

Understanding Practice Risks with Utilities in Commercial Property Transactions

Introduction



Understanding the lie of the land on your client's development site is critical for a couple of key reasons - To ensure that full due diligence is followed on what could present health and safety risks and potential liabilities for your client and their contractors, but also for your firm in terms of advice provided and to manage your own potential litigation risk.

This e-book is designed to give you an overview of the key legislative and procedural requirements when it comes to effective site investigation for utilities and also how these risks can be mitigated through easier research ahead of acquisition or breaking ground on site.

What are the main utilities under consideration?

These will vary according to the site's existing or prior use and its position relative to existing grid or networks. Not all utilities may be present and some may have more extensive or limited infrastructure compared to other sites.

The main utilities under consideration for transaction due diligence are:

- Water & sewerage
- Telecoms/fibre-optics
- Gas
- Electricity
- National critical infrastructure - such as oil supply pipelines.

What are the primary considerations to take into account with utilities on site?

The first most important element is **Discovery** - getting a sense of what could be connected or available for connection and where that exists on site. This serves the purpose of your client understanding the extent and proximity of connections to existing networks, as well as how they could fit with proposed schemes, the potential changes needed in terms of moving utilities and also to identify risk areas for potential strikes.

What are the primary considerations to take into account with utilities on site? *(continued)*



From a redevelopment perspective, the aim is to avoid costs associated with moving utilities or risk of striking them. This requires high level visibility on the potential conflicts of build design, including piling and pre-existing utility siting.

Then the design and contractor team will be able to build in the right protection works and **manage “zones of conflict”** - for example, if the utilities run close to foundation piling, how will this impact on the management time, redesign and additional specification needed to protect those utilities.

Local Authority planning teams are increasingly requesting a **Planning Utility Statement** as a mandatory element of the discharge of conditions. This needs to answer how complex the utility conflict could be between the scheme design and the siting of the existing utilities> This will usually need to be accompanied by a cost projection of connecting to the existing network.

Related to this is the need for any **new connections** - understanding where would be the most sensible point to create this. This could come from a range of options, driven by what is the most cost efficient way to add a new connection to the grid, but it needs also to take into consideration the power requirements of the client going into the site.

The latter point is critical - and relates to **load capacity**. New commercial developments have increased demands, which can be a combination of lighting, heating and ventilation. It can also relate to the power needed for proposed use. A cloud server factory will require high demand, with its supporting air conditioning, for example.

The grid is also under a long term investment plan to scale up to meet future capacity needs as we switch from fossil fuels. Until this happens, in some areas, it is increasingly harder to add new connections to the local network. Some clients may not be able to get an adequate supply for their needs and this could impact project viability.

What are the main legislative and compliance requirements?



Our starting point is always the *Construction Design and Management Regs 1st April 2015*, which underpins everything on correct health and safety processes, identification of risks and having the right people on site doing the right things.

Within this, there are two additional standards:

- *HSG47 - Avoiding danger from underground services*

For commercial real estate lawyers, this is about desktop discovery. If a **utility search** is not provided then there is a risk of prosecution liability for not advising clients in the first instance on the presence of utilities on site. Failure to get the heads-up on the potential presence of utilities, could lead to delay or risk of Health and safety violations if not accounted for and digging commences.

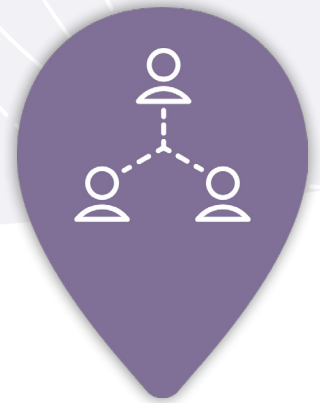
- *PAS128 - The specification for following a process of underground utility detection*

Each site comes with its own unique challenges and characteristics. This can determine the extent to which underground surveys are done.

