

STATES OF JERSEY



DRAINAGE LAW: SERVICE OF NOTICES ON OWNERS (P.57/2008) – COMMENTS

**Presented to the States on 20th May 2008
by the Minister for Transport and Technical Services**

STATES GREFFE

COMMENTS

Background

The Lodging of the above Report and Proposition on 9th April 2008 follows a Transport and Technical Services Ministerial Decision, made on 23rd November 2007, to amend a departmental guideline on the serving of Drainage Law Notices by the Minister on third party landowners on behalf of developers.

The new guideline allows the serving of a Notice on third party landowners on behalf of a developer to be considered, if the developer can demonstrate a Public gain, namely where a developer was able and willing to fund the connection of other surrounding properties to the Public sewer network. The previous policy did not entertain any serving of Notice in these situations.

Senator Shenton's Proposition asks the States to decide whether they should request the Minister for Transport and Technical Services to rescind this decision, with the vote being on 'whether private property developers should have the principles of the Drainage Law extended to their own benefit'.

On pages 3, 4, 9 and 10 of his Report and Proposition, Senator Shenton makes reference to a particular development where the proposed implementation of this new policy has caused concern and has detailed the issues raised. These individual issues are addressed in Appendix A at the end of these comments.

The general issue of the amendment of this policy is discussed in the following paragraphs.

Comments

Planning policy with respect to the disposal of foul sewage on the Island is covered under Policy NR2 of the 2002 Island Plan which states that '*New development proposals that rely on septic tanks, soakaways or private sewage treatment plants as a means of waste disposal will not normally be permitted*'.

In this respect, the Island's building Bye-Laws require buildings to be provided with an adequate system of drainage in the following order of priority –

- Connection to a public sewer
- Private sewer connection to a public sewer
- Cesspool ('tight tank')
- Septic tank and soakaway.

It is clear from the above that the aim of the Planning and Environment Department is to ensure that the potential for contaminating the Island's groundwater by effluent from private sewage treatment systems is minimised.

In addition, Supplementary Planning Guidance, Planning Advice Note 1– 'Disposal of Foul Sewage, October 2005', provides further information on the provision of these disposal routes. In particular, the section for Mains Sewers states –

'Where it is proposed to create a new dwelling or extend an existing dwelling which relies on a septic tank/soakaway system, and where any such proposal would increase potential occupancy, the Minister (for Planning and Environment) will require a connection to the public foul sewer where there is a foul sewer with adequate capacity within a reasonable distance. A connection may even be required, via a private sewer, to a public sewer which is some distance away from the site, if that is deemed to be the most appropriate solution'.

Historically, significant capital funds were allocated to the extension of the public foul sewer network, which made a substantial contribution towards achieving Planning and Environment's aims, and gave proposed developments more opportunity to connect to the public system.

As States Members will be aware, there are currently no funds being allocated to continue the work of extending

the public foul sewer network. Partly because of this, more and more developments, particularly those small in nature, are being forced to adopt a 'tight tank' solution. Planning Department advice notes that this approach is considered not to be "particularly sustainable from both an economic and environmental perspective". The advice adds that "... it is expected that the use of tight tanks/cesspools will be limited".

Regrettably, the use of 'tight tanks' is not only proliferating, but is also proving to be an onerous burden on developments that rely on them. As an example, the current annual average cost to a household on a 'tight tank' is of the order of £2,000. The true cost is actually much higher as the cost to the householder is subsidised by the States in the form of the tanker service.

Given the above, and the fact that the Transport and Technical Services Department is committed to connecting as many properties as possible on the Island to main drains, the Department must explore other means to enable the public sewer network to be extended in order to ensure that pollution of ground waters is reduced and the installation of 'tight tanks' is restricted.

To enable the public sewer network to be extended in the most beneficial and economical way, previous Committees, and now the Minister for Transport and Technical Services, have at their disposal, the Drainage (Jersey) Law 2005 and before that the old Sewerage Law.

Previous Committees adopted a Committee policy on how the powers available under the Laws would be utilised, in particular, when their use was requested for the benefit of a developer. In these particular cases, the use of the Law would not be entertained.

