CONSULTATION RESPONSE

Private Sewers Transfer | 17th Nov 2010

HBF response: Draft regulations & proposals for schemes for the transfer of private sewers to WaSCs in England & Wales

HBF welcome the opportunity to respond to the above consultation.

We have submitted an initial response to you and since that have discussed this consultation within our membership. The Home Builders Federation (HBF) is the principal trade association representing private sector house builders in England and Wales. Our members are companies who between them build about 80% of the new homes in England and Wales.

The HBF fully supports this initiative but in turn it has a number of concerns, in particular, the lack of acceptable/practical transfer arrangements and the consequences arising from the very real prospect of orphaned surface water sewers. Some of our concerns were highlighted in the HBF Technical Paper (November 2009) copies of which have been circulated to both DEFRA and CLG.

Following initial discussions involving Defra, the HBF and at least one HBF member, Defra mande a request for HBF to submit its members' initial comments. We have below crystallised these comments into our response. Our main concerns are listed in the comments below.

Comments/ concerns

Exclusions to Automatic Transfer

It is intended that no part of a surface water sewer system discharging to a watercourse, river or canal, i.e. anything other than discharge to a public sewer, will be transferred to the WaSC. In reality, this will orphan considerable sections of surface water sewerage infrastructure given that no other body will have statutory responsibility for such. The parallel development of the SuDS train management process will not confer any statutory powers on the SuDS Approving Body (SAB) to adopt and/or assume any responsibility for these sewers – the SAB will merely have discretionary powers (once the SAB is in place). It is highly unlikely that the SAB will ever consider taking responsibility for conventional piped surface water drainage systems. Do Defra expect responsibility for orphaned surface water sewers to rest with the home owner? If yes, this is in complete contradiction to the recommendations of the Pitt Report.

This exclusion also raises another major issue for house-builders. With no clearly defined body responsible for surface water sewers discharging to anything other than public sewers, 'orphaned surface water sewers' will continue to be relied upon for highway drainage. The number of occasions where this will arise will be significant. The unintended consequence will be Highway Authorities (HA's) refusing to adopt estate roads, irrespective of the construct of Section 100 of the Highways Act 1980. Furthermore, some HA's may seek a deed of variation to existing Section 38 Agreements – this will impose further, unnecessary costs on house-builders.

This will present the Industry with even greater bond reduction/release problems than we are currently experiencing. HBF has assumed that such a fundamental issue/consideration has been discussed with the Highway Authorities. Accordingly, HBF would welcome disclosure given the propensity for considerable additional cost and highway adoption uncertainty. More importantly, none of the unintended consequences and/or costs associated with this element of the transfer has been reflected in the RIA.

The HBF does have a simple solution to this unintended consequence, namely, on the 1st October 2011, there are to be no exclusions in terms of surface water drainage.

The WaSCs' reasoning for not wanting to take responsibility for certain surface water sewers is understood but HBF firmly believes that it lacks robust rationale. PPS 25 requires any development to be subjected to some form of flood risk assessment. These vary in complexity depending upon the characteristics of the catchment and the nature/size of the site under consideration. The resultant FRA is a material consideration under extant planning legislation and this in turn leads to the development and agreement to an acceptable surface water drainage strategy, inclusive of highway drainage. Thereafter, formal agreement is reached with the WaSC to adopt under Section 104. This remains a simple but robust risk assessment/adoption process and the current intentions have the propensity to cause considerable confusion and even greater inequity. Moreover, we have evidence to the contrary in that WaSCs draw no distinction when it comes to the actual point of outfall – they continue to maintain a consistent sewerage charging regime irrespective of whether a site drains to a public sewer or water course/river. Indeed one can realistically argue that 95% of all surface water outfalls throughout the UK end up entering our watercourse and river systems at some stage – why seek to further fragment what has been shown to be a successful design and adoption process since the onset of the Water Act 1973? In our many discussions with WaSCs and Ofwat, which have taken place over many years, HBF members have consistently been reminded that surface water represents only a very small part of the total sewerage charge levied each year. By far the greatest proportion of the cost of maintenance is directed towards foul drainage networks. If our analysis (and that of Ofwat) is wrong, then the RIA should provide far more robust evidence to support such a fundamental exclusion to the transfer process.

Pumping Stations

HBF considers that it is unreasonable to delay the adoption of pumping stations constructed as part of the Section 104 works. If the works are complete, or when they are completed, then the pumping station should also be adopted simultaneous with the sewers, surely given the limited number of these they should also transfer at the same time. We believe the draft SI should be revised to reflect this.

Sewage Treatment Plants

What is to happen to those developments where sewage treatment plants have been the sole means of meeting the drainage requirements imposed by the Planning Authority?

