

***BY SUBMITTING THIS REPORT TO THE CABINET OFFICE, I,
(ANDREW GREGORY – DIRECTOR PLANNING, TRANSPORT &
ENVIRONMENT) AM CONFIRMING THAT THE RELEVANT
CABINET MEMBER(S) ARE BRIEFED ON THIS REPORT***

**CARDIFF COUNCIL
CYNGOR CAERDYDD**

CABINET MEETING: NOVEMBER 2021

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

CLEAN STREETS, RECYCLING & ENVIRONMENT (COUNCILLOR MICHAEL MICHAEL)

AGENDA ITEM:

Reasons for this Report

1. Following the introduction of legislation in January 2019, entailing the mandatory adoption of Sustainable Drainage Systems (SUDS), approval is being sought for the use of commuted maintenance sums (CMS) becoming the preferred maintenance mechanism on new development.

Background

2. Increasingly, ensuring sustainable solutions to water management are central to the development process. Sustainable Drainage Approval Body (SAB) applications are a key part of the development approval process and a parallel, complementary, system to the land use planning system. As the new legislation has been implemented the specific issue relating to the adoption and long-term maintenance of the new SuDS features has emerged. This has been a particular issue on the major new housing developments being delivered across Cardiff.
3. Regarding the setting up of an effective regulatory system, a report titled Sustainable Drainage Systems (SuDS) was brought to Cabinet on the 21st February 2019. The purpose of this report was to advise members of 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, are required to undertake.
4. The Welsh Government laid the commencement order on the 1st May 2018 for the new legislation to come into force on the 7th January 2019. From this date onwards:

- All new developments of more than 1 house or where the construction area is 100m² or more, were required sustainable drainage systems (SuDS) for managing surface water
 - Drainage systems for all new developments had to be designed and constructed in accordance with statutory SuDS standards
 - Local authorities became SuDS Approval Bodies
 - SuDS schemes were approved by the local authority acting in its SAB role before construction works begin
5. Schedule 3 of the Flood and Water Management Act 2010 places a mandatory requirement for the Local Authority, acting in its capacity as a SAB, to adopt compliant SuDS 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.
6. The SAB are not required to adopt drainage systems when:
- they serve a single property;
 - any part of a SuDS for which the highway authority would already be responsible for maintaining;
 - any SuDS constructed by a sewerage undertaker under section 114 of the Water Industry Act 1991.
7. Where the SAB has a duty to adopt it is ultimately responsible for ensuring the adopted drainage system is maintained in accordance with statutory SuDS Standards. . Therefore, for Cardiff Council as the SAB, it is the statutory body responsible for ensuring that the adopted drainage system is maintained and inspected.

Issues

Pre-SAB Legislation

8. Prior to the implementation of the legislation there was a legacy of poorly constructed SuDS features with no one body responsible for their maintenance. These features remain unadopted by any statutory body.
9. In this pre-SAB period, there would, in general, have been no inspection regime during construction and many SuDS will therefore have had no inspection or have a maintenance regime in place post construction. Poorly constructed and maintained SuDS features are a flood risk to adjacent land and properties.

10. The UK Government commissioned a comprehensive review of the lessons learned from the summer floods of 2007. This was undertaken by Sir Michael Pitt and is known as *The Pitt Review*.
11. 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. The report states:
 - **RECOMMENDATION 20:** The Government should resolve the issue of which organisations should be responsible for the ownership and maintenance of sustainable drainage systems
12. For some developments that were completed prior to SAB legislation coming into effect. The Council is already experiencing pressure from homeowners to adopt historic SuDS features as homeowners raise concerns at being charged for both Council Tax and a Management Company Maintenance Sum.
13. However, since such features would not have been inspected during construction the construction standards may not be up to adoptable standard or sustainable. Such features would not have been subject to mandatory adoption as there was no requirement for SAB approval at the time of the development.