However, the particular development that is the subject of this Report and Proposition highlighted an opportunity whereby, in certain cases, the objectives of extending the public sewer network, reducing the incidence of ground water pollution, and restricting the use of 'tight tanks', could all be achieved at nil cost to the Public.

In this particular instance, the developer offered to provide connections to six other properties to the public sewer network, at his own cost, as part of his development proposals. Given the aims of both Planning and Environment and Transport and Technical Services, and in the current financial climate, it was appropriate that an amendment to the policy on not entertaining offers such as this should be considered and be applicable to future cases of this nature.

As a result, the Transport and Technical Services policy on the use of the Drainage (Jersey) Law 2005 for the benefit of developers was amended on 23rd November 2007.

It should however, be stressed that there are certain safeguards in place that will not enable developers to invoke the Law at their choosing.

As under the previous policy, requests from developers who would be the sole beneficiary of any serving of Notice on adjacent landowners would not be entertained.

In addition, the Ministerial Decision clearly states that consideration will be given to other requests where a public gain can be demonstrated, namely, that a developer is prepared to fund the connection of adjacent properties to public sewer network. Therefore, the amendment is not an 'open' approval for developers to invoke the Law as and when they please.

It is also intended that any consideration and decision on invoking the Law under these circumstances shall be made by the Minister and not delegated to officers.

Turning to the subject of Senator Shenton's Report and Proposition, this singles out one particular development where it is proposed that the amendment to the policy be implemented. It is clear from discussions between officers at Transport and Technical Services and residents local to this development, that there is significant opposition to the development, and that the drainage issue is being used as a means to prevent Planning approval being obtained.

Nevertheless, in this instance, and for future developments similar in nature, Transport and Technical Services can only concern itself with the drainage aspects, and in particular, the policies and aims of both this Department and Planning and Environment.

Whilst the Department is fully aware of the opposition to the development from some local residents, the Department cannot ignore the fact that an extension of mains drains is being offered at no cost to the Public.

It cannot be right to allow the objections to a particular development to be used as a means to prevent extensions taking place, particularly as there is a public and environmental benefit in so doing, as explained previously. Furthermore, whilst it appears that not all current residents will avail themselves of the connections provided, some certainly will and the infrastructure will be in place for the benefit of future residents.

Whilst detailed in its content, Senator Shenton's Report and Proposition primarily presents the general opposition to one particular development that is currently the subject of a Planning Application.

However, the Report fails to acknowledge the wider picture in respect of the public and environmental benefit that could accrue in terms of the public sewer network being extended, the pollution of ground waters being reduced, and the installation of tight tanks being further restricted, all at nil cost to the public, as a result of this policy amendment.

Discussion of Issues Raised in the Report

Senator Shenton's Report can be split into three separate sections. The first section concerns Planning issues raised by local residents, the second section refers to queries on the specifics of the change in policy raised in a letter from a local resident and the third section contains comments and views from Senator Shenton himself on the issue.

Responses to the issues raised in each of the Sections are as follows:

(a) Planning Issues

Pages 3 and 4 of the Report make reference to the grounds for opposing the development in question as submitted by local residents. These are addressed as follows:

(i) Page 4, Points 6, 7 and 8

These points raise the issue of demolition and re-construction of the property in question. Whilst these are not directly related to any Drainage issues, it is worth pointing out that the adjacent property to the development in question has already been demolished by another developer and is in the process of being re-built, with the associated effects on the estate that are highlighted in points 6, 7 and 8, i.e., heavy plant and equipment on the access road and parking for tradesmen.

(ii) Page 4, Point 9

This point refers to the frequency of tanker visits if a 'tight tank' were installed. Given the 10T weight limit on the access road, a small 750 gallon tanker would be required to empty the tank. Based on 4 occupants and a allowance for swimming pool backwash, a tanker load would be discharged to the 'tight tank' approximately every 4.5 to 5 days (or two loads every 9 to 10 days). However, a 'tight tank' is not currently being considered as the solution to the drainage of this development and therefore this issue does not arise.

(iii) Page 4, Point 10

This point refers to lack of access for tankers on the proposed site. Since the solution being considered for this development is connection to main drains, the issue of tankers does not arise. However, if it did, comments to Planning to the effect that alterations to the development proposals would be required to ensure that a small tanker could access the property, including being able to turn around on the road outside the property, would have been made.

