

DRAINAGE – THE ROLE OF SUSTAINABLE DRAINAGE SYSTEMS (SuDS)
A GUIDANCE NOTE for SOLICITORS INVOLVED IN PROPERTY DEVELOPMENT AND TRANSACTIONS

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Introduction¹

This note outlines the solicitor’s (your) duty of care when dealing with ***drainage*** issues for property clients, taking account of recent Government planning policy changes in support of sustainable ***drainage*** systems (SuDS). Please refer to the Glossary at Section 11 for the meaning of words in bold and italicised.

You already undertake CON29DW water and ***drainage*** enquiries of water companies in property transactions to ascertain whether foul and surface water drains from the property and connects to the public sewer. If it does not, your client, the buyer, will have to pay to maintain drains and sewers and may have to bring them up to ***adoption*** standards if the water company wishes to ***adopt*** them. However, traditional water and drainage searches do not address the impact of SuDS (which are designed so that they only drain into surface water / combined public sewers as a last resort).

Government planning policy and planning decisions now include a presumption in favour of SuDS being used for all ***development*** sites, unless they can be shown to be “inappropriate”². You have a duty of care to help your client to make a legally informed decision³ as to whether to buy or develop a site or property which may require the construction and long-term maintenance of a SuDS system.

1. Sustainable Drainage

SuDS control ***surface water runoff*** close to where it falls. SuDS are designed to replicate, as closely as possible, the natural ***drainage*** from the Site before development to ensure that

¹ This Guidance Note provides the authors’ view of good practice in this area. It is not legal advice. Whilst care has been taken to ensure that it is accurate, up-to-date and useful, the authors will not accept any legal liability in relation to it.

² See: HCWS (161) 18th Dec. 2014. See also PPG on Flood Risk, para. 079 ID: 7-079-20150415.

³ See SRA Handbook, Chapter 1: <http://www.sra.org.uk/solicitors/handbook/code/part2/content.page>

the flood risk downstream does not increase as a result of the site being developed, and that the site will have satisfactory **drainage** under current and likely future climatic conditions.

SuDS Benefits

SuDS provide opportunities to reduce the causes and impacts of flooding; remove pollutants from urban runoff at source; and combine water management with green space with benefits for amenity, recreation and wildlife⁴.

Drainage Hierarchy

Generally, the aim of **drainage** in any development should now be to discharge **surface water runoff** as high up the following hierarchy of **drainage** options as reasonably practicable:

- into the ground (**infiltration**);
- to a surface water body;
- to a surface water sewer, highway drain, or another **drainage** system;
- to a combined sewer.

SuDS Implications

SuDS can take up a significant area of the site – e.g. they may take the form of a large pond. This means less land is available for building purposes. The potential for SuDS to give rise to delays in project schedules, complex on-going **maintenance** and management contracts, as well as the costs of installation and ongoing **maintenance**, should all be considered by the client. Equally, SuDS may help a client to unlock the development potential at a site where **drainage** to sewer is impractical.

Indeed, particular types of sustainable **drainage** systems may not be practicable in all locations. Local planning authorities should set out those local situations where they anticipate particular sustainable **drainage** systems not being appropriate⁵. This will relate to

⁴ PPG on Flood Risk, ref ID - 7-051-20150323.

⁵ PPG Flood Risk, para. 080, ref ID: 7-080-20150323.

the costs / benefits of a system as compared with compliance with building regulations or drainage to a public sewer⁶.

SuDS and Climate

The prospect of warmer, wetter weather for the UK over the longer term means that the need for SuDS will become more imperative. The December 2015 Paris Protocol set a target of limiting the average increase in global temperature to 2 degrees Centigrade.

Even if this is achieved, the Intergovernmental Panel on Climate Change predicts that extreme weather events are likely to become more frequent and severe as the climate changes. Any sustainable drainage system should be designed so that the capacity takes account of the likely impacts of climate change⁷.

2. Solicitor Involvement and Duty of Care

You have a duty to exercise reasonable skill and care in progressing the legal aspects of your client's residential or property transaction. Where this involves redevelopment then that professional duty extends to advising about SuDS. Whilst much of the work relating to SuDS is for technical advisors, you are obliged to undertake such investigations as are expressly or impliedly requested by the client. To discharge your professional duty you will need:

- To advise your client that SuDS are relevant to all property developments;
- To make reasonable enquiries to help your client determine whether SuDS are an 'appropriate' drainage solution for the site. Depending on the outcome of these enquiries, you may need to advise your client on the legal aspects of any remedial action (i.e. potential SuDS strategies or how to obtain permission to discharge to public sewers);
- To advise your client about planning conditions that relate to SuDS
- To deal with any easements to drain into or over third party land and regulatory consent to discharge to surface or groundwater;
- To ensure the development complies with Local Plan policies on SuDS;
- To negotiate with relevant authorities about SuDS **adoption**;

⁶ PPG Flood Risk, paras 083 and 085.

