

**TONBRIDGE & MALLING BOROUGH COUNCIL**

**PLANNING and TRANSPORTATION ADVISORY BOARD**

**20 February 2012**

**Report of the Director of Planning Transport and Leisure**

**Part 1- Public**

**Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken by the Cabinet Member)**

**1 RESPONSE TO GOVERNMENT CONSULTATION ON IMPLEMENTATION OF SCHEDULE 3 OF THE FLOOD AND WATER MANAGEMENT ACT 2010**

**Summary**

**This report outlines proposals for the implementation of part of the Act dealing with the approval of sustainable drainage systems in new development and highlights the main points of interest for the Borough Council.**

**1.1 Introduction**

- 1.1.1 The Flood and Water Management Act (the Act) came into effect in April 2010. The Act takes forward a number of recommendations from the Pitt Review into the 2007 floods. This legislation will be a significant change to the way surface water is managed and controlled.
- 1.1.2 The Act designates Lead Local Flood Authorities (LLFA) at County or Unitary Local Authority levels and imposes a range of new strategic and regulatory duties on these bodies. In particular, Section 32 and Schedule 3 of the Act require that any construction work which has drainage implications may not be commenced unless a drainage system for the work has been approved by the approving body. Under the Act, LLFAs are established as the drainage Approving Body. Within Kent, the County Council is designated the "approving body" (this is sometimes referred to as the "SAB").
- 1.1.3 The Approving Body will have responsibility for the approval of proposed drainage systems in new developments and redevelopments, subject to exemptions and thresholds. A key underlying objective of this process is to promote the effective use of Sustainable Drainage Systems (SUDS).
- 1.1.4 The Government is carrying out formal consultation on a range of Secondary Legislation that it is intended will give detailed effect to these provisions of the Act. A response is requested by 13 March 2012.

## 1.2 Background to SUDS and the approval process

### 1.2.1 By way of background, the consultation papers explain that:

*Conventional piped drainage has a limited capacity and is usually designed to convey surface runoff rapidly from a development; it also provides no facility to control diffuse pollution. Significant investment is required to increase the capacity of our sewerage system, which struggles to cope with the high volumes of surface runoff and the increasing costs of improving water quality.*

*The SuDS approach makes use of different techniques, such as infiltration and retention, which mimic runoff from the site in its natural state. Rainwater should be managed close to its source and on the surface where possible. As a result the water is stored and released slowly, reducing flood risk and improving water quality. Less surface runoff frees up capacity in our sewers, whilst more natural materials improve biodiversity and amenity. Examples of SuDS techniques include permeable paving, soakaways, green roofs, swales and ponds.*

*SuDS can be used effectively in both rural and urban areas and help support new development without adding to the risk of flooding or pollution.*

*Government policy already encourages developers to build SuDS. However, we estimate that as few as 40% of new developments and redevelopments are drained by SuDS of some sort; and uptake has been slow.*

*Sir Michael Pitt's review of the 2007 floods identified a number of factors that contribute to the slow uptake of SuDS. His recommendations to resolve these issues included:*

- *Government should resolve the issue of which organisations are responsible for the ownership and maintenance of SuDS.*
- *The automatic right to connect surface runoff from new developments to the sewerage system should be removed.*

1.2.2 Under the Act, in order to be approved, the proposed drainage system will have to meet new National Standards for sustainable drainage. The National Standards (details of which have been published alongside the current consultation) have been prepared by DEFRA in collaboration with appropriate stakeholders, including local authorities and representatives of the Home Builders Federation.

1.2.3 The National Standards set out the criteria by which the form of drainage appropriate to any particular site or development can be determined, as well as requirements for the design, construction, operating and maintenance of SUDS. The approving body considers whether the application meets National Standards and consults statutory consultees, which include the relevant sewerage

undertaker, Environment Agency, highways authority and IDB. The Approving Body has no discretion: if the proposal complies with the standards they must approve, if it does not they must refuse. However, the approval body has the option of imposing conditions in order to make a non compliant proposal into a compliant one.