The remaining points on Pages 3 and 4, i.e., 1 to 5 and 11 to 13 are entirely Planning issues and not connected to the Ministerial Decision regarding drainage.

(b) Resident's Letter

The letter from a local resident commences on page 9 of the Report and Proposition and the issues raised by the resident are summarised in a series of bullet point questions and statements. These are addressed as follows:

(i) Page 9, Bullet Point 2 – *'Powers under the Drainage Law have never been invoked for the benefit of just one property owner'*.

Whilst this was stated in a letter to one of the local residents, further research has determined that, a number of years ago, the former Public Services Committee did agree to serve Notice on a landowner who was preventing a small number of other householders connecting to the main drains. The householders were willing to fund the foul sewer extension and the sewer extension was on the departments list as one that the department wished to carry

out when sufficient funds were available. Given that the extension could be achieved at no cost to the Public, the Committee of the day decided to serve Notice to allow the connection. It is believed that several of these properties have connected to the provision since Notice was served.

(ii) Page 9, 2nd Paragraph – *‘Contrary to the report.....’*

The ‘tight tank’ option, whilst not preferable, is a workable solution, although alterations to the development layout would possibly be required if it was implemented (see item (iii) under Section (a) above).

(iii) Page 9, Bullet Point 4– *‘Why was a decision made solely upon information from the property owner’.*

The information that was received from the developer’s agent was that the developer was unable to connect to the main drains due to the refusal of local residents to allow a private drain to be laid across their land, but that he was willing to connect the remaining unconnected properties in the area to main drains, if he could connect himself.

It has quite quickly become clear that this information was neither biased nor inaccurate, as alleged in the first paragraph of the letter. The overriding reason for making the Ministerial Decision to allow the connection to be made was that the developer was willing to fund the extension of main drains to the rest of the estate. This was considered to be a Public gain as outlined in the discussion section of this response.

(iv) Page 9, Bullet Points 5, 6, 7 and 8 – *‘According to the report.....’*

The Ministerial Decision was based on being able to achieve an extension to the foul sewer network at no cost to the Public. Whilst it was accepted when the decision was made that not all properties would connect at this time, the view was taken that connections would be available for future owners. Given that no Public funds are currently being granted for foul sewer extensions, the offer by the developer to fund this particular extension was seen as a Public benefit. In the event, it is now known that at least one resident will connect to this system and two more are likely to do so.

It should also be pointed out that even though the Ministerial Decision had been taken, the developer was still asked to negotiate with adjacent landowners to try and reach agreement prior to the Minister using his powers under the Drainage Law.

The developer has subsequently demonstrated that negotiations have not been successful and that certain residents are not interested in compensation, nor in allowing any sewer across their land.

In this case, the powers under the Drainage Law will not be implemented to effect a saving for the developer as a condition of serving Notice under the Law is that the developer connects the remaining unconnected properties on the estate, which will incur a not inconsiderable cost for the developer.

(v) Page 9, Bullet Points 9 and 10– *‘How often, and under what circumstances.....’*

To my knowledge, serving Notice under the Law has never been invoked on behalf of a developer prior to any Planning permission being granted nor where the developer does not have another workable solution. The occurrence outlined in (i) above was to allow a number of properties with drainage problems to connect and not to allow properties to develop. In addition, it is not correct to state that there is not another workable solution in this particular instance, as the ‘tight tank’, whilst not ideal, could have been made to work as noted previously.

(vi) Page 9, Bullet Point 11– *‘The act of serving Notice....’*

Whenever the Department carries out drainage works in restricted residential areas it makes every effort to minimise disruption to residents. In this particular case, the Department is aware of the concerns of residents with respect to excavating through the local road, particularly where the road is only single carriageway. Exhaustive investigations have been carried out and it is believed that a solution has been found which will avoid excavating in the single carriageway section. This in turn will address the major concern of residents. Whilst some disruption will still be inevitable, it will be of relatively short duration and the end result will achieve a Public gain.

(vii) Page 9, Bullet Point 12- *'Since these particular circumstances.....'*

These particular circumstances are not that different from previous instances. The only difference is that a developer has agreed to fund the extension of the Public foul sewer network.

