



County Hall  
Cardiff  
CF10 4UW  
Tel: (029) 2087 2000  
  
Neuadd y Sir  
Caerdydd  
CF10 4UW  
Ffôn: (029) 2087 2000

## SUPPLEMENTARY PAPERS

<b>Committee</b>	ENVIRONMENTAL SCRUTINY COMMITTEE
<b>Date and Time of Meeting</b>	TUESDAY, 2 MARCH 2021, 4.30 PM
<b>Venue</b>	REMOTE VIA MS TEAMS
<b>Membership</b>	Councillor Patel (Chair) Councillors Derbyshire, Owen Jones, Lancaster, Jackie Parry, Parkhill, Owen, Sandrey and Wong

The following papers were marked 'to follow' on the agenda circulated previously

- 4 Sustainable Drainage Approval Body (SAB) - Adoption & Future Maintenance of Sustainable Drainage (SUDS) Features (Pages 3 - 12)**

**Davina Fiore**

**Director Governance & Legal Services**

Date: Wednesday, 24 February 2021

Contact: Graham Porter, 02920 873401, [g.porter@cardiff.gov.uk](mailto:g.porter@cardiff.gov.uk)

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**CYNGOR CAERDYDD  
CARDIFF COUNCIL**

**ENVIRONMENTAL SCRUTINY COMMITTEE**

**02 MARCH 2021**

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**SUSTAINABLE DRAINAGE APPROVAL BODY (SAB) - ADOPTION & FUTURE MAINTENANCE OF SUSTAINABLE DRAINAGE (SUDS) FEATURES**

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**Reason for the Report**

1. To provide the Committee with details of a report titled 'Sustainable Drainage Approval Body (SAB) – Adoption & Future Maintenance of Sustainable Drainage (SUDS) Features' prior to it being presented at the March 2021 Cabinet meeting.

**Reasons for this Report**

2. The Cabinet report sets out the reasons for receiving this paper as:
  - To approve the decision for the maintenance mechanism for the mandatory adoption of Sustainable Drainage Systems (SuDS) under Sustainable Drainage Approval Body (SAB) legislation.
  - The introduction of legislation in January 2019, supports two main options for SuDS maintenance for qualifying developments, which are:
    - ❖ A Management Company that will maintain the SuDS features. The funding will be paid directly to the management company through a continuous maintenance charge on all property owners.
    - ❖ A Commuted Maintenance Sum is paid by the developer to the Council to allow for future maintenance of SuDS features to be undertaken by the Council.

## Background

3. A report titled Sustainable Drainage Systems (SuDS) was brought to Cabinet on the 21<sup>st</sup> February 2019. The purpose of the report was to advise Members on the implementation of Schedule 3 of the Flood and Water Management Act 2010 (FWMA) for the use of SuDS in new developments. Also, to approve the creation of the SuDS Approval Body (SAB) and advise on the statutory responsibilities that Cardiff Council, acting in its capacity as a SAB, is required to undertake.
4. The Welsh Government laid the commencement order on the 1<sup>st</sup> May 2018 for the new legislation to come into force on the 7<sup>th</sup> January 2019. From this date onwards:
  - All new developments of more than 1 house or where the construction area is 100m<sup>2</sup> or more, will require sustainable drainage systems (SuDS) for managing surface water;
  - Drainage systems for all new developments must be designed and built in accordance with statutory SuDS standards;
  - Local authorities will become SuDS Approval Bodies (SAB);
  - SuDS schemes must be approved by the local authority acting in its SAB role before construction works begin. The SAB will have a duty to adopt compliant SuDS so long as it is built and functions in accordance with the approved proposals, including any SAB conditions of approval.
5. Schedule 3 of the Flood and Water Management Act 2010 places a mandatory requirement for the Unitary Authority, acting in its capacity as a SuDS Approval Body, to adopt drainage systems that are constructed in accordance with Welsh Government Standards for Sustainable Drainage and approved proposals.
6. There is a mandatory requirement for the SAB to adopt drainage systems that:
  - Are constructed and function in accordance with approved proposals, including any conditions of approval; and,

- That the drainage system is a “sustainable drainage system”, meaning those parts of a drainage system that are not vested in a sewerage undertaker under a section 104 agreement of the Water Industry Act 1991.
7. The SAB are not required to adopt drainage systems when:
- They serve a single property; or,
  - Any part of a SuDS for which the highway authority would already be responsible for maintaining.
8. It is considered that the spirit of the legislation is to ensure that a single statutory body is responsible for the maintenance and inspection of SuDS features. Therefore, Cardiff Council as the SAB is the statutory body responsible for ensuring that the drainage system is maintained and inspected.

