

Sustainable Urban Drainage Systems (SuDs) Overview of legal situation regarding SuDs

1. Sustainable Urban Drainage Systems (or SuDs) are designed to slow down the release of water into a watercourse or sewer system thereby reducing the burden on that watercourse or sewer from the water being discharged into it.

Background

2. In 2007 Sir Michael Pitt was asked to conduct a comprehensive review of the lessons to be learned from the floods that occurred in the summer of 2007. His final report “Lessons Learned from the 2007 Floods” (“the Pitt Review”) was published in June 2008.
3. The Pitt Review looked at SuDs, including their slow uptake particularly in relation to community or strategic SuDs, and noted that the main barrier to the incorporation of SuDs in developments was their adoption once they had been designed and constructed. The Pitt Review recommended that the Government should resolve the issue of which organisations should be responsible for the ownership and maintenance of sustainable drainage (recommendation 20).

Flood and Water Management Act 2010

4. In response to the recommendation in the Pitt Review the Government developed proposals to increase the use of SuDs. These proposals formed part of the Flood and Water Management Bill which, upon receiving Royal Assent on 8 April 2010, became the Flood and Water Management Act 2010 (“the 2010 Act”).
5. The relevant provisions relating to SuDs are found in section 32 of, and Schedule 3 to, the 2010 Act.
6. Schedule 3 to the 2010 Act proposed to introduce standards for the design, construction, maintenance and operation of sustainable drainage systems through the publication by the Secretary of State of national standards for the implementation of sustainable drainage.
7. Schedule 3 also proposed the creation of SuDs approval bodies (or SABs), generally the unitary authority or county council for an area, to approve drainage systems before any construction work which has drainage implications could be commenced. Where the approved drainage system affected more than one property, the SAB would be required to adopt and maintain the system once constructed in accordance with the approved proposals subject to certain exceptions and certain conditions being met.

8. Additional provisions were also provided allowing SABs to voluntarily adopt SuDs where they were not under a duty to do so, and for the Secretary of State to set out the fees chargeable in relation to an application for SuDs approval.

Proposed Implementation of the Legislation

9. On 20 December 2011 the Department for Food, Environment and Rural Affairs (Defra) published a consultation (the 2011 Consultation) setting out the Government's proposals to implement the requirements for SuDs in new and redeveloped site in England set out in Schedule 3 of the 2010 Act.
10. The 2011 Consultation sought responses on the package of measures proposed by the Government including a draft national standard for sustainable drainage. Four draft statutory instruments also formed part of the 2011 Consultation setting out proposals regarding procedure, approval and adoption, enforcement and appeals. The 2011 consultation ran until 13 March 2012. The intention was that the measures relating to SuDs, including those in the 2010 Act, would be brought into force on 1 October 2012.
11. In July 2012 the Government postponed plans to implement Schedule 3 of the 2010 Act, the associated national standards and secondary legislation on SuDs.
12. Following a summary of responses to the 2011 Consultation being published by the Government in August 2012, it was confirmed, in oral evidence given to the House of Commons Environment, Food and Rural Affairs Committee in March 2013, that, in light of the consultation responses, the timetable for implementation of Schedule 3 of the 2010 Act had been moved to April 2014.
13. On 6 January 2014 Defra minister, Dan Rogerson, announced that the intended April 2014 implementation date was unlikely to be achieved.
14. A further consultation "Delivering Sustainable Drainage Systems" was launched by Defra on 12 September 2014 (the 2014 Consultation). It set out an alternative approach to SuDs to the one envisaged by the 2010 Act by proposing the delivery of SuDs through changes to the planning regime. The 2014 Consultation closed on 24 October 2014.
15. On 18 December 2014 the Government published a summary of responses and the Government's response to the 2014 Consultation.
16. Between April 2010 and late 2014 it was therefore the Government's intention to implement Schedule 3 of the 2010 Act to deal with SuDs. However, after

delaying its implementation on a number of occasions, the relevant provisions of the 2010 Act have never been brought into force.

17. The Government has since taken forward its proposals to deliver SuDs using the existing planning process.

Current Situation

18. On 18 December 2014, the same date that the response to the 2014 Consultation was published, the Secretary of State for Communities and Local Government, Eric Pickles MP, issued a Written Ministerial Statement (the WMS) on SuDs.

19. The WMS confirmed:

- a. that the Government would strengthen existing planning policy in relation to SuDs;
- b. that the Government expects SuDs to be provided in new developments wherever this is appropriate;
- c. that local planning policies and decisions on planning applications relating to major developments should ensure that SuDs for the management of run-off are put in place unless demonstrated to be inappropriate; and
- d. that local planning authorities should consult with the relevant lead local flood authority on the management of surface water, satisfy themselves that the proposed minimum standards of operation are appropriate, ensure that through the use of planning conditions or planning obligations that there are clear arrangements in place for ongoing maintenance over the lifetime of the development, and satisfy themselves that the SuDs are designed to ensure that the maintenance and operation requirements are economically proportionate.

20. The approach to SuDs set out in the WMS came into effect on 6 April 2015. It applies to major developments, defined in Article 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the 2015 Order), as development involving any one or more of the following:

- a. the winning and working of minerals or the use of land for mineral-working deposits;
- b. waste development;
- c. the provision of dwelling houses where—
 - i. the number of dwelling houses to be provided is 10 or more; or

- ii. the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);
- d. the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or
- e. development carried out on a site having an area of 1 hectare or more.

21. Following the WMS, the Government has made other changes to the planning process and published new or revised documents to facilitate and assist with the implementation and working of the new approach to SuDs.