⁷ PPG Flood Risk para. 085 Ref. ID: 7-085-20150323.

To draw up SuDS **maintenance** documents / the identification of flood risk features; and

- To advise your client to check with their insurance broker that they have adequate insurance cover, e.g. for third party liabilities arising from inadequate **drainage**.

3. Requirements for SuDS – Planning Policy and Building Regulations

The planning policy is set out in a House of Commons Written Statement from Mr Pickles, the then Secretary of State, who said⁸:

*“We expect local planning policies and decisions on planning applications relating to **major development** - developments of 10 dwellings or more; or equivalent non-residential or mixed development (see⁹ and Glossary) – to ensure that sustainable **drainage** systems for the management of runoff are put in place, unless demonstrated **to be inappropriate**¹⁰.”*

What is considered 'appropriate' and hence reasonably practical by the Planning Authority will vary depending on local planning policy, and site setting. 'Appropriateness' of SuDS should be assessed using the guidance documents available¹¹, taking account of the different requirements for greenfield and developed sites. Where SuDS are “appropriate” and reasonably practical in terms of costs / benefits, the scale and design of the SuDS scheme needs to be determined during the planning and technical design stage of the development.

For non-major developments, the Building Regulations Guidance¹² states that **as a first priority**, “an adequate soakaway or adequate infiltration system” is installed to discharge rainwater, where practicable.

⁸ HCWS (161) 18th Dec. 2014. See also PPG on Flood Risk, para. 079 ID: 7-079-20150415.

⁹ See now SI 2015/595, Art 2(1).

¹⁰ This came into effect on 6th April 2015.

¹¹ See Further Information (Section 10 below).

¹² Building Regulations – Approved Document H – 2015 Revision P39.

Your client will need to follow the hierarchy of **drainage** options (see above), starting by ascertaining whether a SuDS is practicable for the property¹³. “Practicable” will include ground conditions and the costs/benefits¹⁴.

Local Plans may include policies that require improvement such as for the reduction of the volume and speed of water runoff to the **drainage** system. However, the requirement for SuDS does not give rise to a positive duty on a developer to consider improving the **drainage** of the relevant area¹⁵ nor on the local planning authority to require such improvement¹⁶. In *Menston*, Patterson J. described the developer’s duty as “*not to worsen the situation elsewhere*”.

It is inherent in any development that runoff will increase beyond the **greenfield rate** and therefore the developer’s *Menston* obligation (to avoid worsening), will need to be met through SuDS. Only where SuDS are shown to be inappropriate, will it then need to be addressed through increased discharge via mains drains or sewers.

4. SuDS and Related Issues

SuDS can give rise to technical issues which may require specialist advice from an independent scientific advisor, including:

Flood Risk

Local flood risk issues will have implications for SuDS design and operation. At the pre-application stage, the planning authority will require a **flood risk assessment**¹⁷ / statement checklist and **drainage** strategy; while at the outline stage it will want a ground investigation report for **infiltration**. At the full planning stage your client will need full structural, hydraulic and ground investigations together with geotechnical factual and interpretative reports, including **infiltration** results¹⁸.

¹³ Approved Document H (2015) H3 paras 3.2-3.4

¹⁴ Flood Risk PPG at 083 and 085

¹⁵ R (*Menston Action Group*) v City of Bradford MDC [2015] EWHC 2292 (Admin).

¹⁶ See by way of example Kensington & Chelsea Local Plan policy CE 2(e).

¹⁷ See: <https://www.gov.uk/guidance/flood-risk-assessment-for-planning-applications>

¹⁸ Non-Statutory Technical Standards for Sustainable Drainage. Practice Guidance (2015) p. 9 – table.

Pollution

If surface water is to **infiltrate** into the ground, the planning authority will want evidence about the pollution risk to underlying aquifers and the presence of **groundwater source protection zones** (certain wells, boreholes and springs used for public drinking water supply which the Environment Agency have determined as source protection zones).

5. Adoption of SuDS

Sewerage undertakers will **adopt** SuDS as part of the sewerage system. They will require **maintenance** issues to be dealt with in accordance with their Management Plan¹⁹. Local authorities will also have SuDS Adoption policies. Essex County Council, for example, says:

*“ECC has a policy of not **adopting** SuDS unless exceptional circumstances prevail. The developer must be able to demonstrate that it is not possible for the SuDS to be adopted by a water company, with design changes if necessary.”*²⁰

6. Maintenance of SuDS

If the SuDS will not be **adopted** by a **sewerage undertaker** or local authority a planning condition will require that *“The sustainable **drainage** scheme shall be managed and maintained thereafter in accordance with the agreed management and maintenance plan”*²¹. Alternatively a section 106 agreement will be needed.