If these items of infrastructure are approved and/or already in the ground should these not also transfer automatically to the WaSC? The proposed legislation will leave us with a further anomaly in that we will have pipes and ancillary structures (manholes) automatically transferred to WaSCs but

never the treatment plant. Given the limited number of these facilities they also should transfer to WaSCs on 1st October 2011?

Transitional Arrangements

S104 agreements will effectively come to an end on 31st March. It is our belief that this is an area that must be given much more careful thought. Many HBF members are already working on sewerage infrastructure designs that in the current process would lead to Section 104 technical approval and their entering into S104 agreement. (Most if not all of these sites will have planning approval and an agreed/approved surface water drainage strategy as a result of the FRA). The danger we face is that WaSCs will not honour the present process and prevaricate when it comes to technical approval in the hope that the introduction of the MBS will be in force by April 2011. Such an approach will allow WaSCs to further their commercial interests by imposing revised design and/or construction standards for adoptable sewers. In addition, it will leave the door open for the introduction of what could be described as grossly inequitable conditions underpinning future Section 104 agreements, e.g. increased supervision fees and a 100% bonding requirement rather than the current 10%. The transitional arrangements, in particular the SI, should impose an obligation on WaSCs to accept designs based on Sewers for Adoption 6th Edition right up to the 1st October 2011 with a deemed approval if WaSCs fail to respond with 21days. In the event that the MBS becomes mandatory at an earlier date, e.g. April 2011, then the October cut-off date can be brought forward. This will ensure that a reasonable level of consistency is maintained whilst also reducing the confusion that is likely to abound. That said see our subsequent comments concerning the SuDS Standards – these are also relevant to the timescale issues.

A further concern is what will happen to those developments that have been started or are part of a larger development scheme where both planning consent and an approved drainage strategy is in place? Some of the drainage infrastructure may already be in the ground with that serving any future phases of development still to be constructed. Both the guidance and the SI are silent on this issue and yet it is one of paramount importance.

Again the HBF have a simple solution to this issue, namely if planning consent and an agreed drainage strategy is in place by 1st October 2011 then this will be allowed to prevail until the final phase of the development is completed, i.e. the design standards and adoption procedures in place at the time prevail throughout the lifetime of the development.

However, the next part of our response will also affect any subsequent decisions made in terms of timing and conceivably, the transitional arrangements per se.

It is looking increasingly likely that the SuDS Standards that are to effectively replace the present Section 104/SfA surface water design and construction process will not be in place much before April 2012. This leaves us with a serious disconnect in that house-builders (and purchasers of a new home) in England and Wales may well be confronted with a whole year of uncertainty in terms of surface water drainage. (What do we do in terms of surface water drainage and what do we tell purchasers concerning which body will have responsibility for a particular part of the surface water drainage network?) HBF have long advocated that the MBS for adoptable sewers and the SuDS Standards should be introduced simultaneously. The current proposals for transfer and the accompanying SI do not address this crucial aspect of the transitional arrangements. In terms of

timing HBF see no reason why the transfer should still not proceed as planned. However, it appears to be more than sensible and in the best interests of all new home owners for WaSCs to continue to enter into informal Section 102 arrangements, up to the date when the SuDS Standards become a mandatory requirement. Anything other than this will create the utmost confusion. Without clearly defined responsibility and appropriate/sensible transitional arrangements for all aspects of drainage infrastructure, many house-builders face the prospect of prospective litigation under the Property Mis-descriptions Act.

Section 8 (4) (b) of the SI

We normally expect the WaSC to first approach the developer before seeking recourse to the surety. A unilateral ability to approach the surety, if allowed to be implemented will have immediate financial repercussions for the both the developer and surety. The current convention of first approaching the developer to undertake remedial works identified by the WaSC, following a joint inspection (WaSC/Developer) should prevail. The HBF firmly believes that the SI should be amended accordingly.

Clause 21 of the RIA

In terms of the MBS, the HBF does not agree that the increase in costs will be circa 5% of current drainage provision costs. The RIA has not included for the increases associated with technical approval and supervision costs due to the increased level of infrastructure to be passed to WaSCs. Also, the cost of providing a bond to cover 100% of the capital cost of the drainage infrastructure has not been factored into the RIA. However, HBF continues to question the necessity for a 100% surety when Defra/WaSCs have disclosed no evidence to justify such a requirement. The design and construction standards, in particular the significant increase in construction costs due to increased pipe wall thickness have not been given robust consideration. Whilst a straightforward comparison in cost between pipe materials/thickness may be relatively straightforward, no costing work has been undertaken in respect of increases in the cost of fittings etc. It remains the view of HBF that this element of the RIA is insufficiently robust.

