

December 2023

Final determination about whether the King Edward VII Memorial Hospital Estate is in South East Water's area of appointment

Ofwat

About this document

This document sets out our final determination of whether the King Edward VII Memorial Hospital Estate falls within South East Water Limited's (**South East Water**) area of appointment.

Executive summary

This document sets out our final determination of whether the King Edward VII Memorial Hospital Estate (**the Site**) falls within South East Water's area of appointment.

The determination request was referred to us on 23 May 2023 by South East Water. It listed as interested parties, Southern Water and King Edward VII Estates Limited (**King Edward Estates**), the registered freehold proprietor of large parts of the Site. We subsequently received initial views on South East Water's application from both interested parties.

On 15 September 2023 we issued a draft determination and received representations on the draft determination from the three parties. None of the representations took issue with the legal basis for our draft determination or our conclusion. Instead, they raised concerns about some of the factual assertions set out in the draft determination.

Our final determination confirms our draft determination that the Site falls within South East Water's area of appointment (its Water Supply Area). In summary, our reasons for this conclusion are:

- The Water Industry Act 1991 (**the Act**) provides that there must be a water and/or sewerage company (an undertaker) for every area in England and Wales.
- When the water and sewerage industry was privatised in 1989, the areas of undertakers were fixed, with the Site falling within the area of appointment of South East Water.
- An undertaker may only cease to be an undertaker for a particular area if a replacement undertaker is appointed for that area.
- The Act provides the circumstances in which a replacement undertaker can be appointed and prescribes the process that must be followed for making such a replacement.
- There has been no application brought to vary South East Water's area of appointment to exclude the Site and, accordingly, the Site remains within its area of appointment.

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1. Introduction

- 1.1 The Water Services Regulation Authority (**Ofwat**) is the regulator for the water and sewerage sector in England and Wales. It regulates water and sewerage undertakers and, amongst other things, has various dispute resolution functions set out in the Act and in undertakers' Instruments of Appointment.
- 1.2 Water and sewerage undertakers in England and Wales operate under an Instrument of Appointment, which is subject to conditions. Undertakers are appointed under section 6 of the Act and the conditions which attach to those appointments are made under section 11 of the Act. Section 12(2) of the Act provides that appointment conditions may:

"...provide for the reference to and determination by...the Authority...of such questions arising under the appointment...as are specified in the appointment or are of a description so specified."
- 1.3 The issue that we are asked to determine falls within our jurisdiction by virtue of paragraph 5 of Condition A of the Instrument of Appointment of South East Water Limited (**South East Water**), read with section 12 of the Act.

A. The determination request

- 1.4 On 23 May 2023, South East Water submitted a determination request to Ofwat under paragraph 5 of Condition A of its Instrument of Appointment. That paragraph provides that:

"...the Appointee may refer to Ofwat for determination by it (having considered any representations by the Appointee and any other water undertaker) any question arising as to whether any area, island, premises or installation is, or, as the case may be, are, comprised within the Area [for which the Appointee holds the Appointment]."
- 1.5 The determination request from South East Water asked Ofwat to determine that the Site is no longer premises comprised within the area for which South East Water holds the appointment as water undertaker.
- 1.6 South East Water also asked that if Ofwat determines the Site falls within its Area of Appointment, it should also issue a declarator that:

- a. South East Water has no statutory duty to supply new domestic dwellings or premises on the Site unless, and until, King Edward Estates pursues a requisition under section 41 of the Act¹; and/or
- b. South East Water is entitled to levy a charge pursuant to section 146 of the Act², which can be inclusive of off-site water mains reinforcement costs upon the basis that the postcode areas consisting of the Site are not included within South East Water's regulated area for which future development has been anticipated.

1.7 In its determination request, South East Water also identified Southern Water and King Edward Estates as interested parties.

