Appendix B: Legislative framework

Adoption of public amenities by public authorities

Legal framework

B.1 The legal framework for the adoption of public amenities consists of separate legislation for roads, drainage and sustainable drainage systems (SuDS). We discuss the position for each relevant public amenity in England, Scotland and Wales, below.

Roads

B.2 The Highways Act 1980 governs the adoption of roads and some associated amenities (eg trees, street furniture, traffic signals) in England and Wales, typically by agreement under Section 38. This section provides local authorities with the powers to enter into an agreement to take over (adopt) and thereafter maintain at public expense a newly constructed road. The so-called 'Section 38 Agreement' is made between a developer and the local authority. Section 37 of the Highways Act 1980 also allows a house builder to notify the Highway Authority of its intention to proceed to adoption in relation to the construction of new roads and footpaths. Under this process, on successful completion and inspection of the work, a request to proceed to adoption can be submitted to the relevant Highway Authority. If they confirm the work is acceptable, they can proceed with formal adoption. If adoption is refused, the house builder may appeal to a magistrates' court. In Scotland, Section 16(1) of the Roads (Scotland) Act 1984 allows a private road to become a public one following a detailed design and approval procedure known as the "*Roads Construction Consent*" process, governed by Section 21 of the Roads (Scotland) Act 1984.

Drainage

B.3 In England and Wales, the usual course of adoption of drainage for a new development is through either Section 38 agreement (Highways Act 1980) or Section 104 agreement (Water Industry Act 1991) dependent upon who will adopt the drainage system, ie adoption of a drainage system through a Section 38 Agreement is for a drainage system which drains an adopted highway only. In Scotland, the Sewerage (Scotland) Act 1968 requires local authorities and Scottish Water to provide adequate drainage for foul water. This requires a development technical approval of all proposed apparatus. Once consented, this infrastructure will be 'vested' (Scottish Water's term for adoption) upon completion of the development.

Sustainable drainage systems

B.4 In England, SuDS[1] could be adopted by a local authority, a water company, or a private company (eg, a New Appointments and Variations company ("NAV")) under the Flood and Water Management Act 2010. In Wales, but not currently in England, the adoption of SuDS is also dealt with under the Flood and Water Management Act 2010 (Schedule 3), which requires new developments to include SuDS features that comply with Welsh national standards. Systems are approved by the relevant SuDS Approval Body in Wales. In Scotland, the Water Environment and Water Services (WEWS) (Scotland) Act 2003 make Scottish Water responsible for SuDS that deal with the run-off from roofs and any paved ground surface within the property boundary. SuDS need to be designed to Scottish Water specification (as set out in their manual "Sewers for Scotland 2nd Edition") and the law makes the use of SuDS obligatory when dealing with surface water drainage from all new developments. Nevertheless, this does not mean all SuDS will be vested by Scottish Water and Local Authorities and developers could be responsible for their maintenance.

Different SuDS requirements across the UK and potential alignment of the position in England

B.5 As noted, in Wales the adoption of SuDS is dealt with under Schedule 3 of the Flood and Water Management Act 2010. This requires new developments to include SuDS features that comply with Welsh national standards. Not dissimilarly, in Scotland the Scottish Environment Protection Agency requires the use of effective SuDS features in new developments and their preference is for SuDS constructed outside the boundaries of a private property to be adopted by Scottish Water or other public body. However, in England sustainable drainage systems are currently not mandatory in new developments since Schedule 3 was not enacted in England. Instead, England sought to address SuDS through planning policy[2] rather than via mandatory standards. Following the publication of two reports criticising this approach,[3] the government decided to align its approach to that taken by Wales and Scotland and it is expected that from 2024, Schedule 3 will also apply in England.[4]

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[1] Sustainable drainage systems are designed to manage stormwater locally (as close to its source as possible), to mimic natural drainage and encourage its infiltration, attenuation and passive treatment. They are designed to both manage the flood and pollution risks resulting from urban runoff and to contribute wherever possible to environmental enhancement and place making.

[2] From April 2015

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/911812/surface-water-drainage-review.pdf, DEFRA publication - "The review for implementation of Schedule 3 to The Flood and Water Management Act 2010" - January 2023,

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128073/The_review_for_implementation_of_Schedule_3_to_The_Flood_and_Water_Management_Act_2010.pdf

Other adoptable amenities

B.6 Public open space (POS) areas, different types of play areas, wildlife and biodiversity areas, woodland, watercourses, ditches, and ecological features as well as other matters including combined bin collection points not in the adopted highway, public art and town centre or retail public realm are normally adopted via Section 106 of the Town and Country Planning Act 1990 (as amended) in England and Wales and under Section 75 of the Town and Country Planning Act (Scotland) 1997, as amended, in Scotland. In Scotland, a mechanism under the Property Factors (Scotland) Act 2011, can also be used to ensure the adoption and maintenance of POS and other types of shared space, whereby a property factor is appointed on behalf of the residents to manage and maintain the common parts of the land or property owned by multiple residents or homeowners.