This could have serious financial implications for clients. **Maintenance** is a long-term obligation requiring the upkeep of all elements of the SuDS, including mechanical components (e.g. pumps), as well as inspections, regular maintenance and repair.

¹⁹ E.g. Anglian Water Sustainable Drainage Systems (SuDS) Adoption Manual.

²⁰ ECC SuDS Adoption Policy June 2015

²¹ Planning Portal. Model conditions.

7. SuDS Reports

Different SuDS reports are relevant at different stages of the planning and design process.

Pre Application SuDS Report

To ascertain whether SuDS is 'appropriate' for your client's property you should suggest to your client that a SuDS pre-application report from a specialist data provider is obtained.

This will help your client to assess SuDS appropriateness according to the **drainage** hierarchy as to whether:

- the soil and geology underlying the property is suitable for a SuDS **infiltration drainage** solution;
- the property may contain contamination which might be mobilised if a SuDS solution was constructed, thus giving rise to liability; and
- a surface water course is present in the vicinity with capacity to receive site discharge and the implications for third party land access.

In doing this, you should consider your client's intended use of the land. If it becomes clear that the intended use will not be possible due to irresolvable **drainage** issues, you should advise your client and seek specific instructions as to whether to proceed.

Outline and Full Planning Stage SuDS Report

Reports are available from specialist data providers at increased levels of detail to support your client's outline planning application.

These more detailed SuDS reports provide estimates of attenuation and storage requirements for the site, which will constrain the extent and costs of the proposed development.

8. SuDS Insurance

Drainage risks are insurable. You should advise your client to review their existing insurance policies to ensure that coverage is provided for the costs of remedying defective **drainage** systems and paying for first and third party losses arising from such defects. However, such policies may contain limitations on what and who they cover and you may provide advice as to the scope of the cover.

If your client does not have insurance for this risk, you should suggest that they speak to their insurance broker. The amount of any premium, the level of excesses and the imposition of certain conditions are important factors to be considered in selecting a policy.

9. Summary

There is a presumption in favour of SuDS for all **developments**. SuDS are the preferred approach to managing **surface water runoff** unless they are shown to be 'inappropriate'. For smaller developments Building Regulations require a SuDS approach to be taken to your client's property.

You should commission a pre-application SuDS report to ascertain whether SuDS are appropriate or not because this determination has important legal repercussions for your client, including the possibility of your client and its successors in title having a long-term obligation to maintain the SuDS.

SuDS can give rise to a number of other geo-environmental issues, including flooding and contamination (e.g. if the **drainage** system is constructed in an area on previously developed land). Advice may be required from an independent scientific advisor which takes these related considerations into account.

Drainage is already an important issue for clients and for lawyers. The prospect of warmer, wetter weather for the UK over the longer term means that the need for SuDS will become even more significant for clients and solicitors.

10. Further Information for Solicitors

R (Menston Action Group) v City of Bradford MDC (see Section 3 above) determined the meaning of “sustainable urban **drainage** principles”. The following sources of law and policy were cited by the High Court:

- National Standards for Sustainable Drainage Systems Consultation Paper of December 2011;
- Schedule 3 of the Flood and Water Management Act 2010 albeit this schedule is not in force;
- National Planning Policy Guidance (NPPG), paragraph 7;
- PPG on Flood Risk;
- Non-Statutory Technical Guidance for SuDS (DEFRA, March 2015).

11. Glossary

The following words have the following meaning:

Adoption: means the vesting of the drainage system - or part of the system - in the sewerage undertaker or local authority.

Drainage / Drainage System: means all the components that convey the surface water to a point of discharge.

Flood Risk Assessment: means an assessment of the potential flood risk to and from a site, from all sources, which may affect the feasibility of a development and demonstrates how flood risk will be managed now and over the development's lifetime, taking climate change into account in accordance with the NPPF.

Greenfield Rate / Runoff Rate: means the surface water runoff regime from a site in its assumed natural condition before development occurred.

Infiltration: means where rainfall and collected surface water runoff, permeates (soaks) and filters through to the subsoil layer, and continues to the water table within the underlying geology below.

Major Development: means development as follows - a) winning and working of minerals or the use of land for mineral-working deposits; b) waste development; c) provision of dwelling houses where (i) the number of dwelling houses to be provided is 10 or more; or ii) 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) 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. See SI 2015/595, Art 2(1).

Maintenance: means the on-going maintenance of all elements of the sustainable **drainage** system (including mechanical components) and will include elements such as; on-going inspections relating to performance and asset condition assessments; operation costs, regular maintenance, remedial works and irregular maintenance caused by less sustainable limited life assets.

Sewerage Undertaker: is a collective term relating to the statutory undertaking of water companies that are responsible for sewerage and sewage disposal including surface water from roofs and yards of premises.

Surface Water Runoff: means water flow over the ground surface to the **drainage** system. This occurs if the ground is impermeable, is saturated or if rainfall is particularly intense.