September 2021

xxxx and Yorkshire Water: Final decision on an appeal made under section 105(1) of the Water Industry Act 1991 – Appeal about the refusal by Yorkshire Water to adopt a private sewer

Ofwat

[redacted] and Yorkshire Water

Final decision on an appeal made under section 105(1) of the Water Industry Act 1991

Appeal about the refusal by Yorkshire Water to adopt a private sewer

OFW-033140

Contents

Purpose of this document

This is our final decision on this appeal. It sets out the decision we have made following our consideration of the legal framework for appeals made under section 105 of the Water Industry Act 1991, the factual circumstances of this matter, and the evidence provided to us by both parties.

Now we have issued our decision as final there are no routes of appeal if either of the parties disagrees with our final decision. At this point, the only route of challenge to our final decision is via judicial review proceedings. Judicial review claims must be submitted promptly and within three months from the decision to be challenged.

If any party considers that specific information provided in their representations is commercially sensitive and/or confidential, they should make us aware of this. In doing so, they should clearly set out the reasons why, in their view, it should not be disclosed, and provide, alongside their full response, a non-confidential version of the document(s) that could be shared with another party. If we consider that disclosure of the information to another party will facilitate the exercise of our functions, and we do not consider that the reasons provided amount to sufficient justification to withhold disclosure, we will give the party submitting the information notice that we intend to disclose the information in question and will give that party the opportunity to explain further why they believe that it should not be disclosed. We will not accept blanket requests for confidentiality or requests not supported by specific and clear reasons.

1. Summary of our final decision

1.1 This appeal relates to Yorkshire Water Services Limited's ("**Yorkshire Water**") refusal to adopt a private sewer and underground pumping station at [redacted] ("**the Property**"). It was referred to Ofwat for a decision under section 105(1) of the Water Industry Act 1991 ("**the Act**").

1.2 Under section 102(1) of the Act and subject to certain conditions, a sewerage undertaker may declare that a sewer or lateral drain which communicates with a public sewer, or any sewerage disposal works, will become vested in the undertaker (see appendix 1 for factors an undertaker must consider when making a declaration). The owner of any such sewer, lateral drain or sewerage disposal works can also apply to the relevant sewerage undertaker, requesting that it make such a declaration.

1.3 [redacted] ("**Complainant**") made a request to Yorkshire Water, asking it to adopt a private sewer and underground pumping station at [redacted], [redacted]. Yorkshire Water refused this request. The Complainant referred the matter to Ofwat for a decision, pursuant to section 105(1) of the Act. This provision provides that an owner of a sewer, lateral drain or sewerage disposal works, may appeal to Ofwat regarding a sewerage undertaker's refusal to adopt.

1.4 In considering this appeal, we applied the relevant legal framework, as detailed in Chapter 3 of this document, and reflected on the parties' submissions, to inform our decision. As well as the Act, the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 ("**2011 Regulations**") have been considered as these provided for the automatic transfer of certain private sewers to the undertaker.

1.5 A central issue in this appeal concerns whether the pipe is a drain or a sewer. This in turn depends on whether the Property is one or two buildings and the scope of the Property's curtilage. This is because a pipe is only a sewer (and therefore capable of being adopted under section 102 of the Act) if it serves more than one property.

1.6 Our final decision which is set out in Chapter 5 of this document, is that the relevant pipe is not a sewer but a drain, as it is used to drain a single curtilage and so was not capable of being adopted under section 102 of the Act. We therefore uphold Yorkshire Water's decision to refuse the request for the pipe to be adopted.

2. Background

2.1 The Complainant is one of several company directors of [redacted], which owns the freehold of the Property. [redacted] is a non-profit making company guaranteed by fourteen shares which are restricted to one £1 non-transferable ordinary share per flat (there are fourteen flats that make up the Property). The share owners are members of the company. This company structure is confirmed in the 'certificate of incorporation'.

2.2 Yorkshire Water is appointed as a water and sewerage undertaker under the Act to provide water and sewerage services to customers in Scarborough, where the Property is located.

2.3 The Property replaces a former residential dwelling, also known as [redacted], which was demolished. This is confirmed in a planning application dated 24 November 2005 (ref: '[redacted]') which sets out proposals for the demolition of the existing dwelling and erection of fourteen self-contained flats. The plans submitted with this planning application show that the Property is a block of fourteen flats divided into two blocks of seven flats and with two separate entrances, a single driveway, shared parking area with fourteen spaces, a communal garden and bin store. The Complainant informed Ofwat that the flats within the Property are owned by their individual leaseholders who hold tenure of 999 years from 2006.

2.4 See Appendix 2 for the layout of the Property.

The Complainant's request to Yorkshire Water

2.5 The Complainant contacted Ofwat on 20 July 2018 stating that the pipe is a private sewer, and the pipe and the associated pumping station should have been adopted by Yorkshire Water in accordance with the 2011 Regulations (which will be discussed in Chapter 3). Ofwat informed the complainant, on 30 May 2019, his appeal was out of time as it could only consider appeals under the 2011 Regulations within two months of a sewerage undertaker giving notice or publishing its proposals to adopt private sewers and pumping stations under the regulations.

2.6 The Complainant contacted Ofwat again on 18 July and 14 August 2019 stating that he had found three different definitions of what constitutes a sewer, and that the meaning can be simplified as "a sewer is a pipe that serves more than one building". He stated that Yorkshire Water had informed him that the pipe at the Property did not qualify for adoption because the land registry shows a

detached building with one curtilage. Using the simplified definition of sewer above, he considers this decision was incorrect since the detached building was demolished to build two blocks of flats side-by-side. On 12 May 2020 we informed him that he could consider asking Yorkshire Water to adopt the pipe and the associated pumping station, in accordance with section 102 of the Act.

2.7 On 18 September 2020, the Complainant informed Ofwat that on 22 June 2020, he made a formal application, under section 102 of the Act, to Yorkshire Water asking it to adopt the private sewer and pumping station. He confirmed that on 15 September 2020 he received Yorkshire Water's formal refusal to adopt the sewer and pumping station.