B. The Site

Location

- 1.8 The Site is located in Midhurst, West Sussex and comprises a parcel of land which contains a principal building, constructed between 1903 and 1906, that was formerly a hospital, and ancillary buildings, gardens, and grounds.
- 1.9 In South East Water's appointment, the Site is described as 'King Edward VII Hospital, Midhurst Road, Midhurst, Sussex. It is included in Part 1 of the Appendix to Schedule 1 to South East Water's appointment as an additional premises and installation outside the boundary of the Water Supply Area Map but comprised in the Water Supply Area. There is a corresponding grid reference for the Site of "SU88832643".
- 1.10 In Southern Water's appointment, the Site is also described as 'King Edward VII Hospital, Midhurst Road, Midhurst, Sussex. It is included in Part 2 of the Appendix to Schedule 1 to Southern Water's appointment as a premise and installation inside the boundary of the Water Supply Area Map but not comprised in the Water Supply Area. The corresponding grid reference is the same as that in South East Water's appointment, "SU88832643".
- 1.11 Accordingly, in 1989, when South East Water and Southern Water were appointed as water undertakers, the Site fell within South East Water's Water Supply Area notwithstanding that the Site was within the area covered by Southern Water's Water Supply Area Map.

¹ This is referring to the requisition of a new water main.

² This section of the Act refers to connection charges.

History

1.12 Historically we understand there have been three supplies to the Site:

- a. At the time of South East Water's appointment in 1989, South East Water supplied water to the Site via a public main located some 2km to the north of the Site. The Site pumped water via a private main to a private reservoir in the grounds of the Site. South East Water continues to provide this supply.
- b. Southern Water has confirmed that the former hospital had the benefit of one small domestic supply from its network, which was installed at some point in the last 30-40 years and originally fed a separate rehabilitation outbuilding on the hospital grounds. Southern Water considers this connection was installed pre-privatisation³ but it is now inactive and Southern Water has plans to disconnect it.
- c. A private abstraction licence on-site. South East Water has set out that the Site was initially served by natural springs, and the former hospital held an abstraction licence for that purpose. South East Water considers the Site drew water from those natural springs until around 1996⁴.

1.13 The hospital closed in 2006 and the Site has since been redeveloped into residential apartments and houses. The redevelopment commenced around 2015 and, as of 2021, there were 253 domestic properties on the Site⁵.

Current status

1.14 Currently, King Edward Estates supplies water to the occupiers of the residential units on the Site as a private supplier, taking a bulk metered supply of water from South East Water. South East Water provides this supply via its main to a tank and booster owned by King Edward Estates which then pumps water into a private reservoir on the Site. The supply to the Site is then gravity fed utilising the head available from the reservoir. A valve controls the delivery of the water supply from South East Water's network to the Site's tank.

³ Southern Water to Ofwat, 8 November 2021

⁴ Dynamco report on KEVII Hospital Future Development, 17 October 2003

⁵ South East Water slide pack, 13 August 2021

C. The view of the parties

1.15 Each of the parties' views are set out below.

South East Water

1.16 In its application, South East water set out that it considers it is no longer under a statutory duty to supply water to the Site. It considers that it was obliged to supply the hospital but is not obliged to supply the Site. Its reasoning was that the hospital was listed as 'an additional premises' and the estate constitutes new premises located in the area for which Southern Water is appointed as water undertaker.

Southern Water

1.17 In its response to the application, Southern Water said that it considers the Site to form part of South East Water's Water Supply Area and that a change in the premises and installations within South East Water's Water Supply Area cannot of itself change the meaning of the relevant statutory provisions, or the provisions in South East Water's instrument of appointment and Southern Water's instrument of appointment. Southern Water also states that it considers there to be no basis to imply a term or terms in the instrument of appointment the effect of which would be to transfer the Site to Southern Water.

King Edward Estates

1.18 In its response to the application, King Edward Estates said that it considers the Site to form part of South East Water's Water Supply Area and agrees with Southern Water's submissions. King Edward Estates also considers the boundaries of the Site now should be determined as the boundaries of the Site set out in the conveyance dated 3 February 1904 made between (1) The Right Honourable Augustus Arthur Earl of Egmont and (2) The Right Honourable Reginald Balihull Viscount Esher and others, such land being described as "freehold land at Lords Common, Easebourne in the County of Sussex as a site for a Sanitarium".

D. Our investigation

1.19 Having received the determination request from South East Water, we conducted a preliminary assessment to determine whether we had the necessary legal powers to make a determination and whether it was appropriate for Ofwat to handle the request. On 6 July 2023, we confirmed to the three interested parties that we considered we had jurisdiction to determine whether the Site falls within South East Water's area of appointment and it would be appropriate for us to open a formal investigation.

