

Under capacity sewerage infrastructure and Grampian conditions

OPINION

1. I am instructed by Leigh Day solicitors to provide an opinion on the lawfulness or otherwise of the imposition of a ‘Grampian’ condition on a planning permission restricting the commencement or occupation of a development until under-capacity sewerage infrastructure is improved. I am asked to consider whether it would be lawful for a local planning authority or a planning inspector to impose such a condition where there is evidence that existing sewerage infrastructure does not have the capacity to receive sewage from a proposed new development.
2. The short answer to what I am asked is ‘yes’. I explain in more detail below.
3. Under s.106 of the Water Industry Act 1991 there is an ‘absolute right’¹ for a developer (in the capacity of the owner or occupier of premises) to connect a to a public sewer and the sewerage undertaker has no right to object or to refuse on the basis of lack of capacity of the sewer (*Barratt Homes Ltd v. Welsh Water* ([2009] UKSC 13, at para 23).
4. The *Barratt* case was ostensibly about whether or not the sewerage undertaker had the right to select the point of connection to the sewer and to refuse the connection if the developer proposed to connect in an unsatisfactory location. However, the underlying issue, as identified by the Court, was really about the effect of the right to connect on the capacity of the sewerage system. The problem arising is that the sewerage undertaker has no control over the volume of connections that may be made to its system, meaning that it will not necessarily be in a position to ensure that adequate capacity is available at the right time and in the right places, whether due to pressure of time, lack of resources or both. This means that where the system is nearing capacity it can become overloaded with consequent, and sometimes severe, adverse

¹ albeit not extending to the drainage of liquids from manufacturing processes.

environmental consequences. This was recognised in the *Barratt Homes* case (at paras 41 to 43):

“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.

This problem is accentuated by the fact that the budgets of sewerage undertakers and the charges that they are permitted to make have to be agreed by OFWAT and that this process takes place at five-yearly intervals so that forward planning may have to be carried out five years in advance. This is not a problem that arises because, if it be the case, the developer has the right to select the point of connection. It is fortuitous that in this case there was spare capacity in the final short section of Welsh Water's sewer that led to the treatment works. In many cases there will be no alternative point of connection that will avoid overload on the public sewer. Welsh Water has presented this appeal as if the problem to be addressed relates to the point of connection whereas in truth the problem relates to the right of a developer, on no more than 21 days’ notice, to connect to a public sewer that lacks the relevant capacity.

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.”

5. In the Supreme Court, Welsh Water sought to argue that planning law was not an adequate answer to the problem and that instead the legislation should be interpreted so as not to allow an absolute and unconstrained right to connect at any location. That argument was rejected (at paras 56 to 59):

“The lengthy history of the right to communicate with a public sewer does not suggest that the point of connection has ever given difficulty in practice. The facts of this case do not illustrate that section 106 gives rise to a problem with the point of connection. It illustrates the more fundamental problem that can arise as a result of the fact, accepted by Lord Pannick, that no objection can be taken by a sewerage undertaker to connection with a public sewer on the ground of lack of capacity of the sewer.

As OFWAT has pointed out, although the 1991 Act affords no such right, there is a case for deferring the right to connect to a public sewer in order to give a sewerage undertaker a reasonable opportunity to make sure that the public sewer will be able to accommodate the increased loading that the connection will bring. The only way of achieving such a deferral would appear to be through the planning process. Some difficult issues of principle arise however: is it reasonable to expect the sewerage undertaker to upgrade a public sewerage system to accommodate linkage with a proposed development regardless of the expenditure that this will involve? How long is it reasonable to allow a sewerage undertaker to upgrade the public sewerage system? Is it reasonable to allow the

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

The facts of this case suggest that a sewerage undertaker may well take a different view from OFWAT as to how these questions should be answered. Be that as it may, it would seem desirable that the sewerage undertaker and OFWAT should at least be consulted as part of the planning process. I would endorse the comment made by Carnwath LJ, at para 48, that more thought may need to be given to the interaction of planning and water regulation systems under the modern law to ensure that the different interests are adequately protected.

These comments are an aside from the narrow issue of statutory interpretation raised in relation to the point of connection. For the reasons that I have given I would endorse the judgments of the Court of Appeal in holding that a sewerage undertaker has no right to select the point of connection or to refuse a developer the right to connect with a public sewer because of dissatisfaction with the proposed point of connection.”