### **Issues**

9. Prior to the implementation of the legislation there has been a legacy of poorly constructed SuDS features with no one body responsible for their maintenance. These features remain unadopted by any statutory body.
10. There would in general have been no inspection regime during construction and many SuDS will have no inspection or maintenance regime post construction.
11. Poorly constructed and poorly maintained SuDS features are a flood risk to adjacent land and properties.
12. The UK Government commissioned a comprehensive review of the lessons learnt from the summer floods of 2007. This was undertaken by Sir Michael Pitt and is known as the Pitt Review.
13. The review identifies that local flooding is exacerbated by unclear ownership and responsibilities. The review also highlighted the importance of who is responsible for the management of SuDS features:

- **RECOMMENDATION 20:** *The Government should resolve the issue of which organisations should be responsible for the ownership and maintenance of sustainable drainage systems.*
14. There is no prescriptive mechanism to secure the adoption of funding. The Flood and Coastal Risk Management Team (FCRM) are currently working on documentation to allow for the legal mechanism, fees and bonds to be secured. Developers will be required to work closely with the SAB and communities to develop maintenance options and a maintenance plan.
15. The legal requirement to adopt SuDS places a statutory responsibility for the management and maintenance of the drainage system on the SAB. Neither Schedule 3 nor the Welsh Government Standards for Sustainable Drainage provide for a mechanism for adoption; however, Welsh Government's statutory guidance provided does provide suggested options, including:
- **In-house Maintenance with commuted sums** - Payment of Commuted sums by the developer - requires the developer to pay for the long-term maintenance costs, which is reflective of the maintenance plan for the lifetime of the SuDS.
  - **Private Management Company with direct charge on property** - Payment of maintenance charges on individual properties paid to a Private Management Company in perpetuity for each homeowner for ongoing maintenance of SuDS features.
16. For developments that were completed prior to SAB legislation the Council is already experiencing pressure from home owners to adopt SuDS features, as homeowners have become disgruntled at paying both Council Tax and a maintenance sum. They perceive this to be a double taxation.
17. Such features would not have been inspected during construction and so the Council would be unaware of construction standards, quality, capacity and sustainability.
18. Adoption will require the following considerations to be made during the approval process:

- Early engagement and understanding of the developments SuDS, including operation and maintenance;
  - Land ownership/easement legal agreements;
  - Sustainable funding mechanism;
  - Agreement of performance bonds, where applicable.
19. **Appendix 1** shows a table providing a summary of the main maintenance options and potential risks of the two options: in-house maintenance with commuted maintenance sum, and private management company with direct charge on property.
20. The Council already employs a commuted maintenance approach relating to the adoption of highway infrastructure assets and currently manages the maintenance of these assets.

### **Resources**

21. The existing teams in Street Scene services do not have adequate resource to manage the anticipated demand if in-house maintenance with commuted sums is the preferred option. It is proposed in the initial phase is to create a small team of officers that would sit within an existing Street Scene discipline to undertake maintenance of existing features and other flood risk associated assets. As development progresses, more SuDS assets are introduced and commuted maintenance sums are received, the team could expand in line with demand and develop into a specific Street Scene team.
22. Although the Private Management Company with direct charge on property would suggest no resource is required to maintain the SuDS assets; the Council adopts the assets and therefore are ultimately responsible for ensuring maintenance is taking place. Therefore, there would be a requirement for the Council to fund the management of Private Management Companies and also manage any costs of transfer if these companies cease to undertake the work.

23. Any cost for the management of SuDS and commencement of an in-house maintenance team will be met within existing budgets, including the application of appropriate funding from the commuted maintenance sums.

### **Report Recommendations**

24. The Cabinet report will recommend:
- To support the mandatory requirement to adopt SuDS features (where required) via an in-house model where Officers are trained to manage and maintain SuDS features.
  - To support the application of commuted sums to developments as the financial model to manage and maintain SuDS features.
25. The report also provides the reason for accepting these recommendations as:
- To agree the approach for the maintenance mechanism for the mandatory adoption of Sustainable Drainage Systems (SuDS) under Sustainable Drainage Approval Body (SAB) legislation.
26. The following background papers have been taken into account when creating the content of the Cabinet report:

Cabinet Report 21<sup>st</sup> February 2019 – Sustainable Drainage Systems

Flood and Water Management Act 2010

<https://www.legislation.gov.uk/ukpga/2010/29/contents>

The Water and Water Management Act 2010 (Commencement No.2) (Wales) Order 2018

<http://www.legislation.gov.uk/wsi/2018/557/made>

Statutory National Standards for Sustainable Drainage Systems (SuDS)

<https://gov.wales/docs/desh/publications/181015-suds-statutory-standards-en.pdf>

The Sustainable Drainage (Application for Approval Fees) (Wales) Regulations 2018

<http://www.assembly.wales/laid%20documents/sub-ld11778/sub-ld11778-e.pdf>

### **Way Forward**

27. The Cabinet Member for Clean Streets, Recycling & Environment and officers from the Planning, Transport & Environment Directorate have been invited to attend the



meeting. They will provide information on the proposed options, and be available to answer any questions that Members might have.