- 1.20 Having opened a formal investigation, on 11 July 2023 South East Water provided us with further supporting information. We subsequently shared this supporting information with King Edward Estates and Southern Water.
- 1.21 On 14 July 2023, King Edward Estates wrote to Ofwat to question the scope of our jurisdiction to determine all the issues referred by South East Water in its determination request. On 17 July 2023, we confirmed to King Edward Estates that our provisional conclusion on jurisdiction only related to the request that we make a determination of South East Water's area of appointment and did not relate to the issues on which it requested a declarator (see paragraph 1.6 above). On 24 July 2023, we confirmed the same to South East Water and Southern Water.
- 1.22 On 2 August 2023, King Edward Estates wrote to Ofwat to seek confirmation that we had also provided Southern Water with the determination request and underlying documents, and to ask us to confirm the extent of our jurisdiction.
- 1.23 We responded on 7 August 2023, confirming that both Southern Water and King Edward Estates had been provided with all relevant documents. We also said that we had confirmed to Southern Water and King Edward Estates that we consider we have jurisdiction, under paragraph 5 of Condition A of South East Water's appointment, to determine whether the Site falls within South East Water's area of appointment. We also confirmed in that letter that the determination would only look at the issue of whether or not the Site falls within South East Water's area of appointment, and that it would not look at the supplementary request for declarators (see paragraph 1.6) as to South East Water's duty to supply and right to charge if the Site is determined to be within its area of appointment. We made it clear that declarators in the form requested by South East Water, would be of no force or effect.
- 1.24 On 8 August 2023, South East Water provided an additional supporting document. This document was shared with the other parties.
- 1.25 On 17 August 2023, Southern Water submitted representations on the determination request, and, on 24 August 2023, King Edward Estates also submitted representations via its solicitors. On 25 August 2023, King Edward Estates submitted additional legal materials referred to in its representations.
- 1.26 On 15 September 2023, we issued our draft determination to the parties. South East Water and Southern Water responded on 13 October 2023, whereas King Edward Estates requested and was granted a short extension, and it provided its response on 18 October 2023.

2. Legal framework

2.1 The relevant legal framework is set out below.

A. The Act

2.2 Section 7 of the Act provides for the continuity of appointments and replacement appointments. Section 7(1) of the Act provides that:

"It shall be the duty of the Secretary of State to secure that such appointments are made under this Chapter as will ensure that for every area of England and Wales there is at all times both –

- (a) a company holding an appointment under this Chapter as a water undertaker; and
- (b) whether or not the same company in relation to the whole or any part of that area, a company holding an appointment as a sewerage undertaker."

2.3 Section 7(3) of the Act provides that the appointment of a company as a water or sewerage undertaker cannot be terminated or otherwise cease to relate to an area unless replaced by another undertaker. The remainder of section 7 of the Act sets out in what circumstances such a replacement may be made. These circumstances are set out in section 7(4) and (5) of the Act and in summary are:

- when both undertakers consent to the replacement;
- if the relevant area is unserved;
- if the area is occupied by a large user and the customer consents; or
- if the Instrument of Appointment itself includes provisions allowing for such a replacement.

2.4 Section 8 of the Act sets out the procedure for granting a replacement appointment.

B. The Instrument of Appointment

2.5 South East Water is a water only undertaker and its Instrument of Appointment provides in Schedule 1 that:

"The area for which the Appointee is appointed to be the water undertaker ("the Water Supply Area") comprises:

(1) the area the boundaries of which (other than the seaward boundary) are more particularly delineated by the line shaded pink in the Water Supply Area Map and the seaward boundary of which is as described in sub-paragraph 1.2, the area described in this sub-paragraph (1) being shown for identification only in the map entitled "the Water Supply Area: Map Sheet Identification Map" accompanying and forming part of this instrument;

(2) those islands (if any) within the Appointee's limits of supply for the purposes of section 12 of the 1973 Act immediately before the transfer date; and

(3) the premises listed in Part I of the Appendix to this Schedule,

but excludes the premises and installations listed in part II of the Appendix to this Schedule."

- 2.6 An appendix to Schedule 1 lists, "additional premises and installations outside the boundary of the Water Supply Area Map but comprised in the Water Supply Area." One such listed premises is "King Edward VII Hospital Midhurst Road, Midhurst, Sussex" which is listed with a grid reference number that, according to South East Water's determination referral, refers to a pumping station some two kilometres to the north of the Site.
- 2.7 This is mirrored in Southern Water's [Instrument of Appointment](#) as an express exclusion. Part II of an appendix to Schedule 1 of Southern Water's Instrument of Appointment lists "premises and installations inside the boundary of the Water Supply Area Map but not comprised in the Water Supply Area" and the King Edward VII Hospital is one of the premises cited in the list that follows, with the same grid reference number as appears in South East Water's Schedule 1 appendix.

