by the undertaker are passed on to those paying the sewerage charges.

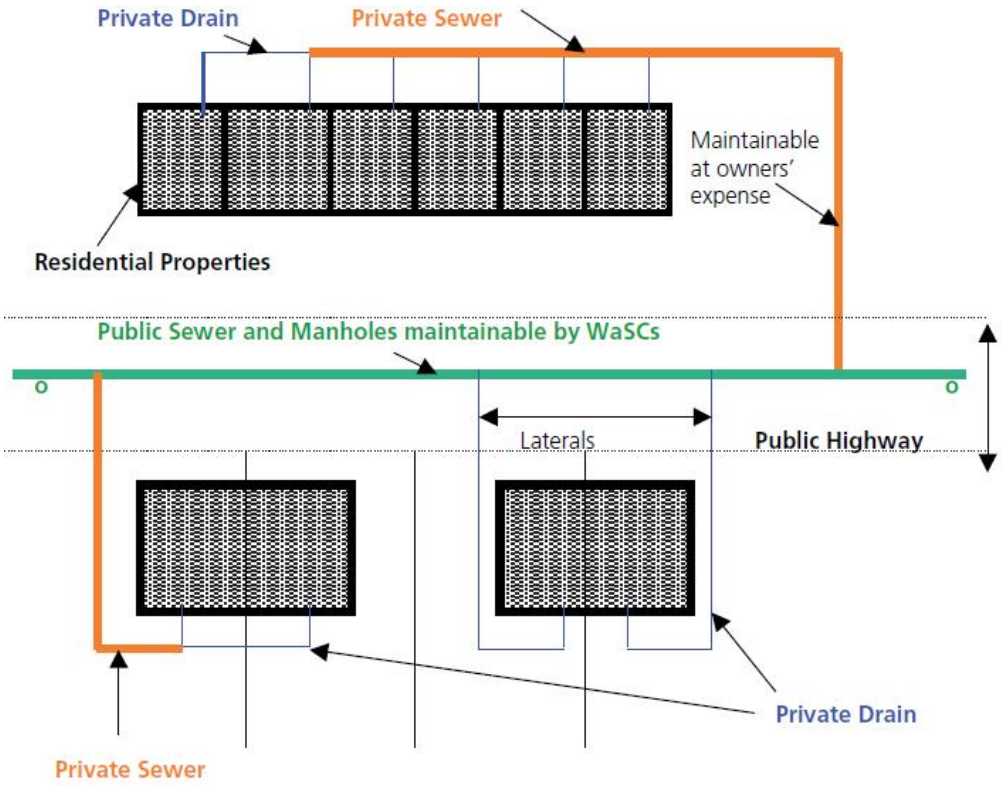
The statutory undertaker has the right under section 107 WIA 1991 to carry out the connection works itself instead of the developer and if it does then the reasonable cost of such works will be recoverable by the undertaker. In addition the undertaker may require an advance payment of a reasonable estimate of the costs of the works and security for payment of the actual costs.

19.5 <u>Connection over third party's land</u> – The transfer in ownership of sewers will result in an increase in the number of public sewer under private land which will mean that there will probably be an increase in the number of connections taking place on private land. It will still be necessary to obtain the consent of the owner of the land (Wood v Ealing Tenants Limited [1907] 2 KB 390).

19.6 <u>Private right to connect</u> – Once the transfer has taken place the exercise of any private right to connect to any transferred sewer or lateral drain will need to comply with the requirements of section 42 FWMA 2010.