The PAS128 specification identifies tiers of reporting for underground utility detection, ranging from D to A. Utility searches conform to D (top level), while others including ground breaking radar/geotechnics, soil samples and cavity scanning range from C to A (most complex/sophisticated)

The key point is that this sequence from D to A is always followed as needed based on the complexity of the site - **always starting with the desktop utility search.**

Understanding the Chain of Liability



There are three key stakeholders in play:

- The Client (e.g. developer, and their solicitor)
- The scheme designer
- The contractor

There is a chain of liability where: the developer follows the requirements of CDM and the PAS128 specification pathway of reports of increasing complexity that identify utilities. The scheme designer translates the modifications needed into the final scheme of work and delivers this to the contractor, having identified the precise location of any utilities and its related risks. If the contractor working from this information then strikes the utility, then the contractor is at fault.

It therefore follows that if Discovery and reporting is not followed correctly, then the liability transfers from the contractor back up through the scheme designer and, ultimately, the client and its adviser.

Where connectivity to roads and streetworks are to be considered, they also follow a similar pathway, as determined by the [Roads and Streetworks Act](#).

What are the impacts on viability for the site?

If you don't gain visibility of site restrictions and potential strike risks underground, you can kill the residual value of the site, rendering it unviable. Much of this is to do with the cost associated with delays eating into the time to realise the return on investment.

What are the impacts on viability for the site? *(continued)*

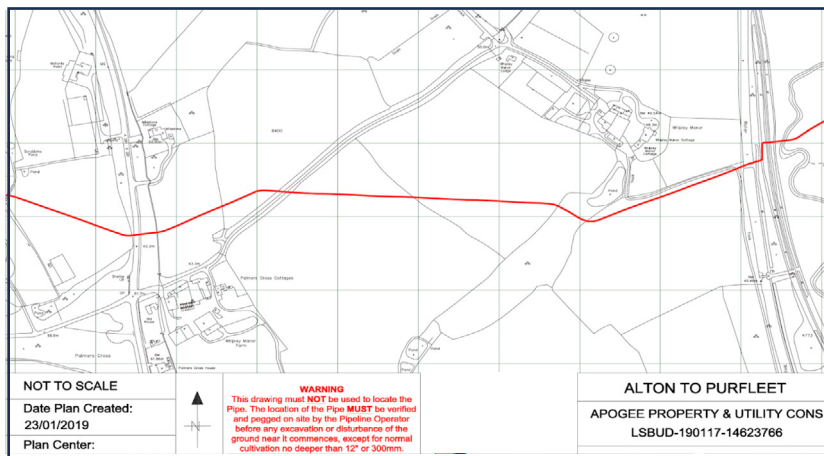


Image courtesy of Apogee Property & Utility Consultants

In the above example, a development site intersected with the Purfleet gasoline main that couldn't be moved, as it is part of our national critical infrastructure network. The pipeline serves fuel supply depots and airports.

It cost the client £1m and 3 years of further negotiation to adapt the proposed development site around it, which impacted the number of units and layout further affecting the potential yield that the developer could gain.

Has there been any case law against a law firm?

In 2012, Spire Property Development LLP purchased two adjacent properties in London for development. After completion, the developers discovered that three high-voltage electric cables owned by UK Power Networks (UKPN) ran beneath the properties. Unless removed, the cables would significantly limit the scope of the re-development.

The solicitors acting on behalf of the developers did not carry out a power-line search. The developers asked their solicitors:

- (1) why the existence of the cables had not shown up before completion;
- (2) to elaborate on UKPN's statutory rights of access;

and (3) if there was some kind of legal documentation relating to the laying of the cables on both sites.

Has there been any case law against a law firm? *(continued)*



The solicitors told the developers that the Electricity Act 1989 permitted UKPN to install power lines under private land (i.e. without such rights having to be formally documented/registered against the title to the property). However, they did not advise the developers of their rights and potential remedies against UKPN. Taking that to mean that no solution was available to them, the developers reduced the scope of the development.