2.8 Yorkshire Water decided not to adopt the private sewer because it considered that the Property is within one curtilage and therefore the private sewer is a drain. In reaching its conclusion it noted that:

- there is one building on the site;
- the freehold of the Property is owned as a single unit;
- the site is managed by [redacted];
- [redacted] is a management company with responsibility for the communal areas of the site;
- there are several examples of inter-communication at the site; and
- the site has a single comprehensive system of drainage.

Accordingly, it considers the Property to be within a single curtilage and the private sewer to be a drain.

2.9 We issued a draft decision on this appeal on 17 June 2021.

3. Legal framework

3.1 Central to this appeal, and the dispute between the Complainant and Yorkshire Water, is whether the private sewer is an 'adoptable sewer' within the definition of the Act.

3.2 Under section 102 of the Act, a sewerage undertaker may declare, and an owner may ask that undertaker to declare, that the following are vested (adopted) in that undertaker:

- any sewer which is situated within its area or which serves the whole or any part of that area;
- any lateral drain which communicates or is to communicate with a public sewer which is so situated or serves the whole or any part of that area; or
- any sewage disposal works which are so situated or which serve the whole or any part of that area.

3.3 Section 102(1) of the Act must be read together with section 219(1) of the Act, which sets out provisions for interpreting the Act[1]. It defines "sewer", "drain", and "lateral drain" as:

> ""sewer" includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings.
>
> ""drain" means (subject to subsection (2) below) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage".
>
> ""lateral drain" means-
>
> - 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
> - (if different and the context so requires) the part of a drain identified in a declaration of vesting made under section 102 above or in an agreement made under section 104 above.

[1] Except in so far as the context otherwise requires.

3.4 What this means is that a pipe will be a drain where it is used to drain one building within one curtilage, or buildings or yards appurtenant[2] to buildings within the same curtilage. The Act expressly excludes such a drain from being adopted under section 102 of the Act.

3.5 We note that the definition of lateral drain – which, unlike a 'drain', may be adopted under section 102(1) of the Act – confirms that a lateral drain means the part of a pipe which runs from the edge (outside) of a curtilage, to a public sewer. It is not contentious in this case that the pipe is not a lateral drain.

3.6 It follows that in order to decide if the pipe is a sewer or a drain, we must consider whether:

- the Property is one building; and,
- if it is more than one building, whether the buildings are within the same curtilage; and
- whether any part of the buildings or yards are appurtenant to the buildings within the same curtilage.

3.7 'Building', 'buildings', and 'curtilage' are not defined in the Act and we therefore have considered relevant caselaw on the interpretation of these terms.

The meaning given to the terms 'building', 'curtilage' and 'appurtenant to buildings'

3.8 On the interpretation of the word 'building', the caselaw indicates that the question of whether a structure constitutes one or more buildings is a question of fact, to be decided on a case-by-case basis. In this case, the Property is a single structure divided by a wall into two semi-detached blocks of flats, with seven flats in each block. Therefore, we have reviewed the following caselaw which specifically considered whether semi-detached buildings constitute one or two buildings.

- In 'Weaver v Family Housing Association (York) Ltd (1976) 74 LGR 255' ("**Weaver**"), the House of Lords upheld a finding that a row of separately owned semi-detached properties constituted several buildings. The court identified potential criteria for determining whether a structure was one or more buildings, namely structural unity, unity of ownership, the existence of a comprehensive system of drainage, intention to occupy separately, and facilities peculiar to each house[3]. The Court emphasized

[2] The term 'appurtenant', in the statutory context of the Act, should be given its ordinary meaning, namely 'belonging. In *R (Hampshire CC) v Secretary of State for Environment, Food and Rural Affairs* [2020] 3 WLR 597, paras 77-79, wherein the High Court explained that ""appurtenance" denotes something belonging to another, or a minor property or right belonging to another more important property or right."
[3] In *Weaver* at p. 261.

that deciding this question of fact, required balancing conflicting criteria and factors, some which might go one way and others another, before making a judgement.

Weaver concerned a terrace of houses numbered 1, 2, 2a, 3, 4, 5, 6, and 7. No 1 was separated by a courtyard from No 2. Nos 3 to 7 were at all times occupied as separate dwelling-houses; they were until 1951 in common ownership. The drainage of Nos 2 and 2a emptied northwards into a public sewer. The drainage system of No 3 emptied southwards into a junction with the drainage system of No 4 under the latter. The combined effluent of Nos 3, 4 and 5 emptied southwards to a junction with the drainage system of No 6 in the backyard of No 6. The drainage system of No 7 emptied northwards to the same junction in the back yard of No 6. See Appendix 2 for the full description of the houses.

- In 'Cook v Minion (1979) 37 P&CR 58' ("**Cook**"), the Court upheld a finding that a semi-detached building was one building for the purposes of the definition of drain in section 343 of the Public Health Act 1976, which defines drain in the same way as section 219 of the Act. Cook concerned two semi-detached properties. In reaching this decision, the court gave weight to, amongst other factors, there being no fence or barrier between the gardens, and the cottages being in common ownership, let to separate tenants.

- In 'Humphery v Young [1903] 1 KB 44' ("**Humphery**"), an older case, the Court found that two semi-detached houses, built at the same time, were two separate buildings and not in the same curtilage. In reaching this decision, it gave weight to, amongst other factors, a dividing party wall, and that both houses had gardens at the front and the back, separated by fences, and that both houses were subject to separate lettings.

- In 'Hedley v Webb [1901] 2 Ch 126' ("**Hedley**"), an older case, the Court found that a pair of semi-detached houses, as a matter of fact constituted a single building. This was in the statutory context of section 4 of the Public Health Act 1875, which defines 'drain' differently from section 219 of the Act, namely as "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with […] a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed". Section 4 of the Public Health Act 1875 also provided that 'sewer' "includes sewers and drains of every description, except drains to which the word 'drain' as interpreted as aforesaid applies".

- In ‘The Vestry of the Parish of St Martin-in-the-Fields v Bird [1895] 1 QB 428’, the Court found more than one building (and indeed curtilage) where there was a passage with a common road, and a range of houses and shops on either side of the passage.