- 1.2.4 The Act, in response to Sir Michael Pitt's Review, also makes the right to connect surface water drainage from new development to the public sewerage system conditional on the surface water drainage system being approved by the Approving Body.
- 1.2.5 The Approving Body will also adopt and maintain SUDS that serve more than one property, where they have been approved. Highways authorities will be responsible for maintain SUDS in public roads.

### **1.3 Proposed response to consultation**

- 1.3.1 The four draft Statutory Instruments that are the subject of the current consultation deal with:
- Approving body approval and timeframes
  - Procedure including definitions of thresholds and the value of fees that can be charged for applications
  - Regulation of appeals
  - Enforcement of the requirement for approval.
- 1.3.2 The consultation also discusses the timetable for implementation of this legislation. At present, this has not been finally established, although there is an expectation that it will come into force on 1 October 2012, most likely with some degree of phasing to the implementation.
- 1.3.3 Having reviewed the content of the consultation papers, and the specific questions to which answers are sought, it is clear that much of it is of a detailed technical and procedural nature that will principally be the concern of KCC, as the SUDS Approving Body and the body responsible for adoption of the approved drainage systems once constructed.
- 1.3.4 The most pertinent consideration for the Borough Council is, I believe, the question of how the SUDS approval process will operate alongside the Planning Application process. It is envisaged that, in many instances, the two processes may run concurrently, although there is no requirement that this should be so. Clearly, in a practical sense and on a day-to-day basis, it is important that effective and efficient ways are found to ensure that the two processes do not unreasonably interfere with each other, or hold each other up, whilst recognising that the general objective of promoting sustainable development is common to both.

1.3.5 To a large extent, achievement of this will depend upon establishing practical working arrangements, rather than the detail of the legislation. We are engaged in discussions with colleagues across the County, both at County and district level, with the objective of setting up appropriate working protocols.

1.3.6 There are three areas where specific comment by the Borough Council is justified, in my view:

- The timetable for implementation and proposed transitional arrangements;
- A proposed exemption from the need for SAB approval for development carried out under a Neighbourhood Development Order;
- Proposed enforcement arrangements whereby both SABs and the LPA would have enforcement powers.

1.3.7 The consultation papers propose a common commencement date of 1 October 2012, but recognised that this may not be practically achievable, given the complexity involved in setting up all the new procedures and so on. Alternative commencement dates of April or October 2013 (or later) are mooted. Transitional provisions are also suggested, that would, for the first twelve months, exempt developments that already have planning permission, or where an application for planning permission or for the approval of Reserved Matters has been submitted at the time of coming into force of the legislation, from the need to seek SAB approval. There is also a proposal that, at least initially, only “major” developments would be subject to the requirement for approval, but that these thresholds would be reviewed once the legislation had been operating for some time.

1.3.8 I think that is it optimistic, to say the least, to expect a fully functioning and effective approval and adoption system to be operational by October this year. April 2013 seems a much more realistic target. The need for transitional arrangements is fairly obvious, but the way in which this is expressed is confusing and irrational. If submission of a planning application before “commencement date” is a route to exemption, there is the potential for developers to see that as a target and bring forward ill-conceived schemes. This aspect needs to be looked at again. On the other hand, I believe that it is both a practical approach and a rational one to concentrate on “major” developments as part of the approval process. This will, according to the Government’s Impact Assessment, bring the most immediate benefits through examination of the largest schemes, without overburdening a fledgling system with lesser projects.

