

Code for Adoption Agreements

Sewerage sector documents: Change proposal (Ref 008)

Modification proposal	Model Sewerage Adoption Agreement: Changes to occupancy and Surety requirements for land promoters
Independent Sewerage Adoption Panel Recommendation	The Panel recommended rejecting the change proposal
Decision	Ofwat has rejected this change proposal
Publication date	16/05/2022
Implementation date	Not Applicable

Background

L&Q Estates (**L&Q**), a land promoter, submitted this change proposal on 5 November 2021 to the Independent Sewerage Adoption Panel (**the Panel**), with the Panel publishing the proposal on its website on the same day. The function of the Panel is to consider change proposals to the [sewerage sector guidance and model sewerage adoption agreement](#) which apply to companies operating wholly or mainly in England. These documents were developed by companies as required by the [Code for Adoption Agreements \(the Code\)](#) and came into effect in April 2020. A change proposal is defined in the Code as a proposed change to the sector guidance or the model adoption agreements.

Land promoters and master developers are organisations that facilitate the building of new properties by other developers. L&Q has set out that they do not construct houses, but instead divide land into discrete development plots which are then serviced with primary infrastructure such as sewerage infrastructure. These plots are then sold to housing developers under a model known as the "Serviced Site Model".

L&Q has proposed two changes be made to the Model Sewerage Adoption Agreement (**the Model Agreement**):

1. The first proposed change is to relax the current requirement in clause 8.2.2 that 'a wastewater company will not adopt the relevant wastewater infrastructure until the majority of the properties intended to be served by the wastewater infrastructure have been occupied' if the customer is a land promotor or master developer.
2. The second proposed change is to remove the requirement for a surety to be party to the agreement (and likewise the requirement for a deposited sum in lieu of a surety) for land promotors and master developers meeting a predetermined acceptance criterion.

The change proposal

L&Q has requested a change be made to clause 8 of the Model Agreement, which it considers places an unreasonable requirement on land promotors and/or master developers. Clause 8.2 currently states:

- “S.8.2 The Works shall be deemed completed when:
- S.8.2.1 they have been substantially constructed in accordance with this Agreement; and
- S.8.2.2 a majority of the premises within the Green Land and intended to be served by the Works are occupied; and”

As per the above clause, if a land promoter constructs all the sewerage infrastructure for a site, it will retain ownership of these assets until the majority of the properties on the site are constructed and occupied. During this time, it would be responsible for maintenance and responding to emergency situations relating to the sewerage assets, which L&Q considers land promotors may not be well equipped or resourced to carry out. L&Q considers that this may be a significant health and safety concern for residents who occupy the new development before the adoption of the wastewater assets occurs, who are reliant on the land promotor to maintain their sewerage infrastructure. L&Q also considers it may drive up the cost of housing.

L&Q also considers this issue encourages land promotors to enter into numerous adoption agreements each of which covers part of a development site rather than a single agreement covering a whole site. This approach allows for the adoption of sewerage infrastructure on parts of a wider development site as and when those parts reach more than 50% occupancy¹. L&Q notes, however, that this increases administrative costs, as well as costs associated with site inspections and technical approval processes, when compared to a single agreement covering an entire site.

¹ Appendix B (Procedures) of the SSG sets out the requirement for a site to meet 51% occupancy.

L&Q has also requested that, where the customer is a land promoter or master developer, the requirement within the Model Agreement for a surety to be party to the agreement as set out in clause S.17.1 should not be applied. L&Q considers that the risk of such parties becoming insolvent is negligible and, therefore, the financial risk to the wastewater companies that justifies the requirement for a surety has not been evidenced. L&Q considers that this increases its costs unnecessarily and, therefore, increases the costs of housing. We understand these concerns also apply to the requirement for a deposited sum in lieu of a surety.

Consultation and assessment

In submitting its recommendation, the Panel confirmed that it met the Code requirement² to assess the change in terms of:

- The need for change, for example, is it a service improvement or is it needed to address a particular issue?
- Consistency with the principles and objectives of the Code, and any relevant statutory requirements; and
- The impact of the change (be it positive and/or negative) on customers and on sewerage companies.

In considering the change proposal, the Panel has:

- discussed the proposal at two meetings;
- heard from L&Q, who attended a Panel meeting on 17 December 2021;
- consulted with water and sewerage companies on the proposal and considered their feedback, which was provided by six of those companies; and
- consulted with the Land Promoters and Developers Federation (**LPDF**) on the proposal and considered their feedback.

Panel recommendation

On 4 February 2022, the Panel recommended to Ofwat, by unanimous decision, that the proposed change should be rejected. The Panel stated that it considered the following factors relating to both of L&Q's proposals:

- Land promoters are usually involved in very large development sites and the Panel noted that the Code regime is generally more aligned with traditional housing sites & developments. However, notwithstanding that land promoters are not specifically defined in the Code documentation, there is potentially crossover between the activities of land promoters and developers in any case; and

² See paragraph 3.8.11 of the Code.