3.9 It follows from the above that when considering whether there is one building, it is useful to consider the physical layout, ownership, occupation of the premises, existence and context of any party wall, existence and access to front, side and back gardens, and extent of the drainage system. This is an indicative and not exhaustive list of the kinds of factual considerations that may be weighed, balanced, and considered in the round when considering whether the Property is one or more buildings.

3.10 If the Property constitutes a single building, the pipe will be a drain. If the Property is more than one building, there is a further question to be answered, namely whether the buildings are within the same curtilage. We have therefore also reviewed caselaw dealing with the issue of curtilage to identify the appropriate approach.

3.11 The caselaw indicates that curtilage must be interpreted in its statutory context. The statutory context in this case concerns pipes and accessories to pipes and whether those pipes and accessories are adoptable. We have reviewed the caselaw to identify factors that the courts considered relevant in a determination of curtilage:

- In ‘Challenge Fencing Ltd v SSHCLG [2019] EWHC 553’, para. 18, in the planning context, it was held that “the extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law”.

- In Weaver, the Court held that curtilage is used to denote an "enclosure" or "land within an enclosure". In deciding that the terraced houses (the property discussed in Weaver is described in Appendix 3) formed more than one curtilage, a "decisive factor"[4] for the Court was that it was necessary to go onto the public street to get in and out of any of the terraced houses.

- In ‘Pilbrow v Vestry of the Parish of St Leonard, Shoreditch [1895] 1 QB 433’ ("Pilbrow"), in a much older case, the Court of Appeal concluded that 46 apartments divided into two blocks, were within one curtilage, largely

[4] In *Weaver* at p. 262

because the yard within the boundary walls enclosing the premises was meant to be used by everyone occupying the apartments. Here the Court considered that regard should be had to the mode of building, purpose of the building and the manner in which they have been used. The Court also noted that the term curtilage was not only reserved for "a mansion-house, which has stables […] and [therefore] cannot include the case of several buildings like the present […] it includes the case of several buildings which are included in the same curtilage – which have a curtilage which is common to all"[5].

- In 'Morris v Wrexham County Borough Council [2002] 2 P&CR 7' at para. 33, the Court held that it is possible for one building to be within the curtilage of another building, where the buildings are sufficiently close and accessible to one another. We note that the Court was considering curtilage in the context of listed buildings.

- In 'Attorney General, ex rel Sutcliffe v Calderdale MBC (1983) 46 P&CR 399' ("**Sutcliffe**"), the Court held that in the context of deciding whether a structure/object is within a listed building's curtilage, and notwithstanding that it considered to be "the ancient and somewhat obscure word "curtilage", three factors must be considered 1) the physical layout, 2) their ownership, past and present, and 3) their use or function, past and present.

3.12 With regard to the meaning given to 'appurtenant to other buildings' the normal meaning of 'appurtenant' includes the element of being supportive or accessory to the main element. In this case, there is no indication that one block of flats is accessory to the other. However, the definition of drain includes yards appurtenant to buildings so in this case it is relevant to consider whether the common outside areas (e.g. the car park and garden) are appurtenant to one or two buildings.

3.13 In 'Skerrits of Nottingham v Secretary of State for the Environment [2001] QB 59', the Court of Appeal held that no piece of land can be within the curtilage of more than one building.

3.14 In 'R (Hampshire CC) v Secretary of State for Environment, Food and Rural Affairs [2020] 3 WLR 597', the High Court said the following: (para. 75): "appurtenance" denotes something belonging to another, or a minor property or right belonging to another more important property or right."

[5] In *Pilbrow* at p.440

3.15 Our conclusion from the above is that the common outside areas (i.e., the car park and the garden) must belong to one curtilage or alternatively must be obviously divisible.

Defining the pumping station

3.16 Section 219(1) of the Act also defines "accessories" as:

> ""accessories", in relation to a water main, sewer or other pipe, includes any manholes, ventilating shafts, inspection chambers, settling tanks, wash-out pipes, pumps, ferrules or stopcocks for the main, sewer or other pipe, or any machinery or other apparatus which is designed or adapted for use in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it, but does not include any [electronic communications apparatus] unless it-
>
> a is or is to be situated inside or in the close vicinity of the main, sewer or other pipe or inside or in the close vicinity of another accessory for it; and
> b is intended to be used only in connection with the use or maintenance of the main, sewer or other pipe or of another accessory for it.

3.17 Subsection 219(2) of the Act states that:

> "In the Act-
> a references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and
> b references to any sewage disposal works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes; and
> c accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another."

3.18 The pumping station on the Property, is therefore an accessory to the sewer or drain. If the pipe is not a sewer, then the pumping station will be an accessory to a drain and neither the drain nor the pumping station will be adoptable under section 102 of the Act. If the pipe is a sewer, then the pumping station will be an accessory to a sewer and both the pipe and the pumping station will be capable of being adopted under section 102 of the Act.

Legal context of automatic transfers under the 2011 Regulations

3.19 In addition to the above, section 105A of the Act, provides that the Secretary of State may by regulations, provide for schemes for the adoption by sewerage undertakers of sewers, lateral drains and sewage disposal works of the description set out in section 102(1) of the Act. The exclusion of drains that serve one building or several buildings within the same curtilage, set out in section 219 of the Act, also applies to regulations made under section 105A.

3.20 The compulsory adoption of private sewers was implemented in terms of schemes made by the Secretary of State and the Welsh Ministers under section 105A of the Act and under the 2011 Regulations. In essence, all private sewers and private lateral drains (other than certain exempt private sewers or lateral drains) transferred to the relevant sewerage undertaker on 1 October 2011. Private pumping stations (defined to include rising mains) transferred on or before 1 October 2016.

3.21 Defra issued 'Provisional non-statutory guidance on private sewers transfer regulations' in June 2011, which reiterated that the terms sewers and lateral drains are defined in section 219 of the Act. Full relevant excerpts are produced in Appendix 4.

3.22 Under section 105B of the Act, Ofwat had the power to hear appeals lodged by those affected by the compulsory transfer of private sewers under the schemes. The grounds for appeal were narrow and in summary were that the sewerage undertaker was not under a duty to transfer the relevant sewer and that the making of the transfer would result in serious detriment to the appellant. People affected by the proposed transfer had two months to lodge an appeal against a proposal to adopt, or three months to lodge an appeal against a failure to issue such a proposal.