[60] s.106B(3) WIA 1991

Appendix A – Drainage system prior to vesting on 1st October 2011



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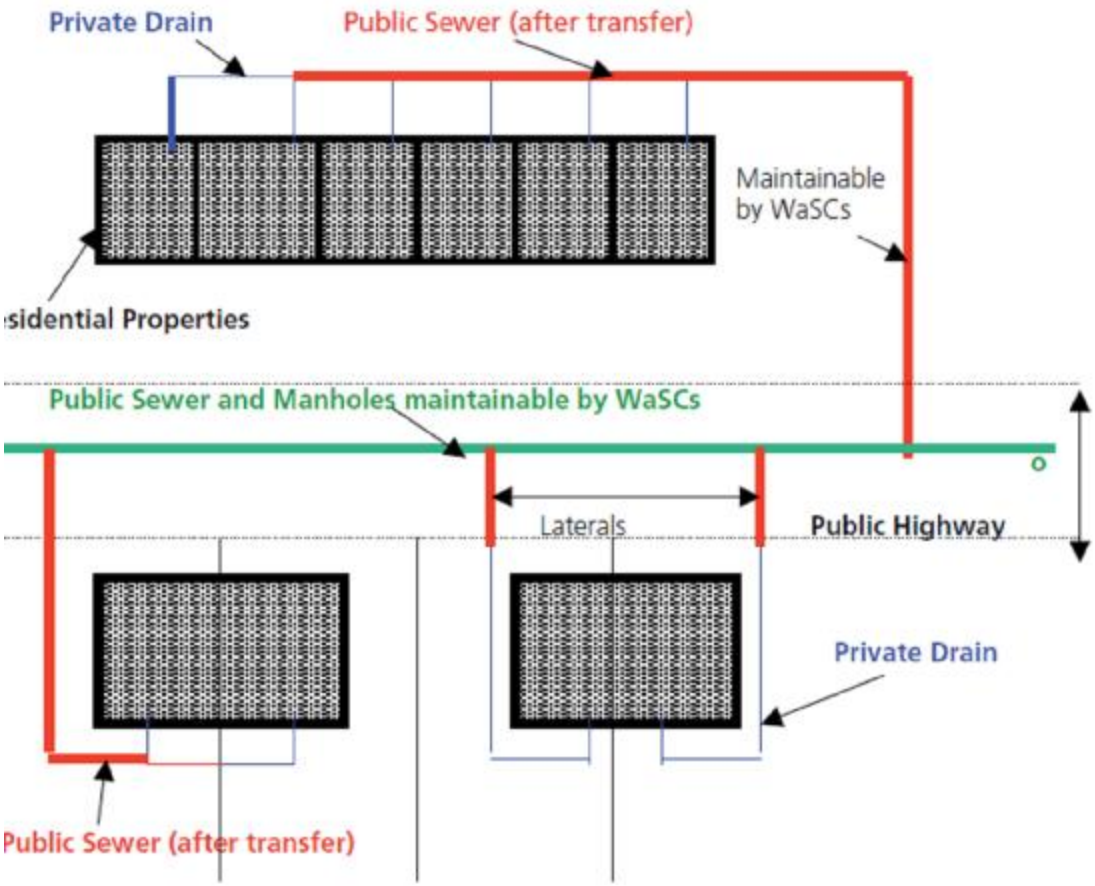
Appendix B - Drainage system on 1st October 2011