The developers brought claims in negligence against the solicitors, arguing that they had failed to conduct a power-line search and advise them as to their rights and remedies.

The judgement fell against the law firm, identifying that:

The solicitor's duty is limited to carrying out the tasks which the client has instructed, and the solicitor has agreed to undertake as per the retainer. It is **implicit in the retainer that the solicitor will offer advice which is 'reasonably incidental'** to the work that they have agreed to carry out.

In determining what advice is 'reasonably incidental', regard should be given to all the circumstances of the case, including the **character, sophistication and experience of the client**.

In this case, the solicitor and developer were **familiar to each other and involved in ongoing professional relationships** on other projects, and the developers were both **highly experienced and well-resourced**.

It was considered that the availability and knowledge of utility desktop searches was already understood and formed "incidental advice" that should have been taken - i.e. a report commissioned and the client advised.

Ensuring Compliance from the Start

So, kicking off utilities due diligence through the Discovery phase using desktop utility searches gets your client on the front foot with compliance, as part of the formal reporting process that underpins health and safety requirements.

Ensuring Compliance from the Start *(continued)*

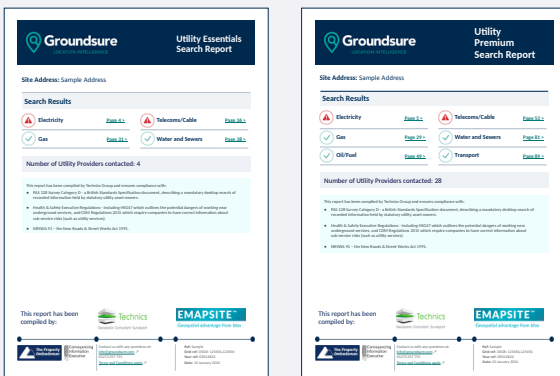
But it is also a risk mitigation tool for commercial law firms in order to meet their own due diligence compliance and avoid potential litigation risk.

We offer a ***range of desktop utility searches*** that support commercial real estate lawyers to meet compliance with HSG47 and guide potential future site investigations by other specialist contractors to identify the specific utilities more accurately ahead of spades in the ground.

They not only help solicitors and their clients comply with relevant legislation and construction guidance, but help protect their health & safety and financial interests.

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Ensuring Compliance from the Start *(continued)*

We also offer webinar and in-house training for firms to support your teams compliance needs.

By undertaking this straightforward due diligence, you fulfil your obligations to the client to advise on potential subsurface utility risks. Without, you are opening yourself and your client up to costly and even fatal errors.

To find out more about our range of utility searches for commercial property transactions, then go to www.groundsure.com/utilities, call us on 01273 257 755 or email info@groundsure.com

References

Construction, Design and Management Regulations (CDM) - 1st April 2015

[https://www.hse.gov.uk/pubns/books/l153.htm#:~:text=Managing%20health%20and%20safety%20in%20construction,-Construction%20\(Design%20and&text=The%20Construction%20\(Design%20and%20Management,with%20duties%20under%20the%20Regulations.](https://www.hse.gov.uk/pubns/books/l153.htm#:~:text=Managing%20health%20and%20safety%20in%20construction,-Construction%20(Design%20and&text=The%20Construction%20(Design%20and%20Management,with%20duties%20under%20the%20Regulations.)

HSG47 - Avoiding Danger from Underground Services

<https://www.hse.gov.uk/pubns/books/hsg47.htm>

PAS128 - Client Specification Guide (2022) - Chartered Institute of Civil Engineering Surveyors

<https://www.cices.org/hawkfile/386/original/PAS128%20Client%20Specification%20Guide%20Sep%202022%20final.pdf>

Roads and Streetworks Act 1991:

<https://www.legislation.gov.uk/ukpga/1991/22/contents>

Spire Property Developments LLP Case:

<https://knyvet.bailii.org/ew/cases/EWCA/Civ/2022/970.html>



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