3.23 All eligible sewers, lateral drains and pumping stations would have transferred automatically within the time periods set out above, unless those sewers, lateral drains or pumping stations were the subject of an appeal made under section 105B of the Act. In respect of the Property, if it comprises two curtilages, the sewer should have transferred automatically under the 2011 Regulations. If it did not transfer that could constitute a breach of a statutory duty, enforceable by the Secretary of State, rather than Ofwat (see section 105(7) of the Act).

4. The parties' submissions

The Complainant's submissions

4.1 The Complainant considers that the Property is two separate properties with two separate curtilages. He holds this view on the basis that:

- When the existing property at [redacted] was demolished and replaced with a semi-detached block of flats the new property was given the same Unique Property Reference Number ("UPRN") as the demolished property, instead of being given two new UPRNs, and was given the same street number as the demolished property, instead of being numbered [redacted] for 'Building 1' and [redacted] for 'Building 2'.
- The original planning application and a recent survey show there are no connecting doorways between the two buildings or shared services, with 'Building 1' and 'Building 2' being separated by a party wall. The existence of a party wall defines the Property as two separate buildings.
- The land around the Property, that is, the communal garden, parking area and driveway, constitute two separate curtilages. He considers that the "curtilage does not need to be marked off in any way. So, if we take the middle of the common wall between Buildings 1 and 2 as a starting point and project a line towards the front boundary and rearwards toward the rear boundary (back fence), that is the curtilage line dividing the buildings, even though it has not been marked in any way (other than by the common wall). The external boundaries of the site are what they were when the project was started around 2006 but effectively the old Fairholme curtilage was cut in half longitudinally and one building erected in each half".
- Although the freehold of the Property is owned by a single company, [redacted], the 14 flats within the two halves of the Property are owned by individual leaseholders and, in the Complainant's view, are 14 separate dwellings.

4.2 As he considers the Property to be two separate properties with two separate curtilages, the Complainant considers that the pipe is a private sewer that should have been adopted under the 2011 Regulations.

4.3 In support of his appeal under section 105 of the Act, the subject of this decision, the Complainant has provided Ofwat with a report by a building surveyor, [redacted] ("**the Surveyor**"), dated 1 July 2020 ("**the Report**"). The Report included a proposed site layout plan which showed that there is an

existing underground drainage pumping station and pumping station kiosk, both of which are currently maintained by [redacted], the freeholders of the Property. The plans show the kiosk containing the pumping station electricity meter to be inside 'Building 2'. The plans show that the pumping station lies under a hatch near the front of 'Building 1' and pumps effluent uphill to the foul sewer in [redacted] Road. The drains leaving 'Building 1' join the pipe at or before the pumping station and the drains from 'Building 2' join the pipe between the pumping station and car parking space 10. The pipe then extends to an inspection hatch in car parking space 14 and then to the Property boundary and to the main sewer in [redacted] Road. A reproduction of the site layout is given in Appendix 2.[6]

4.4 The Report notes that the Property is divided into two blocks separated by a cavity wall with seven flats in each block. The Surveyor noted that each block has a separate entrance, independent fire alarm system, separate electrical supply, separate intercom system and separate postal system.

4.5 In his Report, the Surveyor concluded that the Property is two separate buildings and is set within two separate curtilages. The Surveyor also considered that when applying a dictionary definition, the Property could also be described as one or two buildings (para. 5.2.3 of the Report). He went on to state that it could also be described as fourteen buildings, reflecting the total number of flats at the Property. The Surveyor also referred to the planning application and the site layout plan which refers to “Building 1” and “Building 2” in support of his conclusion that there are two buildings at the Property.

4.6 Finally, the Complainant considers that Yorkshire Water has not applied the definition of “sewer” and “drain” given by Water UK in their document 'Transfer of Private Sewers Regulations 2011 – General Principles to assist in applying the Regulations'[7].

Yorkshire Water's submissions

4.7 Yorkshire Water considers that the private sewer and pumping station serve a single curtilage, as shown on HM Land Registry. Therefore, they consider that the pipe is a drain, not a 'lateral drain' or 'sewer'. As, under section 219 of the Act, only 'sewers', 'lateral drains' and 'sewerage disposal works' can be adopted

[6] Yorkshire Water provided Ofwat with this copy of the plan and it is a clearer reproduction of the plan provided by the Complainant. We have compared it to the plan in the surveyor’s report and verified that it shows the same features.

[7] See: https://www.water.org.uk/wp-content/uploads/2019/03/Transfer-of-Private-Sewers-Regs-2011-Water-UK-template.pdf

under section 102 of the Act, Yorkshire Water refused the Complainant's request to adopt the pipe and the pumping station.

4.8 Yorkshire Water confirmed that it did not adopt, and the pipe and pumping station did not automatically transfer to it under the 2011 Regulations. This is beacuse the pipe is not a private sewer but a drain, which was not eligible for automatic transfer under the 2011 Regulations.

Requests for further submissions

4.9 On 12 March 2021, Ofwat wrote to the parties, inviting their views on the Weaver case. We explained that having reflected on the legal framework (as set out above in Chapter 3) we considered the Weaver case most applicable to the factual circumstances of this appeal. We also requested recent photographs of the Property and additional information regarding the layout of the drainage system and shared facilities at the Property.

4.10 Yorkshire Water responded in a letter dated 23 March 2021. It confirmed that a site visit was carried out in July 2019 and that it has not carried out any further site visits. It provided photographs of the Property, including the inside of the pump kiosk and the inspection hatch. It did not appear to have inspected the pump itself.

4.11 It noted the following features of the Property:

- several examples of inter-communication at the Property, including the relationship of all tenants with [redacted];
- the single driveway used by all tenants;
- the ability to access all site facilities without going onto the public highway;
- the communal nature of the garden;
- existence of a single comprehensive system of drainage; and
- with reference to the factors set out in the Weaver case: the structural unity of the Property and that the freehold of the Property has single ownership, namely [redacted], are both indicative of one building at the Property.