LLFA as statutory consultees

22. From 15 April 2015, Article 18 of Schedule 4 to the 2015 Order makes the Lead Local Flood Authority (LLFA), which is either the unitary authority or county council for an area, a statutory consultee for certain applications for planning permission requiring a local planning authority, prior to the grant of planning permission, to consult the LLFA on any “major development with surface water drainage.”

23. As a statutory consultee, the LLFA is required to respond to the LPA within 21 days of receiving notice of the application for planning permission with a substantive response. A substantive response is one which:

- a. states that the consultee has no comment to make;
- b. states that, on the basis of the information available, the consultee is content with the development proposed;
- c. refers the consultor to current standing advice by the consultee on the subject of the consultation; or
- d. provides advice to the consultor.

24. The LLFA, in its capacity as a statutory consultee, is under a duty to report annually to the Secretary of State on their performance in providing a substantive response to any the local planning authority within the required timescale. The report must be provided to the Government by no later than 1 July in respect of the period of 12 months commencing on 1 April the preceding year, and must cover the points set out in Article 23 of the 2015 Order.

National Planning Policy Framework

25. The WMS must be read in conjunction with the National Planning Policy Framework (NPPF), published in March 2012. The NPPF, and in particular part 10 “Meeting the challenge of climate change, flooding and coastal change” (paragraphs 93 to 108), contains provisions relating to flood risks and SuDs.

26. Paragraph 103 of the NPPF states:

“When determining planning applications, local planning authorities should ensure flood risk is not increased elsewhere and only consider development appropriate in areas at risk of flooding where, informed by a site-specific flood risk assessment following the Sequential Test, and if required the Exception Test, it can be demonstrated that:

- within the site, the most vulnerable development is located in areas of lowest flood risk unless there are overriding reasons to prefer a different location; and
- development is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed, including by emergency planning; and it gives priority to the use of sustainable drainage systems.”

27. Local planning authorities must take into account the National Planning Policy Framework (NPPF) when preparing plans and the NPPF is a material consideration when making decisions about planning applications.

National Planning Policy Guidance

28. In addition to the NPPF, the Government publishes the National Planning Policy Guidance (NPPG).

29. The Flood Risk and Coastal Change section of the National Planning Policy Guidance (NPPG) was updated on 15 April 2015 following the change of position on SuDs and the role of the LLFA in planning. The guidance in this section is intended to assist local planning authorities, in relation to flood risk and coastal change, in preparing their plans and in considering applications for planning permission.

30. In particular, the NPPG guidance “Why are sustainable drainage systems important?” provides guidance on when SuDs should be considered, the type of SuDs that should be considered and when SuDs may be inappropriate.

Non-statutory technical standards

31. On 23 March 2015, Defra published a document setting out non-statutory technical standards for sustainable drainage systems.

32. The document sets out technical standards for the design, maintenance and operation of SuDs covering a number of points including construction, structural integrity and flood risk both within and outside the development.

33. The standards are intended to be used and read in conjunction with the NPPF and NPPG.

Effect

34. The provisions in Schedule 3 of the 2010 Act have not been brought into force and, in light of the Government's change of position on SuDs, it appears unlikely that they will be implemented in the near future.
35. SuDs for new major developments should be secured through the planning process when the local planning authority is considering and determining an application for planning permission, and the WMS dated 18 December 2014 is a material planning consideration in planning decisions. The NPPF and NPPG contain relevant sections regarding SuDs and Defra has published non-statutory technical standards for SuDs.
36. For any major developments with surface water drainage the local planning authority should consult the relevant LLFA and the LLFA is expected to make a substantive response.
37. Local planning authorities are required to ensure that there are clear arrangements in place for the continued maintenance of SuDs over the lifetime of a development. This is to be achieved through the use of relevant planning conditions or planning obligations secured under section 106 of the Town and Country Planning Act 2010.

Charging for services

38. A Best Value authority (which includes a County Council) may charge for providing discretionary services under section 93 of the Local Government Act 2003. Where services are charged for under section 93 the charges must not exceed the cost of providing the service, taking one financial year with another. Section 93 allows an authority to set charges as it thinks fit, subject to it not exceeding the cost of the service, including charging only some people for providing the service and/or charging different people different amounts for the provision of the service.
39. In the context of SuDs, the County Council could not charge for those things done as part of their role and function as a statutory consultee. However, it may be possible for the County Council to charge where it engages in pre-planning application advice or discussions with a developer or potential applicant. This does not form part of the statutory consultee role.
40. In relation to charging for pre-application advice, the National Planning Policy Guidance (NPPG) states that:
 - a. Any charging should not discourage appropriate pre-application discussions;

- b. Consideration should be given as to whether charging is appropriate in all cases;
 - c. It is strongly recommended that at least a basic level of service is provided without charge;
 - d. Where charges are to be made for certain pre-application services, clear information should be provided about:
 - i. the scale of charges for pre-application services applicable to different types of application;
 - ii. the level of service that will be provided for the charge, including:
 - iii. the scope of work and what is included;
 - iv. the amount of officer time to be provided;
 - v. the outputs that can be expected (e.g. a letter or report) and firm response times for arranging meetings and providing these outputs.
41. Whether the County Council can charge for other services will depend upon a number of different factors including nature of the proposed service, whether that service is a discretionary service, whether the County Council has any other power to charge for the service or is expressly prohibited from charging and other relevant considerations.

Emma Bethell

Principal Solicitor – Planning and Environment