Post-SAB Legislation

14. 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 maintenance following adoption. The Welsh Government Sustainable drainage (SuDS) Statutory Guidance (Welsh Government statutory guidance) which the SAB must have regard to, provides two main suggested options of how SuDS can be maintained:

a) In-house Local Authority Maintenance utilising Commuted Maintenance Sums (CMS)

This option requires the developer to pay for the long-term maintenance costs which is reflective of the maintenance plan for the lifetime of the SuDS. For consistency it is proposed that these Commuted Sums are calculated based on the industry standard prepared by the County Surveyors Society.

b) Private Management Company

Many developments use management companies to maintain features such as public open space, which may also be utilised to maintain SuDS features. Typically, the cost of a maintenance charge is shared by individual properties and paid to a Private Management Company by way of a service charge in perpetuity for each homeowner for ongoing maintenance of SuDS features.

15. Having considered the relative merits of the options, it is proposed to proceed with Option a) The **In-house Local Authority Maintenance utilising Commuted Maintenance Sums (CMS)**. The reason for this approach is that it will provide:

- (i) construction and future maintenance expense will be borne by the developer;

(ii) assurance that flood risk is managed through local authority-maintained assets and managed resources. In this regard it allows the risks and costs to be managed in a more coordinated manner;

(iii) a positive approach for end users (homeowners) as there is no ambiguity regarding the service charge payments;

(iv) the potential to utilise funds to develop existing teams (PROW or Parks), and if required utilise external contractor for specialist works;

16. In terms of the implications of this proposed model on wider services areas such as housing and schools, engagement has taken place to ensure this approach is acceptable.

17. Nonetheless, although we propose to proceed with this option there will be some exceptional circumstances when the use of Management Companies is acceptable. These are:

- Where the Council are the developer, a Management Company approach could be considered as the financial risk could be reduced by a guaranteed future SuDS maintenance agreement should the management company cease to trade.
- An existing an ongoing agreement for a development where a Management Company (e.g., Plas Dwr development and Plasco Management Company) legal agreement for SuDS maintenance was signed prior to the SAB legislation being introduced.

18. A further advantage of this approach is that the Council already employs a CMS approach relating to the adoption of Highway infrastructure assets and currently manages the maintenance of these assets.

Resources

19. The existing teams in Highways services do not currently have adequate staff resource to manage the anticipated demand if in-house maintenance with CMS is the preferred option. It is therefore proposed to gradually develop the existing service area to undertake maintenance of existing features and other flood risk associated assets. As development progresses, more SuDS assets are introduced and more CMS are received, the team would expand in line with demand and develop into a specific Street Scene SuDS maintenance team.

20. The Private Management Company with direct charge on households would suggest no resource is required to maintain the SuDS assets. However, this is not the case, as the Welsh Government statutory guidance states that the SAB should ensure the management company is competent to maintain SuDS. Also, the Council must still adopt the assets and therefore remains ultimately responsible for ensuring maintenance is taking place to fulfil its statutory obligation to manage flood risk. There would therefore be a requirement for the Council to fund the management of Management Companies and manage any costs of transfer if these companies cease to undertake the work.

Reason for Recommendations

21. To agree to the proposed maintenance mechanism for the adoption of Sustainable Drainage Systems (SuDS) under Sustainable Drainage Approval Body (SAB) legislation.

Financial Implications

22. The costs arising from the implementation and operation of the in-house model will be funded from within existing resources. The Directorate plan to use relevant Commuted Sum resources to part-fund this model but further work may be necessary to ensure that this is an appropriate and feasible use of this earmarked funding source. As the Commuted Maintenance Sums are to cover long term liabilities regular review of these resources will be required to ensure that the Council has sufficient resources to fund these long-term obligations.

Legal Implications

23. Schedule 3 of the Flood and Water Management Act 2010 (FWMA) establishes SABS in Local Authorities. The legislation gives those bodies statutory responsibility for approving and in specified circumstances, adopting the approved drainage system.
24. Paragraph 17 of Schedule 3 of the FWMA imposes a mandatory duty to adopt where SuDS features are constructed and operate in accordance with SAB approval, save for single properties or publicly maintained roads.
25. The legislation does not provide specific power for SABs to raise charges to maintain SuDS features, nor does prescribe how such system should be maintained. However, a SAB does have broad discretion to impose conditions when issuing a SuDS approval, which may include the approval of a funding mechanism. Such conditions can ensure that the sustainable drainage systems will be maintained for the lifetime of the development. It is expected that local authorities will utilise both conditions and supplemental agreements pursuant to existing local government powers under s.111 of the Local Government Act 1972 to secure arrangements for a robust funding mechanism. Such matters will need to be considered in detail when considering a SuDs application.
26. It is a matter for the Council as SAB to determine how best such drainage systems should be maintained. The Welsh Government statutory guidance provides suggestions of how such systems may be maintained and includes both payment of commuted systems and use of private management companies as potential funding solutions. The SAB is required to have regard to statutory guidance. The decision maker will need to have regard to the risks of each option as set out in this report in considering a preferred funding mechanism.