4.12 In an email on 27 April 2021, the Complainant responded stating he considers that:

> "the two buildings are within one parcel of land, nevertheless the fact that there are two buildings means that the number of buildings required to create a sewer have been met. I have the strongest feeling that the

land surrounding the two buildings is 'the planning unit x 2,' and not a 'curtilage x 2'. A curtilage is for the use of the owners/occupiers of 'one building only', unless other buildings like a garage or an outbuilding are appurtenant to the main or principal building. So if owners of 'Building 2' can exit that building, cross the parking court at will, walk down the pathway at the side of 'Building 1' at will and occupy the garden at will, it seems to me that that cannot be a curtilage. Some buildings do not have a curtilage and I believe at [redacted], that is the case."

4.13 The Complainant also provided photographs showing the outside layout of the Property (see Appendix 5). He confirmed that owners of flats in 'Building 2', other than the ground floor flat which has a patio door leading directly to the garden, must cross the car park and use the passageway to the side of 'Building 1' in order to access the shared garden. The Complainant also provided us with Google street map pictures dated August 2018 and we have viewed aerial photography dated 2021.

Responses to draft decision

4.14 Yorkshire Water confirmed in an email of 13 July 2021 that they had no comments on our draft decision.

4.15 The Complainant, in an email of 3 June 2021 sent prior to receiving our draft decision, stated that Yorkshire Water in making its decision had, in error, viewed out of date Land Registry entries. These entries showed the previous, now demolished building, at [redacted], and from this incorrect information had concluded that the building was detached, and therefore the pipe was a drain and not adoptable. The Complainant provided copies of more recent Mastermap imagery from Ordnance Survey which shows the new semi-detached building.

4.16 In an email of 21 June 2021, the Complainant noted that recent excavations at a new development next door to the property revealed a lateral drain which drains the 'bin store' and part of the parking forecourt. It leaves the boundary of the property and travels through the curtilage of the new development to enter the main sewer in [redacted] Road. He considers that Ofwat "will need to make sure that this lateral drain is adopted by Yorkshire Water".

4.17 The Complainant sent emails and letters by post between 22 June and 19 July 2021 and sent a summary letter to Ofwat's Chief Executive received on 7 July 2021. The issues raised are summarised below.

- The Complainant notes that in our draft decision the phrase 'a drain is used to drain one building within one curtilage or' is not correct since the

words 'within one curtilage' are not in the definition of drain. He considers that a building does not have to be in any curtilage. He states that the interpretation of 'building' is contained in the Building Act 1984 and the Building Regulations and that there is an interpretation of curtilage in Section 55 of the Town and Country Planning Act 1990.

- He notes that the Weaver case is from 1976 but that it is not clear whether the houses are semi-detached or terraced. He notes the first Building Regulations are from 1965/6 made under the Public Health Act 1961. The Regulations interpret a 'Separating Wall' which would clearly have shown the judge that any building with one or two separating walls was an adjoining building, therefore counting as one of the two buildings, required in the case of a sewer. He also considered that a separating wall should be interpreted as "any separating wall shall be imperforate and shall form a complete vertical separation between any buildings" and so the wall dividing the two buildings meets this definition.

- The Complainant provided information regarding the Fire Service Order in place at [redacted]. He noted that he 'Regulatory Reform (Fire Service) Order 2005' replaced most fire safety legislation with a single order, requiring any person with some level of control in a premises, to take reasonable steps to reduce the risk from fire and make sure people can safely escape if there is a fire. The Complainant states that, under this Order, each building within the Property is a 'relevant building' and this is relevant to Ofwat's consideration of this appeal.

- He reiterated his assertion that the Property has been given an incorrect UPRN and street number. He stated that he was informed on 29 May 2020 by an officer at Scarborough Council that the Property was given the same UPRN as the demolished building.

- He reiterated his assertion that Scarborough Council numbered the Property as Number 90, rather than Numbers 88 and 90 because they incorrectly considered that numbering buildings was dependent on the number of entrances from a building on to the road. The Complainant states that Number 88 was available for allocation and still is available.

- He considers that "the interpretation of 'sewer' does not require that any pipes draining buildings need to be within the same or any curtilaqe. His view is that all that is required by the Building Act of 1984 and the Act is that more than one building or yard is drained by the 'sewer.' He also considers that while section 219 of the Act interprets 'drain,' and 'sewer' and 'lateral drain', the Building Act 1984 defines 'building'. He also

considers that as the Building Regulations state that "separating wall means a wall or part of a wall which is common to two adjoining buildings", the existence of a party wall at the Property, alone, leads to a conclusion that the Property is two separate buildings and therefore the pipe is a sewer.

- He recognises that the Property is within a larger parcel of land but since neither building is appurtenant to the other, they cannot be in the same curtilage. This is because he considers that "in a curtilage there can only be one entity and this is the main/principal building".

- The Complainant does not consider that the existence of separate curtilages is the defining feature of a sewer, rather the existence of two separate buildings defines the pipe as a sewer.

5. Our final decision

5.1 We set out our final decision in this chapter. It has been informed by the legal framework, as set out in Chapter 3, and the evidence provided to us by both parties.

5.2 The issue underpinning this appeal is a dispute between the parties as to whether the pipe and accessories are adoptable under section 102 the Act. As set out above, section 102 of the Act provides that only a 'sewer', 'lateral drain' and 'sewerage disposal works' can be adopted under that provision. Section 102 of the Act must be read together with section 219(1) of the Act, which expressly excludes drains which are used for the drainage of "one building or of any buildings or yards appurtenant to buildings within the same curtilage" from the definition of sewer. The Complainant considers that Ofwat should look to legislation, other than the Act, when considering issues such as 'curtilage' and 'building'. However, as set out above these issues must be interpreted in their statutory context, which is set out in section 3 above. Furthermore, as explained above, the caselaw also indicates that whether a property is one or two buildings, or within one or more curtilages, are questions of fact for Ofwat.

5.3 Our starting point, therefore, is the definition of ‘drain’. If the pipe is not a drain or a lateral drain, it will be a sewer and capable of being adopted. If it is a drain it will not be capable of being adopted.

5.4 In this case we are dealing with a single structure divided by a wall into two semi-detached buildings. If we decide it is one building, then the pipe will be a drain. If we decide that it could be, or is, two buildings, there is a further question and that is whether the buildings are within the same curtilage. We also must consider the adjacent land (car park and garden). If there are two curtilages the question is whether the common areas are divisible between the two curtilages or whether they attach to only one of those curtilages.