### **Legal Implications**

28. The Scrutiny Committee is empowered to enquire, consider, review and recommend but not making policy decisions. As the recommendations in this report are to consider and review matters there are no direct legal implications. However, legal implications may arise if and when the matters under review are implemented with or without any modifications. Any report with recommendations for decision that goes to the Cabinet/Council will set out any legal implications arising from those recommendations. All decisions taken by or on behalf of the Council must (a) be within the legal powers of the Council; (b) comply with any procedural requirement imposed by law; (c) be within the powers of the body or person exercising powers on behalf of the Council; (d) be undertaken in accordance with the procedural requirements imposed by the Council e.g. Scrutiny Procedure Rules; (e) be fully and properly informed; (f) be properly motivated; (g) be taken having regard to the Council's fiduciary duty to its taxpayers; and (h) be reasonable and proper in all the circumstances.

### **Financial Implications**

29. The Scrutiny Committee is empowered to enquire, consider, review and recommend but not making policy decisions. As the recommendations in this report are to consider and review matters there are no direct financial implications at this stage in relation to any of the work programme. However, financial implications may arise if and when the matters under review are implemented with or without any modifications. Any report with recommendations for decision that goes to Cabinet/Council will set out any financial implications arising from those recommendations.

## **RECOMMENDATIONS**

30. The Committee is recommended to:
- (i) Consider the report and the information presented at the meeting;
  - (ii) Determine whether they would like to make any comments, observations or recommendations to the Cabinet on this matter; and,
  - (iii) Decide the way forward for any future scrutiny of the issues discussed.

**Davina Fiore**

**Director of Governance & Legal Services**

**24 February 2021**

## Appendix 1

Option	Description	Potential Risk	Requirements/key questions
<p>In-House Maintenance with Commuted Maintenance Sum</p>	<p>Payment of a commuted sum based on the type of drainage system implemented to cover maintenance charges for the lifetime of the development. This is similar to the funding mechanism for Section 38 adoption and Section 106 of the Town and Country Planning Act 1990 (where planning is involved).</p>	<p>Local authority management and responsibility.</p> <p>The requirement for commuted sum would need to be viable for the site. Historically a disincentive for a developer.</p> <p>Commuted sums are calculated for the lifetime of the development and would need to be ring fenced within the authority.</p> <p>Contributions for commuted sums are usually calculated early in the development design. Whilst SAB would promote early consideration, there is a perceived risk to the viability of future development and contributions to S106.</p> <p>Commuted sum is calculated over the lifetime of the development and there are risks for unfunded liabilities.</p> <p>Attractive to the end users as there is no ambiguity for service charge payments and the expense is borne by the developer.</p> <p>There is currently no in house team to deliver SuDS maintenance. Potential to use funds to employ external contractor/develop in-house teams.</p>	<p>Early involvement and agreement with developer for costs</p> <p>Development of in house maintenance team <b>AND/OR</b> resource for management of external contractors</p> <p>Development of in house inspection team</p>

Option	Description	Potential Risk	Requirements
Private Management Company with direct charge on property	Householders pay a sum to a management company as part of a service charge with no direct Council involvement in maintenance	<p>External contractor relied upon for a mandatory requirement and not under control of Council.</p> <p>The statutory requirement to adopt and maintain SuDS resides with the Council; this would be outsourcing of a statutory duty where liability for flood risk remains with the Council.</p> <p>Payment by householders for the complete life span of the development and SuDS.</p> <p>Residents may resent the idea of an 'additional tax' and request that the Council adopt the feature without access to finances.</p> <p>The private company may go into administration and liquidate. The option would need a contract to ensure Council step in rights when required; there would still be a legal requirement for the maintenance by the Council.</p> <p>Should the Council utilise step-in rights it will still need a funding mechanism and therefore will need to continue to charge residents for future maintenance.</p> <p>Should residents renege on payment the Council will need a legal enforcement mechanism to recover funds.</p> <p>Significant risk in relation to land ownerships and easements.</p>	<p>Robust legal agreements to ensure that the Council is fulfilling its mandatory duty.</p> <p>The ability to step-in where maintenance of SuDS features is inadequate and the risk of flood is apparent.</p> <p>Access to funds to ensure any step-in is possible and any necessary maintenance is sustainable.</p> <p>Access to funds in an emergency event to prevent actual or potential flooding as a result of inadequate maintenance.</p>