6. Since the Supreme Court decision in *Barratt Homes*, and possibly as a consequence thereof, sewage undertakers have become further involved in the planning process, as observed recently by HHJ Jarman KC in *R (oao) the Llandaff North Residents' Association v. Cardiff Council* ([2023] EWHC 1731(Admin), at paras 21 to 22). Indeed there are now express duties on local planning authorities to consult sewerage undertakers when considering planning applications for a variety of developments including where the development includes 150 dwellings or more (see Art 18 and paras (zg) to (zh) of Schedule 4 of the Town and Country Planning (Development Management Procedure) (England) Order 2015).
7. In light of the Supreme Court and Court of Appeal judgments in *Barratt* it is clear that it is lawful for planning decision makers to use Grampian conditions to ensure that development that is to be connected to the sewerage system does not have the effect of

overloading that system with the consequential risk of environmental effects. Whilst it is well established that local planning authorities may be entitled to assume that other statutory regimes operate effectively in dealing with such things as the capacity and environmental impacts from the sewerage network (see e.g NPPF para 183 and the line of authority following *Gateshead MBC v. SSE* ((1996) 71 P & CR)), there is no obligation on them to exclude consideration of such matters. Furthermore, where there is evidence of a positive risk of harm in a particular case, a planning authority would be obliged to take that risk into account and the refusal of permission for the development (or the imposition of a Grampian condition) may be the only proper course, as recognised in *Gateshead* itself.

8. Given the recognition in *Barratt* of the inability of the statutory regime governing connections to the sewerage system to prevent overloading, it would be similarly incumbent on a planning authority to refuse planning permission or to impose a Grampian condition where there is evidence that harm would be caused or exacerbated by the connection of the proposed development to a sewerage system that is at, or over, capacity.
9. Further, in *WE Black Ltd v. Secretary of State for the Environment* ([1997] Env. L.R. 1), the High Court held that it was lawful for an Inspector to impose a condition preventing the construction or occupation of dwellinghouses, whose construction was permitted by the permission, before completion of works necessary for surface water attenuation and storage. The Court held that such a condition did not involve duplication of other statutory controls and was not inconsistent with the scheme or objectives of the Water Industry Act 1991.
10. From my own professional experience it is not uncommon for planning authorities (including Inspectors on appeal) to impose such conditions. For example, in an appeal decision dated 30 May 2022 allowing a proposal for up to 30 dwellings in Earnley, Chichester, the following condition was imposed (condition 8):

“No development shall commence unless and until details of the proposed means of foul water sewerage disposal including any proposals for associated off-site infrastructure improvements (if required) and an agreed timetable for the works

have been submitted to and been approved in writing by the Local Planning Authority. Thereafter all development shall be undertaken in accordance with the approved details and in accordance with the approved timetable for implementation. Should off-site works be required, then there shall be no occupation of any dwelling until those approved off-site works have been completed. In the event that the agreed off-site works are not completed in full by the time of the first occupation, detailed interim on-site measures for the disposal of foul water sewerage shall be agreed in writing by the Local Planning Authority and shall be installed prior to the first occupation of the site. The interim works shall be removed when the permanent connection is made.”

11. The reason for this condition was set out in paragraph 65 of the decision letter:

“The evidence before me suggests that there is (sic) currently issues with sewerage capacity and this has led to impacts on living conditions when sewerage backs up. To this end, Southern Water took the unusual step of objecting to a recent planning application at another site in Clappers Lane. However, Southern Water did not object to the appeal scheme and nor has the Council on this matter. This, I understand, is because sewerage from the site would move in a different direction to other sites in Clappers Lane. Notwithstanding this, the appellant confirmed at the hearing that an interim on-site solution could be progressed if it transpired that Southern Water needed to upgrade sewerage infrastructure. Based on the information before me I am content the appeal scheme would not have an adverse impact on sewerage capacity.”

12. An example of a Grampian condition imposed by a local planning authority is the one considered in *Llandaff* (referenced above):

“Condition 24:

STRATEGIC FOUL DRAINAGE MASTERPLAN

No reserved matter application shall be approved by the Local Planning Authority until a strategic foul drainage masterplan for the whole outline permission site, accompanied by a foul drainage catchment plan and informed by a Hydraulic

Modelling Assessment (HMA), have been submitted to and approved in writing by the Local Planning Authority. The Submitted strategic foul drainage masterplan shall include details of the following:

- (a) Suitable points of connection for each foul drainage catchment to connect to the existing public sewerage system
- (b) How each development phase within each drainage catchment will be effectively drained to the existing public sewerage system and demonstrate how each phase will accommodate and include a provision for foul drainage flows for all subsequent phases
- (c) Any improvement or reinforcement works required to the public sewerage system in order to accommodate the development
- (d) An implementation programme, which shall take into consideration the phasing schedule and plan approved under condition 17 (PHASING).

Thereafter, any subsequent Reserved Matter application shall accord with the approved details or any modification as may be approved through subsequent discharge of condition applications. No building shall be occupied on any reserved matters site until the works, identified by the Hydraulic Modelling Assessments and through part C of this condition, have been completed on the public sewerage system serving that reserved matters site.

Reason: To prevent hydraulic overloading of the public sewerage system, protect the health and safety of existing residents, ensure no pollution of or detriment to the environment and to ensure the site can be effectively drained.”