Protections against unexpected costs arising from a new development

B.7 The legislation in place also contains some provisions to protect the relevant authorities from unexpected costs arising from a new development, namely:

(a) As part of the adoption process, local authorities have the power to require a road or sewer bond as a guarantee. Under various sections of the Highways Act 1980, Roads (Scotland) Act 1984 or Water Industry Act 1991, the developer agrees to bond or place cash collateral to the value of the works and that covers the roadway and / or sewer until the end of the 'making good of defects' period and issue of the final adoption certificate by the local authority. The bond risk ceases at this point. Its value is usually sufficient to ensure the local authority can construct or repair the road / sewer if the developer fails to do so. Road and sewer bonds are therefore a guarantee on behalf of a developer that they will complete roads and sewers to the required standard and within a defined time-frame to enable them to be adopted by the relevant local authority.[5] The Department for Transport (DfT) notes that a Section 38 agreement is very unlikely to be completed by a local authority until all fees have been paid and a bond is in place to cover the full cost of constructing new roads in a development.[6] DfT guidance indicates that the bond value should reflect the costs to the local authority of constructing and completing the road(s) in accordance with the details that have received a technical approval should the developer default on the agreement. DfT also notes that the value of a bond may differ from the costs incurred by the developer in constructing and completing the roads. The guidance also states that most local authorities will

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[5] See Cambridge Centre for Housing and Planning Research (for NHBC) Road and sewer bonds in England and Wales, 2015

[6] Highways Adoption (publishing.service.gov.uk), page 16.

include the value of any commuted sums within the bond to ensure the public purse is protected if the developer defaults prior to the payment of such sums.

(b) Although not explicitly set in legislation, local authorities (in their capacity as highways authority[7] and local planning authority) can request the payment of commuted sums as a condition of adoption, ie financial contributions made by developers as compensation for taking on future maintenance responsibility of roads. They are typically secured through legal agreements[8] with developers and landowners when land is then adopted into public ownership by a local authority. The calculation of the commuted sum is the subject of individual agreements.

Planning

The planning and regulatory framework

B.8 Housing, the environment and planning are devolved to the respective legislatures in Northern Ireland, Scotland, and Wales. The Town and Country Planning Act 1990, as amended, sets out the main legislative framework for planning in England and Wales. In Scotland, planning legislation and policy is distinct from the rest of Great Britain with the Town and Country Planning Act (Scotland) 1997, as amended by the Planning (Scotland) Act 2019, being the basis for the planning system.

B.9 Each of the nations of the UK has a 'plan led' planning system that requires decisions on planning applications to be made in accordance with LPA development plans unless there are material considerations that indicate otherwise.

B.10 In relation to planning policy, all three nations have a national policy framework. in England, this is the National Planning Policy Framework (NPPF)[9]. In Wales, the Welsh Government sets out its national planning policy framework in Planning Policy Wales (PPW),[10] and in Scotland the National Planning Framework (NPF4) sets the context for planning.[11] LPAs must have regard to these national policies when taking planning decisions.

B.11 In relation to national plans, in Wales the "Future Wales: The National Plan 2040", published in February 2021, focuses on solutions to issues and challenges at a

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[7] The power of local authorities to accept commuted sums under the Highways Act 1980 was confirmed by the Court of Appeal in its decision in *The Queen on the Application of Redrow Homes Ltd v Knowsley Metropolitan Borough Council* [2014] EWCA Civ 1433.]

[8] Made under s.38 and/or s.278 of the Highways Act 1980.

[9] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/See: NPPF_data/file/1005759/NPPF_July_2021.pdf

[10] See Future Wales: The National Plan 2040.

[11] See National Planning Framework 4 for Scotland.

national level. Unlike Wales, Scotland and England do not have a similar national plan, although Scotland does have a National Spatial Strategy for Scotland 2045 and NPF4 sets out that Scotland will plan their future places in line with six overarching spatial priorities.

B.12 There are no regional plans in England. Conversely, in Scotland, the Planning (Scotland) Act 2019 introduced a duty requiring the preparation of Regional Spatial Strategy where a planning authority, or authorities acting jointly, are expected to prepare long-term spatial strategies for the strategic development of a regional area. In Wales, the national plan is to be built on by regional plans in the form of Strategic Development Plans that aim to focus on issues that cross LPA boundaries. However, it should be noted that few regional plans in these forms currently exist in Scotland or Wales.

B.13 In terms of local plans, all three countries require LPAs to produce local development plans setting out positive visions for the future of each area and a framework for addressing housing needs and other economic, social, and environmental priorities, including where development should and should not happen.

Planning conditions and obligations

B.14 Planning obligations are legal obligations entered into to mitigate the impacts of a development proposal. England, Wales, and Scotland all use these to require developers to contribute to the cost of infrastructure required to support new developments, including the provision of affordable housing.

B.15 In England and Wales, section 106 of the Town and Country Planning Act 1990 sets out that agreements can be negotiated between developers and LPAs to meet concerns that an LPA may have about meeting the cost of providing new infrastructure (referred to as s106 agreements). Section 106 agreements are legally binding and may either be in cash or kind, to undertake works, provide affordable housing, or provide additional funding for services.

B.16 Alongside s106 agreements, in England and Wales, the Community Infrastructure Levy (CIL) is a levy that LPAs can charge new developments in their area to help pay for the supporting infrastructure.

B.17 In Scotland, section 75 of the Town and Country Planning (Scotland) Act 1997 sets out the framework for agreements that can be negotiated between Local Authorities and developers.

The Levelling-up and Regeneration Bill (the LURB)

B.18 The LURB is expected to introduce a series of changes to the planning system in England. We will assess in more detail the impact this will have on incentives of different market players and the operation of the market in the second half of the market study.