Equalities

27. In considering this matter the decision maker must have regard to the Council's duties under the Equalities Act 2010 (including specific Welsh public sector duties). Pursuant to these legal duties Councils must, in making decisions, have due regard to the need to (i.) eliminate unlawful discrimination, (ii.) advance equality of opportunity and (iii.) foster good relations on the basis of protected characteristics. Protected

characteristics are: (a) Age, (b) Gender reassignment, (c) Sex (d) Race – including ethnic or national origin, colour, or nationality, (e) Disability, (f) Pregnancy and maternity, (g) Marriage and civil partnership, (h) Sexual orientation (i) Religion or belief –including lack of belief. When taking strategic decisions, the Council also has a statutory duty to have due regard to the need to reduce inequalities of outcome resulting from socio-economic disadvantage ('the Socio-Economic Duty' imposed under section 1 of the Equality Act 2010). In considering this, the Council must take into account the statutory guidance issued by the Welsh Ministers (WG42004 A More Equal Wales The Socio-economic Duty Equality Act 2010 (gov.wales) and must be able to demonstrate how it has discharged its duty.

28. An Equalities Impact Assessment aims to identify the equalities implications of the proposed decision, including inequalities arising from socio-economic disadvantage, and due regard should be given to the outcomes of the Equalities Impact Assessment (Appendix 1).

The Well-being of Future Generations (Wales) Act 2015

29. The Well-Being of Future Generations (Wales) Act 2015 ('the Act') places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales - a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible. In discharging its duties under the Act, the Council has set and published wellbeing objectives designed to maximise its contribution to achieving the national wellbeing goals. The wellbeing objectives are set out in Cardiff's Corporate Plan 2020 -23
30. When exercising its functions, the Council is required to take all reasonable steps to meet its wellbeing objectives. This means that the decision makers should consider how the proposed decision will contribute towards meeting the wellbeing objectives and must be satisfied that all reasonable steps have been taken to meet those objectives.
31. The wellbeing duty also requires the Council to act in accordance with a 'sustainable development principle'. This principle requires the Council to act in a way which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. Put simply, this means that Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:
- Look to the long term
 - Focus on prevention by understanding the root causes of problems
 - Deliver an integrated approach to achieving the 7 national well-being goals
 - Work in collaboration with others to find shared sustainable solutions
 - Involve people from all sections of the community in the decisions which affect them
32. The decision maker must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible on line using the link below:
<http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en>

Welsh Language

33. The decision maker should be mindful of the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards.
34. The decision maker must be satisfied that the proposal is within the Policy and Budget Framework, if it is not then it must be referred to the council.

HR Implications

35. If the in-house option is taken forward as per the recommendation, it will require in the medium term the development of an in-house team. The roles within this team will be evaluated and created in line with corporately agreed processes and the standard recruitment processes applied.
36. Trade Unions have been fully consulted on the details within this report.

Property Implications

37. There are no property implications for this report

RECOMMENDATIONS

Cabinet is recommended to:

38. Support the mandatory requirement to adopt SuDS features and the in-house service model to manage and maintain these features on all qualifying developments funded by commuted maintenance sums.

SENIOR RESPONSIBLE OFFICER	ANDREW GREGORY
	Director Planning, Transport & Environment

The following background papers have been taken into account:

Cabinet Report 21st February 2019 – Sustainable Drainage Systems

Flood and Water Management Act 2010, Schedule 3
<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>

Approval and Adoption (The Sustainable Drainage (Approval and Adoption) (Wales) Order 2018);

Procedural matters relating to approval and adoption (The Sustainable Drainage (Approval and Adoption Procedure) (Wales) Regulations 2018)

| [Welsh Government Sustainable drainage \(SuDs\) Statutory Guidance](#)