1.3.9 With regard to Neighbourhood Development Orders, the consultation paper says:

*In addition to this phased approach and in order to ensure consistency with Government’s planning reforms, we are also considering exempting development*

*built under a Neighbourhood Development Order from the requirement for SAB approval. We assume that about 5% (cumulative) of development per year will be built through neighbourhood plans.*

*Our vision is that the discussions on the most appropriate type of drainage for the area will be conducted at the outset, during the development of a Neighbourhood Plan. We believe that this approach supports the presumption in favour of sustainable development. We expect the Local Flood Risk Management Strategy, Strategic Flood Risk Assessment, and the National Standards for SuDS to be drivers for SuDS in new development (even in the absence of a requirement for SAB approval). There may also be pressure from within Local Planning Authorities to deliver multiple benefits such as amenity or biodiversity.*

1.3.10 Quite apart from the somewhat ambitious assumption about the amount of development that might be brought forward through NDOs, I consider that there are far too many uncertainties surrounding the nature, content and quality of such schemes for a blanket exemption to be introduced at this stage. Again, this is an element of the proposals that needs to be looked at again.

1.3.11 The proposed enforcement provisions do, at first sight, appear to be somewhat complicated, even though they are said to be modelled on the Planning enforcement regime. This will no doubt require more detailed analysis. However, there is one particular point to do with identifying the body responsible for any necessary enforcement actions. The consultation paper explains:

*Government proposes to give enforcement powers to both the SAB and the Local Planning Authority (LPA) (article 3). The SAB will usually take enforcement action but by giving powers to the LPA as well it will mean that, where the SAB and LPA agree, the LPA will be able to take enforcement action on the SAB's behalf on a case by case basis. This may be useful for example where there has been a breach of the requirement for approval and also a contravention under the Town and Country Planning Act and it is more cost effective for the LPA to take the enforcement action in respect of both.*

1.3.12 Whilst there is clearly some attraction in avoidance of duplication of action, I have some concerns over the legitimacy of this approach. This is related to a more fundamental point about the extent to which drainage issues (where they are covered by the SUDS approval process) will be capable of being a material planning consideration to be taken into account in decisions on planning applications and the like. Members will be well aware of the normal stipulation that, where a particular matter is capable of being adequately dealt with under other (non-planning) legislation, it is not normally appropriate for the LPA to take such matters into account in reaching planning decisions. This is a point that requires further clarification in its own right but, if that rule were to be applied, it is difficult to see how a LPA could legitimately take enforcement action against a breach of the SUDS approval regime.

## **1.4 Conclusion**

- 1.4.1 As ever with draft legislation of this nature, it is conceivable that some of the early concerns will be resolved as the consultation process unravels. It is also possible that further concerns may come to light. As I have indicated, there is also ongoing liaison with colleagues elsewhere with the objective of formulating workable practices and procedures. Nevertheless, I proposed that the issues as set out in this report be put forward as the Council's response to the current consultation.

## **1.5 Legal Implications**

- 1.5.1 None arising at this stage.

## **1.6 Financial and Value for Money Considerations**

- 1.6.1 None arising from this consultation

## **1.7 Risk Assessment**

- 1.7.1 The only area of potential risk that arises for the Borough council would be if its own procedures in dealing with planning applications were in any way hampered by the proposed SUDS approval process. The response suggested in this report and our practical involvement with other authorities will seek to minimise this.

## **1.8 Equality Impact Assessment**

- 1.8.1 See 'Screening for equality impacts' table at end of report

## **1.9 Recommendations**

- 1.9.1 The key points raised in this report be submitted to Government as the Borough council's response.
- 1.9.2 The Board note the steps being taken to engage with other authorities in order to streamline incoming processes as far as possible.

The Director of Planning, Transport and Leisure confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and Policy Framework.

Background papers:

contact: Neil Hewett

Nil

Steve Humphrey  
Director of Planning, Transport and Leisure

<b>Screening for equality impacts:</b>		
<b>Question</b>	<b>Answer</b>	<b>Explanation of impacts</b>
a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	[Yes / No]	[Please explain your answer]
b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	[Yes / No]	[Please explain your answer]
c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		

*In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above.*