13. As to the precise terms of the condition in any particular case, this will depend on the evidence of what the problem is, how the proposed development will cause or exacerbate that problem and what needs to be done to avoid it. In considering that evidence and deciding whether to impose a Grampian condition and in what form, the following principles will be relevant:

14. First, one of the tests for lawfulness of a condition is that it must ‘fairly and reasonably’ relate to the development permitted by the planning permission (see *Newbury DC v.*

Secretary of State for the Environment [1978] 1 WLR 1241, at 1248). So, for example, in *Menston Action Group v. City of Bradford MDC* ([2016] EWCA Civ 796), the Court of Appeal was required to interpret the phrase “based on sustainable drainage principles” as used in a condition requiring a surface water drainage scheme to be submitted to and approved by the local planning authority. In construing the phrase, the Court said at [14]:

“As the parties agree, whatever the concept of ‘sustainable drainage principles’ might mean in some other context, it does not - and cannot – in this context have the effect of compelling the council to require, or the developer to submit, a surface water drainage scheme that would alleviate the existing problem of flooding beyond the boundaries of the development site. To construe the condition as requiring ‘betterment’ of that kind would be to ignore at least one of the three fundamental principles recognized in the House of Lords’ decision in *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578: that conditions attached to a grant of planning permission, to be intra vires and valid, must be imposed for a planning purpose, must fairly and reasonably relate to the development permitted, and must not be so unreasonable that no reasonable planning authority could have imposed them (see the speech of Viscount Dilhorne at p.599H to p.600A, the speech of Lord Fraser of Tullybelton at p.607F to p.608C, the speech of Lord Scarman at p.618F to p.619A, and the speech of Lord Lane at p.627A-E). These three principles bear on the local planning authority’s statutory power, now in section 70(1) of the Town and Country Planning Act 1990, to impose ‘such conditions as they think fit’.”

15. It follows from this that a positive condition requiring the applicant to submit a scheme to be approved to rectify an existing deficiency in the sewerage network or to provide extra capacity in the network beyond that reasonably required to accommodate the discharges of the development will not be valid. A positive condition of this type would only be likely to be appropriate in circumstances where (1) there was evidence that the existing network would not be able to accommodate the additional sewage flow from

the development either because it was at, or over, capacity; and (2) there was evidence of a specific scheme or measures that the developer would be able to satisfactorily implement to deal with or divert (just) the sewage from the site, either on an interim basis (as in *Earnley* – see above) or otherwise.

16. However, it may be the case that a sewerage network is already operating well over capacity (as evidenced by, for example, routine discharges to the sea in non-storm conditions) and that nothing less than a system wide upgrade is necessary to provide capacity. In such circumstances it could be argued that no further development should take place until that upgrade is implemented both to solve the existing issue and provide sufficient capacity to allow development to proceed without causing harm. In those circumstances, a positive condition (or s.106 obligation²) could not lawfully require the developer itself to undertake or to fund such an upgrade, not least because the works would be fixing a pre-existing problem and would likely accommodate much more than the proposed development. Such works could not be said to be ‘fairly and reasonably related’ to the proposed development and a condition requiring such works would likely be *Wednesbury* unreasonable.

17. But in those circumstances, a negative Grampian condition could be imposed preventing the development from proceeding (or being occupied) unless and until that network wide upgrade took place. The decision of the House of Lords in *Grampian* establishes that a condition can be validly imposed where it prevents development proceeding unless and until an event has occurred which is not wholly within the power of the applicant to bring about. Further, contrary to some previous authority, it is now established that in legal terms it is not irrational (and the condition is not therefore invalid) to impose such a negative condition even if the contingent event might appear to have no reasonable prospect of coming about (see *British Railways Board v. SSE* [1994] JPL 32).

18. Finally, in my view a pre-commencement (as opposed to a pre-occupation) condition would be the most appropriate in circumstances where insufficient evidence has yet been provided to demonstrate whether and when a necessary upgrade is likely to take

² under s.106 of the Town and Country Planning Act 1990

place. A pre-commencement condition requiring such evidence would then ensure that a development is not commenced before there is some confidence that a solution is available in a reasonable timescale (and would minimise the risk of a development being constructed that cannot then be occupied). There could then be a restriction in the condition on any occupation before the upgrade has been implemented.

19. In conclusion, the exact terms of any condition (and whether such a condition is appropriate) will depend on the circumstances and evidence in any particular case. But what is clear is (1) evidence of harm likely to be caused by sewage discharges from a proposed development will be a material consideration in a planning determination, and (2) the imposition of a Grampian condition preventing development from proceeding or being occupied before a satisfactory solution is found and implemented is one lawful way of dealing with the situation.

20. This deals with the matters raised in my Instructions. Should you require anything further, please contact me in Chambers.

15 October 2023

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