Rationale for Transfer of Domestic Drainage to WaSCs

The basis for this appears to be the assessment work undertaken by W S Atkins several years ago. When the Atkins data is subjected to more detailed analysis, the rationale for automatic transfer is actually based on a sample size that is less than 1%. In statistical terms, e.g. application of the Chi-squared test to determine significance, the output from the Atkins work (in statistical terms) is insignificant and unrepresentative. Atkins identified that a considerable number of problems associated with the long-term durability and performance of foul drainage systems (some 30% of reported instances) were directly related to the reliance placed on the use of pitch-fibre pipes. HBF has contended that many drainage defects are attributable to old standards both in terms of design and material specification. On many occasions HBF has requested the disclosure of evidence covering the performance of domestic drainage installations since the onset of the Water Act of 1973 – this has not been forthcoming and HBF remain firmly of the opinion that insufficient evidence exists to justify what is about to take place from April 2011.

Requisition procedures

The consultation and the SI remain silent on such an important issue. This comment has significant relevance given the hiatus that will exist from the date that the MBS comes into force and the operative date of the SuDS Standards and the SAB. Even when the SAB is in place, HBF have yet to be convinced that adequate requisition procedures will be available to avoid third party land ransom implications. Is there any clarity Defra can offer on this matter.

Appeal Mechanism

Determinations under the Water Act 2003 have been shown to be fraught with delay. HBF considers that a new regime provides an opportunity to set down a much more effective and streamlined appeal process complete with improved terms of reference and response timescales. Is this a possibility before we get too far?

Question responses

Question 1: *Can you suggest an efficient and simple way to identify sites which may be in multiple occupation but comprise a single curtilage?*

The definition of curtilage has been with us for many years and may not be appropriate in a modern day context. It may be more appropriate to define curtilage as the demise of a premise but thereafter, provide a schedule of instances within the Sl where drainage will not be adopted by the WaSC, for example, communal (vertical) SVPs are excluded but once SVP leaves the building, the section of sewer from the receiving inspection chamber to the point of connection to the public sewer will be the responsibility of the WaSC.

Question 2: *Do you consider that there are other circumstances that should be excluded from transfer? If so, please provide a reason for your answer.*

Generally no; in many respects, the proposals do not adequately capture a number of instances where existing sewerage infrastructure should automatically transfer.

Question 3: *Are there any further matters that you consider the Secretary of State or the Welsh Ministers should require Ofwat to have regard to when determining appeals against transfer? If so, please provide a reason for your answer.*

When appeals involve sections of downstream sewer on which upstream development is reliant, then the owner should not be allowed to create a ransom situation by objecting to the transfer/ adoption of the downstream section of sewer.

Upholding an appeal in such a situation would seriously undermine the whole process of transfer and place upstream sewerage asset holders in an unfair and inequitable position. In addition, any appeal process, particularly if it involves Ofwat, will need to be supported by performance KPIs and possible financial penalties if agreed dates are not met by the various parties.

Question 4: *Are there any transitional arrangements not covered in this document you would expect to see and why?*

There are two important issues that fall under this heading.

Firstly, at the time of automatic transfer there will be a unilateral change to many existing plot transfer documents and deed plans. In other words, those documents which already define responsibility for ownership and maintenance of the domestic drainage system, or part thereof, will be wrong. How is this to be dealt with? Will Defra be advising HM Land Registry and how is this matter be dealt with as part of established conveyancing practice? Drainage maintenance responsibility is a key question on the Law Society's standard for of pre-contact enquiry.

Secondly, the role and impact of the CDM Regulations does not appear to have been considered, especially when dealing with contaminated land that has undergone remediation. At present, when sewerage infrastructure is to be adopted, developers are required to pass over to WaSCs any relevant health and safety risk assessments. How will Defra deal with this requirement? There is the potential for a dereliction of duty on the part of all remediation, ill-informed or indiscriminate excavation to deal with subsequently identified blockages etc. could expose operatives to a health and safety risk. In addition, an approved and verified remediation strategy could be compromised by WaSC contractors leading to the possible serving of statutory notices under Section 33 of the EPA. This is a major risk, in particular when remediation involves inert cap and cover systems. At the recent workshops, Defra conceded that they have not considered this particular aspect but believe it to be of significant importance.

Question 5: *How would you expect to see them covered in the proposed Regulations?*

By including sufficient dedicated, robust statutory guidance.

Concluding comments

The automatic transfer of existing sewers is both a welcome and positive step forward in terms of better defining which body has statutory responsibility for a particular element of drainage infrastructure.

However, we will still have competing standards i.e. drainage design and construction covered by Part H of the Building Regulations. We see the latter as a minor issue when compared to the currently intended transfer arrangements. It is here where little thought appears to have been given to the provision of sensible, fair and equitable transitional arrangements, with the commercial interests of the WaSCs having been allowed to take precedence.

There need to be compromises in this area on the part of WaSCs, if not, we firmly believe that our business will be subjected to considerable and unnecessary additional costs. HBF would welcome the opportunity to engage in further discussions with Defra and the WaSCs/ Water UK concerning this issue, in order to achieve a more sensible and reasonable set of transfer arrangements.

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