3. Our draft determination

3.1 On 15 September 2023, we issued our draft determination to the parties. In our draft determination we set out our provisional conclusion that the Site falls within South East Water's area of appointment. We received representations from the three parties. None of the representations challenged the legal basis for our draft determination or the outcome, but each party noted factual statements in our draft determination that it considered were wrong or in dispute. The representations from the parties on the draft determination are summarised below.

A. South East Water

3.2 South East Water responded setting out it does not wish to make any submissions upon the draft determination, apart from the comment that whilst a geographical interpretation has been made (rather than temporal), for sake of clarity it must follow that the geographical site must be that as factually existing immediately prior to 1989 (that is, at the point of privatisation), and not that as proposed being pursuant to the 1904 conveyance.

3.3 On the facts set out in the draft determination, South East Water said that it did not agree to provide an unrestricted water supply to the Site in 2015.

B. Southern Water

3.4 Southern Water responded setting out that it agreed with the conclusion in the draft determination that the Site falls within the Water Supply Area of South East Water.

3.5 On the facts set out in the draft determination, Southern Water said that its pipework on the Site does not constitute an active supply pipe, and it intends to take steps to isolate and disconnect the pipe and to remove it as soon as practically possible.

C. King Edward Estates

3.6 King Edward Estates responded setting out that it appears the fundamental principle of the draft determination is now accepted by all parties, that is, that the Site remains part of South East Water's area of appointment. King Edward Estates also set out that it further accepts that this principle is to be applied by reference to the extent of the Site in 1989. It agrees with South East Water that this will not be wholly identical to the land, which was the subject of the 1904 conveyance, but it will be substantially the same, and the differences do not fall to be determined within this referral.

3.7 King Edward Estates also raised a further three issues:

- King Edward Estates does not accept that any legally binding limitation on daily hours of pumping from South East Water's main exists or ever existed, and it has pumped on demand without limitation of time for a considerable number of years.
- Only one reservoir, a second reservoir constructed in the early 2000s, is in current use on the Site and is only served by the South East Water main.
- There is a third (unused) means of bulk storage on the Site, namely an underground tank. It is physically connected to a small, disused branch pipe from a Southern Water main. The second reservoir on the Site is the only storage in use. It is not served by Southern Water and never has been.

D. Our response

3.8 Following the representations received on the draft determination, we have amended section 1 of this document, where we provide details about the Site, to clarify/correct or remove certain details where the parties are not in agreement on the facts (as set out above). These facts did not form a part of our proposed determination but were provided for background purposes only.

4. Our final determination

- 4.1 Our final determination is that the Site remains part of South East Water's area of appointment. Our reasoning for this is set out below.
- 4.2 When the water and sewerage industry was privatised in 1989, undertakers' areas of appointment were fixed so that there is at all times a water and a sewerage undertaker for every area in England and Wales in accordance with the requirement set out in section 7(1) of the Act. Each undertaker has one or more maps attached to its appointment setting out its area of appointment as a water undertaker (its Water Supply Area) and, if applicable, its area of appointment as a sewerage undertaker (its Sewerage Services Area). In addition, most appointments that were made at privatisation list additional premises, installations etc. which are outside the area of appointment as set out in the map or maps, but which are determined by the instrument of appointment to be within the area of appointment of the undertaker.
- 4.3 The circumstances in which an undertaker can cease to be an undertaker for a particular area are limited to the circumstances listed in section 7(4) and (5) of the Act, and in this instance none of those circumstances apply. More importantly, in all cases, an undertaker can only cease to be an undertaker for a particular area if a replacement undertaker is appointed by Ofwat. This involves a formal application to Ofwat in compliance with section 8 of the Act. This creates necessary certainty for customers and undertakers and has the effect that there will always be an undertaker for every area.
- 4.4 There has been no application to vary South East Water's area of appointment to remove the Site from its Water Supply Area and accordingly, we determine that the Site remains part of South East Water's area of appointment.
- 4.5 The Site's boundaries are not at this stage in dispute, and it is accepted by the parties that the Site as it existed in 1989, is the Site that falls within South East Water's Water Supply Area.

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

Ofwat
Centre City Tower
7 Hill Street
Birmingham B5 4UA
Phone: 0121 644 7500

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