5.5 We reviewed the photographs provided by the Complainant in support of his appeal. We note that they show that there is a continuous metal and glass barrier along the front of the Property. We note that the communal garden is not sub-divided and is for the use of occupants of all flats and that exterior access to the communal garden from the front of the Property is through a passage and ramp along the side of 'Building 1'. The photographs also show no exterior access to the garden from the front of 'Building 2' except through this passage and ramp. We note from the photographs that there appears to be no exterior access to the garden from the rear of 'Building 2' except for the occupants of the

ground floor flat. We also note the single shared driveway used by occupants of all fourteen flats.

5.6 Our conclusion from the above is that the common outside areas (i.e., the car park and the garden) must belong to one curtilage or alternatively must be obviously divisible.

5.7 We investigated the allocation of the UPRN and street number given to the Property after its redevelopment and found it to be correct. We contacted GeoPlace, the company that maintains the National Gazetteer, and they confirmed that the UPRN of the demolished property was [redacted] and the UPRN of the new property is [redacted]. The 14 flats within the parent property then have UPRN [redacted] (Flat 1) to UPRN [redacted] (Flat 15, there is no Flat 13). We contacted Scarborough Borough Council and, in an email dated 3 February 2021, the Council confirmed that an address was allocated to the Property in line with the Council's established practice at that time and the Town Improvement Clauses Act 1847. The procedure is set out in Street Naming and Numbering (SNN) Policy.

5.8 The developer of a new property can request the number or name, or the council will assign it. Properties are only renumbered in exceptional circumstances and so it is correct that number 90 was re-used. However, a semi-detached building could be numbered 90A and 90B if requested. It is not known whether the developer requested the current numbering or whether it was assigned.

5.9 In forming our view on whether the Property is one or more buildings, we have considered the following:

- street number and UPRN of the Property;
- ownership of the flats by independent leaseholders and common ownership of the freehold;
- both blocks of flats were built during the same redevelopment of the site, with common gardens, access, bin store and car park;
- the apparent similar design of the two blocks of flats;
- the division between two parts of the structure, with a party wall extending above the roof line and separate entrances;
- the independent entrances to the two buildings;
- the independent fire alarm systems, electrical supplies, intercom systems and postal systems;
- the structure appears to have a comprehensive system of drainage;
- access between the two blocks of flats without use of the public street;
- the shared driveway used by residents of all fourteen flats; and
- the communal nature of the garden.

5.10 We investigated possible errors in the allocation of a street number and UPRN to the redeveloped property, finding them to be correct. The Complainant has disputed whether the UPRN and street number were allocated correctly. Neither street number nor UPRN determine the type of building present and are not considered further.

5.11 We considered whether facilities are shared by both blocks. In Weaver the Court identified facilities peculiar to each house as a potential criteria for determining that a structure was more than one building. The Property has some facilities peculiar to each building, including independent entrances, fire alarm system, postal system and electrical supply. The Property also has some facilities that are shared, including the driveway, bin store and pumping station kiosk. This could give weight to the Property being either one or two buildings.

5.12 We considered the division between the two parts of the structure by a party wall. The case of Humphery gave weight to the presence of a dividing wall in finding that two semi-detached houses were two separate buildings and not in the same curtilage. This supports the argument that the Property is two buildings. We considered whether one block of flats is appurtenant to the other. Although 'Building 2' contains the electricity kiosk for the underground pump, there is no indication that one block of flats is accessory to the other.

5.13 We considered the redevelopment of the whole site into two blocks of flats with surrounding grounds. In Pilbrow a development of 46 apartments into two blocks was found to be one curtilage because the yard within the boundary walls enclosing the premises was meant to be used by everyone occupying the apartments. That is the situation at this Property and gives weight to the argument that the Property is one building.

5.14 We considered the ownership of the flats. The cases of Weaver and Cook both considered common ownership to be indicative of properties being in a single curtilage. In Cook the court gave weight to cottages being in common ownership, let to separate tenants. The freehold of this Property is in common ownership but with fourteen leaseholders. This gives weight to the Property being one building.

5.15 We considered the communal nature of the garden, shared access to the garden and absence of any sub-division of the garden. The cases of Humphery and Cook both considered a fence or barrier separating the gardens gave weight to there being two separate buildings in two separate curtilages. This supports the argument that the Property is one building.

5.16 We considered how access is gained between the two blocks of flats. Entry can be gained to both blocks of flats without going out onto the public street. In Weaver the Court considered access via a public street a "decisive factor" in determining the existence of two separate curtilages. This supports the argument that the Property is one building.

5.17 We considered the comprehensive system of drainage. In Weaver the Court identified the existence of a comprehensive system of drainage as one of the potential criteria for determining that a structure was one building. This supports the argument that the Property is one building.

5.18 Taking all the above into account, we have provisionally concluded that the Property consists of one building.

5.19 Even if it can be argued that the Property is two buildings, as the Complainant does, we consider that the Property is in one curtilage. We have given weight to the factors set out in the Weaver case as that case concerned the definition of "building" within the drainage context. We note as mentioned above that in Weaver the decisive factor was that in order to get from one building to another it was necessary to go out into the public street, which is not the case at this Property. Furthermore, in Weaver the court did not consider a party wall separating the buildings to be a defining feature of separate curtilages.

5.20 We have also given weight to the outside areas being common to both blocks of flats. There is no evidence that the outside areas of the Property are divisible between the two blocks. As one piece of land cannot attach to two curtilages, we consider that this is indicative of the Property being a single curtilage.

5.21 Given our view set out above, it follows that the pipe is a drain within the meaning of section 219 of the Act and is not adoptable under section 102 of the Act.

Conclusion

5.22 Considering our findings above, we conclude that the pipe is not a sewer and accordingly was not capable of being adopted under section 102 of the Act. We therefore uphold Yorkshire Water's decision to refuse the request for the pipe to be adopted.

5.23 We also consider that contrary to the Complainant's assertion in paragraph 4.16 above, Ofwat is not responsible for arranging for the adoption of certain pipes. As set out above, this is provided for in section 102 of the Act. This matter falls outside the scope of this appeal and is addressed for completeness.

