

Changes to utility charges for developers...

Will the winds of change bring welcome improvements - or just a whole new set of problems?

Andrew Walker, Technical Director of MA Infrastructure, looks at two of the major infrastructure related issues of 2016: proposed changes to the way water and sewerage infrastructure is charged for and systemic overcharging by utility companies.

Utility charging issues are going to be a live and controversial subject as 2016 progresses, and this is particularly so for water and sewerage.

Proposed new charging regime

The current charging provisions for water and sewerage infrastructure are notoriously complex, and developers often express dissatisfaction with the existing regime. The Water Act 2014 provides Ofwat with powers to produce charging codes for the provision of water mains, sewers, connections, diversions etc. This means the current charging regime will be replaced.

Ofwat will consult on its new charging proposals in late Spring, and publish its final response in October 2016, with the new charging arrangements starting in April 2017. This is a compressed timetable and, in our opinion, the new proposals present a significant potential risk for developers.

For those concerned with land purchase, Ofwat's changes could have wide ranging repercussions. One example is charges for off-site sewer reinforcement works necessary to drain a development. Under the current legal provisions, where a developer installs the sewers, the utility company cannot charge it for off-site reinforcement works to upgrade existing pipes. This is in contrast to water, where the utility can charge for off-site reinforcement works, although the utility company may make an asset payment to the developer in exchange.

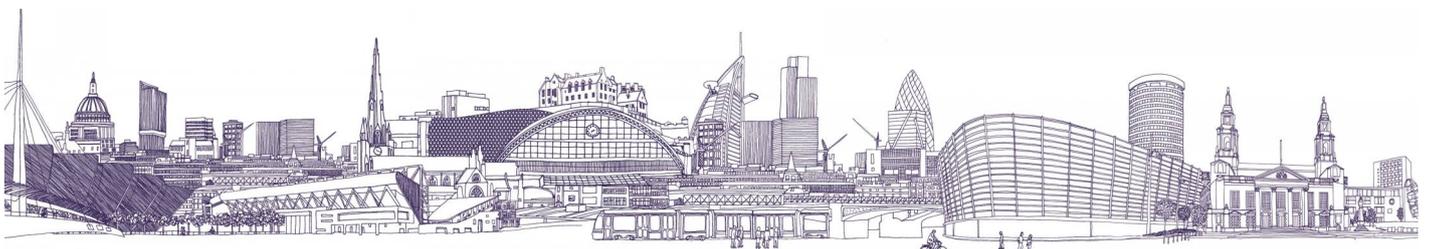
There has been discussion that this could change, with the utility companies charging for reinforcement works for both sewerage and water infrastructure, whilst (potentially) not making any asset payments for sewers.

This will mean that developers will have fewer rights and substantial extra costs when compared to the existing system. It may also undermine the current permissive right to connect to the public sewer (confirmed by the Supreme Court in *Barratt Homes -v- Welsh Water* (2009 UKSC 13). This decision reaffirmed the right to connect to public sewers in England and Wales, regardless of whether the existing system could accommodate new flows).

Another major change under consideration is to make developer charges 'cost reflective'. Currently, developer costs (such as infrastructure charges) are based on an average across England and Wales - in other words, costs are the same in Barnsley as they are in Balham. The new proposals will mean that the charges will reflect actual costs at the specific location. This will, of course, mean that charges in London and the South-East will be much higher than elsewhere. This could make many developments in London and the South-East uneconomic. Developers will have bought land, assuming that infrastructure charges will be based on the current levels, only to be confronted by higher, cost-reflective, charges.

We are unclear whether the market has yet really grasped the potential significance of the changes and associated consequences. However, it is essential that developers engage with the proposed public consultations regarding the new charging regime, because there is a very limited timeframe to challenge the proposed new charges. One thing that is for certain is that water companies and their trade bodies will be lobbying Ofwat and DEFRA very hard to promote their commercial interests.

Strategic infrastructure cannot be planned and funded on a piecemeal basis, or by water company boundaries. If the ambitious housing targets for London are to be met,



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new water resources (reservoirs) will be built in Oxfordshire or Kent, and not in Hyde Park. New water resources should serve the region, and not a particular water company area, and this should include trading existing resources across water company boundaries much more effectively.

Strategic projects should be funded by the whole customer base, not developers. There is perhaps an argument, albeit the politics are fraught, for targeted spending of taxpayers' money where a project provides a clear 'public good'.

We have highlighted elements of the future charging regime, but what about the here and now?

In the course of our recent work for developer clients, we have discovered a systemic water infrastructure-related overcharging issue that affects many developers in London and the South-East of England, which they will have had no reason to be aware of when agreeing costs and charges.

To give some indication of the significance of this opportunity to a developer, the refunds already secured amount to a 25% reduction on the amount originally paid to the water companies by clients. Because of our specific knowledge and expertise, we were not only able to identify this issue, but also to challenge the initial offer of a refund, finally securing a total 75% uplift on the original offer made to the client. Due to the complexities of the issues involved in this matter, we are certain that they are very difficult to identify without specialist knowledge. We understand the complex regulatory and legal issues involved, and are able to deal with this for our client at no risk to their relationship with the utility company, and in a timely way.

We're confident there is a significant opportunity to secure redress on this previously un-realised issue for developer clients across the South-East area.

The overcharging matter described above is just one example of what we continually uncover during our work, and is further evidence of the dysfunctional market. Weak competition, complexity of both law and regulation, together with the ability of utilities to charge up-front all produce a witch's brew of poor service and systemic overcharging.

Far too often developers pay for work they legally shouldn't fund, or they pay a disproportionate amount of the charges to provide infrastructure. These overcharges go back 12 years in some cases, and therefore the cumulative totals are enormous. In the water and sewerage sector we estimate developers have contributed over £1 billion in the last 12 years.

As we outline above, our day-to-day work confirms a significant number of charging and service issues across different utilities, and we have secured substantial refunds for historic sites but also ensured current and future projects do not include egregious overcharges.

It promises to be a busy and very interesting year, and MAI will be working to ensure that it and its clients understand what is happening, preparing for any changes and ensuring current and historic charges are legal and proportionate.

If you would like to discuss any of the issues raised in this update, please contact:

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