- There is also a risk that introducing changes to the Code for land promoters only could discriminate against other customers; whereas the current mechanisms under the Sewerage Sector Guidance (**SSG**) and [Charging Rules for New Connection Services \(English Undertakers\) \(Charging Rules\)](#), for companies operating wholly or mainly in England, are applicable to all customers.

The Panel stated that it considered the following factors relating to the proposal on the occupancy requirement:

- Occupancy requirements are set out in the current version of the Model Agreement. However, section 5 of the SSG states that while undertakers must use the Model Agreement, it can be amended by agreement with the customer. Further, section 2.3 of the SSG permits undertakers and customers to deviate from its procedures by written agreement.
- There is, therefore, already scope within the SSG to vary the Model Agreement – including occupancy requirements – provided that this is negotiated and agreed in writing between the parties to the agreement, which in this case would be between the water and wastewater company and the land promoter or master developer.
- It would also be possible for land promoters to enter into separate commercial agreements (i.e. outside of the Model Agreement) with wastewater companies regarding asset maintenance.

The Panel stated that it considered the following factors relating to the proposal on the Surety requirement:

- Bonding requirements are not contained in the Code documentation but are in fact part of undertakers' charging arrangements and are provided for in Ofwat's Charging Rules for New Connection Services (English Undertakers). Therefore, it is already open for wastewater companies to vary or waive their bonding requirements in individual cases and based on their assessment of risk in particular schemes.
- Following market opening in the water industry, for particular sites, it is open for land promoters to approach NAVs or other undertakers who do not require bonds.

The Panel considers that its recommendation is consistent with the Code principles and the remit of the Panel, having considered the likely impact and scale of the change proposed.

Our decision and reasons

We have considered the above issues, and all the supporting documentation provided to us by the Panel, and have decided to reject the change proposal. In making our decision, we have factored in the Code definitions for "Customer", "Developer" and "Development", which capture land promoters and their activities.

In terms of the occupancy requirement, in the responses to the Panel's consultation, several wastewater companies raised specific concerns over the proposal to remove the requirement for the majority of properties to be occupied before the sewerage infrastructure can be adopted. They pointed out that there needs to be a reasonable level of flow in the system to assess whether the sewer system is working as intended and, therefore, whether it is suitable for adoption. Additionally, where there are fewer properties connected to the sewerage infrastructure than it is designed for over a prolonged period, the low flows in the system can cause blockages and odour issues. We, therefore, consider there to be benefits of the default position of the Model Agreement requiring the customer to achieve over 50% occupancy of the development in order for the assets to be adopted.

In terms of the surety requirement, we do not share the Panel's view that water and sewerage companies' ability to require a 'bond' (such as a deposited sum or surety) when entering adoption agreements is not covered by the Code documentation: this aspect is reflected in both the Model Agreement and Ofwat's Charging Rules, and so may be considered under either framework. We note that, in accordance with paragraph 5.1.2 of the Code, parties can deviate from the Model Agreement by written agreement where the deviation is justified under the principles of the Code. As such, if the parties agree that the standard clauses set out in the Model Agreement are not suitable for a particular development, these can be changed.

One wastewater company also noted that it was aware of at least one instance of a land promoter becoming insolvent during a development. As a result, we consider that there is a real risk of such issues occurring. The removal of any requirement for a surety from developments involving land promoters and master developers would transfer this risk onto the customer base of the wastewater companies. We do not see a reason why customers should face this risk as a default position.

We are also aware that developers that are not master developers or land promoters can, and will, structure larger developments such that they are phased. This allows for adoption of parts of the larger development to occur once the various phases are completed and occupied. As a result, it is not just land promoters and master developers that face additional costs associated with having multiple adoption agreements that each apply to parts of a larger development. As such, we do not consider that the removal of this requirement for land promoters and master developers would provide a level playing field between all types of customers. As L&Q has set out in its change proposal, such changes to the adoption criteria can have a financial impact on the customer. We do not consider that either of the proposed changes would meet the Code principle of having a level playing field as they would result in different adoption criteria being applied depending on the type of customer that is requesting the adoption.

Overall, we do not consider that the potential benefits of the proposed changes are sufficient to justify the proposed change to the Code. We consider that there is a benefit to having both

a requirement that encourages development sites to achieve more than 50% occupancy and having a surety in place as the default position of the Model Agreement. Where there are reasonable justifications for allowing adoption before half of the properties are occupied, or for a surety not to be required, this can be negotiated between the parties.

Decision notice

In accordance with paragraph 3.9.4 of the Code Ofwat rejects this Change Proposal

Emily Bulman
Director, Markets and Charging