Appendix 1 – Summary of legal provisions

Factors an undertaker must consider when making a declaration:

Under section 102(4) a sewerage undertaker which proposes to make a declaration under this section is required to give notice to the owner and under section 102(5) is required to have regard to all the circumstances of the case and, in particular, to the following considerations, that is to say:

a. whether the sewer or works in question is or are adapted to, or required for, any general system of sewerage or sewage disposal which the undertaker has provided, or proposes to provide, for the whole or any part of its area;
b. whether the sewer is constructed under a highway or under land reserved by a planning scheme for a street;
c. the number of buildings which the sewer is intended to serve, and whether, regard being had to the proximity of other buildings or the prospect of future development, it is likely to be required to serve additional buildings;
d. the method of construction and state of repair of the sewer or works; and
e. in a case where an owner objects, whether the making of the proposed declaration would be seriously detrimental to him.

Appealing a sewerage undertaker's refusal to adopt:

Under section 105(1) of the Act, an owner of any sewer lateral drain or sewage disposal works may appeal to Ofwat if:

a. he is aggrieved by the proposal of a sewerage undertaker to make a declaration under section 102 above; or
b. he is aggrieved by the refusal of a sewerage undertaker to make such a declaration.

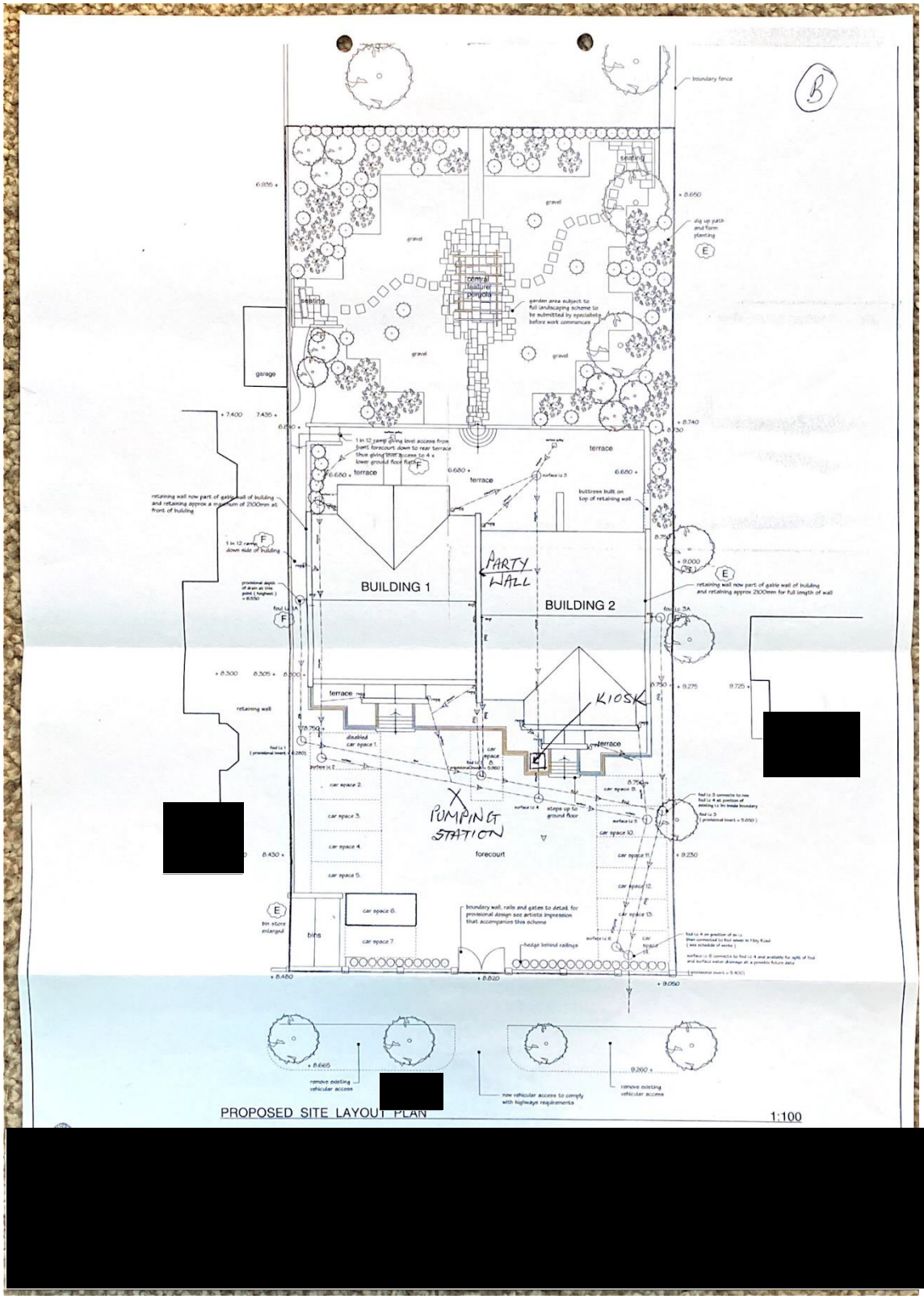
Under Section 105(4)(b) of the Act, when hearing an appeal made under section 105 of the Act, Ofwat may uphold the refusal of the undertaker to grant the application or to modify the terms offered; or on behalf of the undertaker, refuse the application or enter into any agreement into which the undertaker might have entered on the application.

Section 105(6) of the Act provides that in making an agreement under subsection 105(4)(b) on behalf of a sewerage undertaker, Ofwat may do so on such terms as we consider reasonable or, as the case may be, on the terms offered by the undertaker

subject to such modifications as we consider appropriate for ensuring that the terms of the agreement are reasonable.

Section 105(7) of the Act provides that in deciding an appeal Ofwat must have regard to the considerations specified in section 102(5) of the Act. These include the number of buildings which the sewer is intended to serve, and whether, regard being had to the proximity of other buildings or the prospect of future development, it is likely to be required to serve additional buildings.