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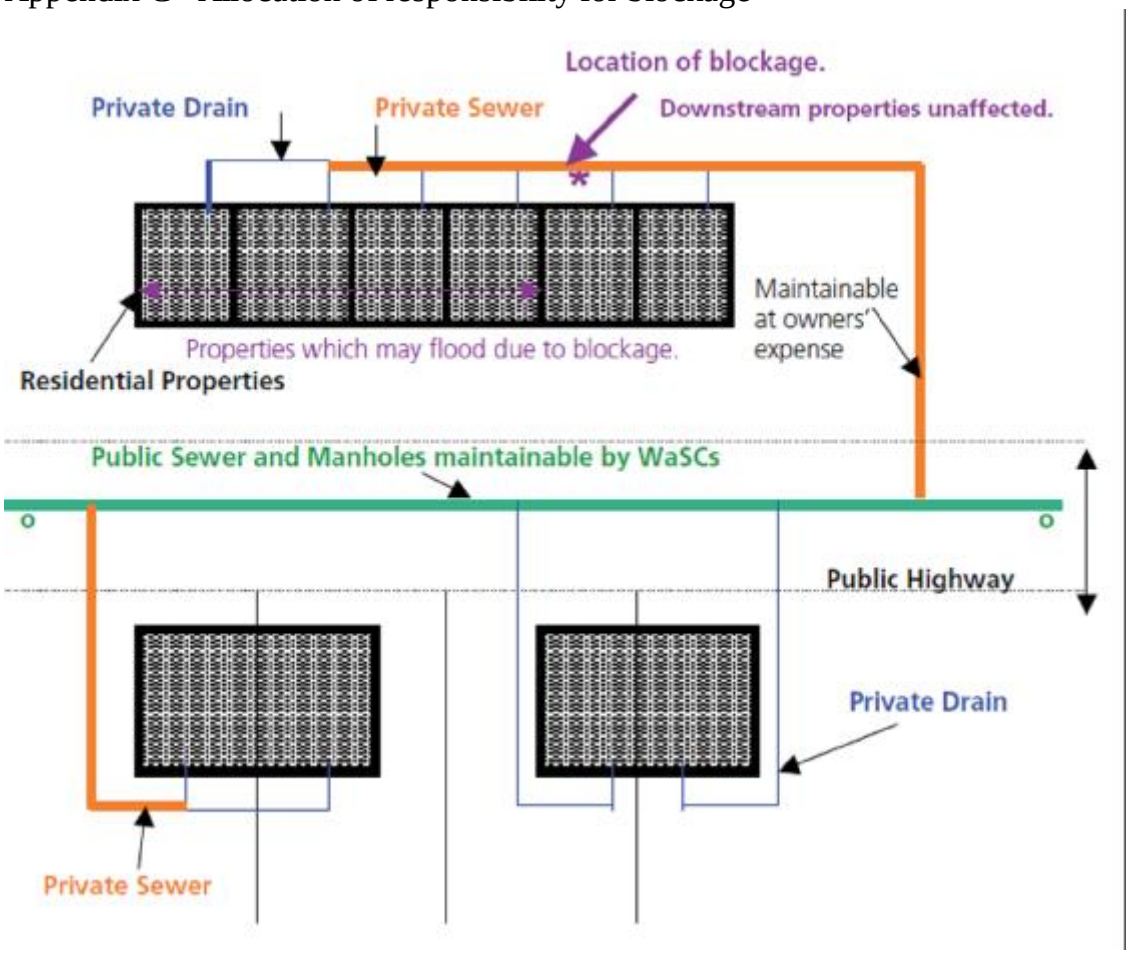
Appendix C - Allocation of responsibility for blockage



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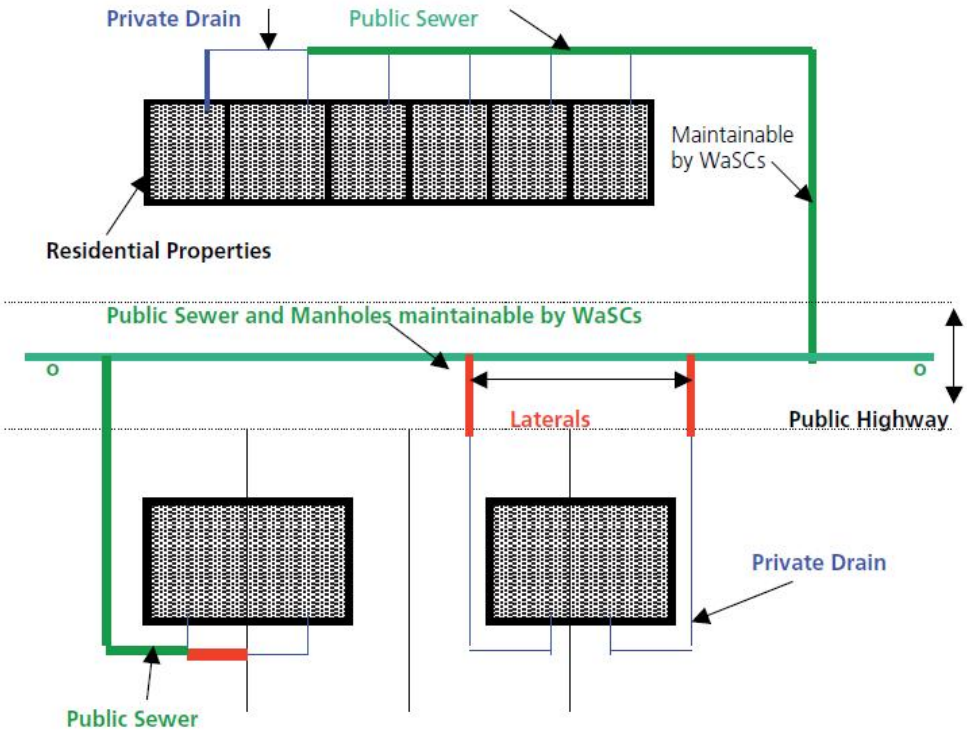
Appendix D - Lateral drains



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