As stated previously, discussions with landowners are still ongoing, despite the Ministerial Decision permitting Notice to be served, as ultimately, the Department always tries to reach agreement prior to serving Notice.

In this particular case, it has been clear from the outset that landowners are against the development and have attempted to use the drainage issue as a means to prevent the granting of Planning permission. Nevertheless, every effort is being made to achieve the connection of properties to main drains by negotiation so that the serving of the Notice becomes a formality rather than a means to an end.

(viii) Page 9, Bullet Point 13- *'Will this proposition proceed if Mr. X fails to gain Planning permission.'*

The developer has confirmed that he will provide funding for the foul sewer extension to the estate whilst the Planning process is ongoing and therefore, it is anticipated that a public gain will be achieved irrespective of whether Planning permission is eventually received or not.

(ix) Page 9, Bullet Point 14- *'It is interesting to note.....'*

As stated previously, exhaustive efforts are being made to ensure that disruption from any work carried out in the area is minimised and it is believed that the main concern of residents regarding access has been overcome.

(x) Page 9, Bullet Point 15- *'Previous Committee's have maintained.....'*

It should be pointed out that whilst the policy on serving Notice has been amended, it still does not allow the serving of Notice in instances where the developer is the sole beneficiary, and the Public gain to be accrued under any other request will be considered carefully before allowing Notice to be served. Therefore, the amended policy does not force the Department to invoke the Drainage Law as and when developers choose.

However, given the current lack of Public funding for foul sewer extension schemes, the amended policy does enable the Public network to be extended at the expense of developers, IF it is felt there is a sufficient Public benefit in so doing.

(xi) Page 9, Final Paragraph- *'Mr. X does not have Planning permission.....'*

It should be re-stated that the developer has confirmed that he will provide funding for the foul sewer extension to the estate whilst the Planning process is ongoing and therefore, it is anticipated that a public gain will be achieved irrespective of whether Planning permission is eventually received or not.

From Transport and Technical Services' point of view, a developer is offering to extend the Public foul sewer network at no cost to the Public, and whilst it is accepted that will require the Public to serve Notice on local residents, this will be done as it is believed that there is a Public benefit in so doing.

(c) **Senator Shenton's Comments**

Senator Shenton's comments appear on page 10 of the Report and Proposition and are addressed as follows:

(i) Page 10, Paragraphs 4 and 5- *'Furthermore, the action under the Drainage Law.....'*

The Drainage Law is not flawed.

Article 10 of the Law allows the Public to construct a Public sewer or outfall on or over any land that is not ir

Public ownership. There is no mechanism for a statutory appeal as Senator Shenton states as this would make the implementation of this Article unworkable. Essentially, the laying of Public sewers is seen as beneficial but a mechanism whereby landowners could delay or obstruct their construction would result in sewer works and sewer extensions being severely curtailed.

Officers in the Department recognise that there is no right of statutory appeal and it is the reason that attempts to reach agreement with landowners are made first rather than applying the law in a 'heavy-handed' way. In this way, the serving of Notice becomes a legal formality rather than a means to an end. This principle is still being applied in this instance.

Article 10 does allow for the payment of compensation under Article 38, but this is in respect of any reduction in value of land, or for any person who sustains damage by being disturbed in the enjoyment of any right in land as a consequence of the serving of the Notice. It has been confirmed that compensation would not be payable in this instance however, it could be argued that those properties that are provided with a public foul sewer connection could increase in value.

It has however, been confirmed that an application can be made to have any decision made under Article 10 reviewed by the Courts by judicial review. However, the leave of the Bailiff is required to bring an application for judicial review.

It should also be noted that the connection solution referred to in (b)(vi) above, which will significantly reduce disruption to local residents whilst connection works are in progress, relies on adopting an existing private sewer under Article 12 of the Drainage Law. Article 12 provides for making a Declaration to adopt the sewer if agreement cannot be reached with the landowner for its adoption.

Should the sewer be adopted by a Declaration under Article 12, the Article gives the landowner the Right of Appeal to the Royal Court under Article 42 of the Drainage Law to overturn the decision to adopt. However should any appeal be successful, the only remaining solution to connect the local properties would result in excavation in a single lane carriageway which would cause significant disruption to local residents, something which the department is trying to avoid.