[redacted]



[redacted]

Appendix 3 – Extracts from the Weaver case

The physical context of the property under consideration in the Weaver case was described by Lord Simon at p.257-8:

"It concerns a terrace of houses in St Martin's Lane, York, which runs into the south side of the famous street, Micklegate. They were built in 1869 to the order of a Mr Manstead on the boundary of his property, the plans being passed by the local Board of Health. The houses he built are now numbered (from north to south) 1, 2, 2a, 3, 4, 5, 6, and 7. No 1 is in the angle of St Martin's Lane and Micklegate. It is separated by a courtyard from No 2. The houses were at some time after their construction let to tenants; though what are now Nos 2 and 2a were apparently in 1958 occupied together as an hotel, but are now again divided into two dwelling-houses. Nos 3 to 7 (which are smaller than Nos 2 and 2a) have been at all times occupied as separate dwelling-houses; they were, however, until 1951 in common ownership, which in 1936 passed to Samuel Smith's Old Brewery (Tadcaster) Ltd ("Smiths"). One continuous slate roof covers the whole range from No 2 to No 7, without gables except at the north face of No 2 and the south face of No 7. The bonding of the external brickwork of the whole range from No 2 to No 7 is continuous. […]

The drainage system remains as it was originally constructed. The drainage of Nos 2 and 2a empties northwards into the public sewer under Micklegate, probably via the drainage system of No 1. The drainage system of No 3 empties southwards into a junction with the drainage system of No 4 under the latter premises; the combined effluent of Nos 3 and 4 empties southwards to a junction with the drainage system of No 5 under these last premises; and the combined effluent of Nos 3, 4 and 5 empties southwards to a junction with the drainage system of No 6 in the back yard of No 6. The drainage system of No 7 empties northwards to the same junction in the back yard of No 6. From this junction in the back yard of No 6 a six-inch pipe carries the sewage effluent of the whole of the part of the range from Nos 3 to 7 to the north terminal (opposite the boundaries of Nos 6 and 7) or the public sewer which runs under the southerly part of St Martin's Lane to empty into a larger public sewer further to the south. There is an interceptor trap in the cellar of No 6 – presumably to obviate any danger of back-flow of sewage from the public sewer in St Martin's Lane or of effluvia from it."

Lord Simon stated (regarding curtilage) at p.262:

"I think that "curtilage" in the definition is used in the sense of "enclosure" or "land within an enclosure". Here again there will be extreme cases where as a matter of law the evidence points decisively to the premises being or not being within the same

curtilage – a matter of law because there is no sufficient evidence to the contrary. One such case was Harris v Scurfield.

The learned county court judge, however, in the instant case, decide as a matter of fact and not of law that these houses were not premises within the same curtilage. The Court of Appeal also treated it as a question of fact. No doubt the land on which the houses were built in 1869 could have been said to have been within the same curtilage as the rest of Mr Manstead's property. But with the building of the houses an entirely new situation was created. The decisive factor thenceforward was that in order to get from one of these houses to any of the others it was necessary to go out into the public street. I respectfully agree with the Court of Appeal that it is impossible to say that the judge was wrong in reaching the conclusion that he did on this point."

Lord Russell stated at pp.263-4:

"It was contended in the last resort… that in respect of drainage from No 7 reliance could not be placed on a statutory right to drain into a sewer because the pipe from No 7 to the junction box under the backyard of no 6 was not part of the sewer – a point in itself of some uncertainty on authority – and that accordingly, insofar as that pipe traversed the premises of No 6 for a few feet to that junction box, its user must be a matter of private right only."

Appendix 4 – Extract from Defra's 'Provisional non-statutory guidance on private sewers transfer regulations (June 2011)[8]'

In June 2011, Defra issued "The private sewers transfer regulations Provisional non-statutory guidance in private sewers transfer regulations". Section A, point 13 on page 8 of that guidance, under the section 'What assets will be transferred?' states that:

"Curtilage"

13. The law makes use of the term curtilage but does not lay down an exact definition or mechanism by which to define the 'curtilage' of a property. During the Consultation […] on these regulations the majority of respondents agreed that for the purposes of transfer, it was not practicable to define curtilage in these regulations. […]

(ii) Identifying the curtilage – single properties

15. For the purposes of transfer, one practical basis for establishing the limits of the curtilage of a property may well be the land within the boundary of that property. While the best evidence of this area and its boundary will often be the legal boundary, this is not invariably the case. What is attributable to the curtilage of a property may not necessarily reflect ownership. When doubt arises it will be necessary to establish the extent of the curtilage in individual cases […].

17. Where there are disputes about the curtilage and whether it relates to the legal boundaries of a property, any determination will continue to rest with the courts or the Upper Tribunal (Lands Chamber), which is the successor to the Lands Tribunal. The resolution of appeals about whether particular sewers or lateral drains should have been the subject of a notification by a sewerage undertaker of intent to transfer (vest) them will rest with Ofwat.

(iii) Identifying the curtilage - Multiple property sites

18. A single curtilage may contain a number of individual properties under common ownership (such as a shopping mall) or with separate lease or other arrangements (such as some commercial estates) but which have common drainage arrangements by virtue, for example, of the site's freehold management. Such sites should be regarded

[8] Provisional non-statutory guidance on private sewers transfer regulations (June 2011)

as having their own internally managed drainage which would not be regarded as private sewers for transfer since the site itself comprises a single curtilage.

19. This means that for sites in common ownership the lateral drains will be adopted up to the curtilage of that site, but that the drains within the curtilage would continue to be the responsibility of the site owner. […]

22. Where a development comprises a number of blocks of residential apartments, each block should be regarded as having a curtilage (comprising the land immediately surrounding and obviously attributable to an individual block). A practical point up to which a sewerage undertaker may wish to take responsibility for blockage clearance would need to be determined in individual cases but might comprise an access chamber outside the building but not within the highway or in third party land. Flat owners should not remain responsible for sewers which lie beneath streets. Equally the [Water and Sewerage Company] would not become responsible for the internal, communal drainage arrangements within the building. See diagram below."

[redacted]

Figure 1 – Photograph of the Property supplied by Yorkshire Water

Figure 2 – Google street view image of the Property supplied by [redacted]

Ofwat (The Water Services Regulation Authority) is a non-ministerial government department. We regulate the water sector in England and Wales.

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