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SuDS Team
Defra
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Dear Defra SuDS Team,

Delivering Sustainable Drainage Systems- Essex Planning Officers' Association consultation response

This response has been produced in co-ordination with the Essex Planning Officers' Association members, made up of:

- Essex County Council
- Basildon District Council
- Braintree District Council
- Brentwood Borough Council
- Castle Point Borough Council
- Chelmsford Borough Council
- Colchester Borough Council
- Epping Forest District Council
- Harlow District Council
- Maldon District Council
- Rochford District Council
- Tendring District Council
- Uttlesford District Council
- Southend on Sea Unitary Authority
- Thurrock Unitary Authority

Essex County Council is involved under its capacity as a Lead Local Flood Authority (**LLFA**), not as a Local Planning Authority (**LPA**), since minerals and waste developments are exempt from these proposals. Whilst most of the LPAs falling under the County support the opinions outlined below there are one or two who feel they have resources available to carry out an assessment of SuDS proposals themselves. Similarly at the Unitary Authorities, the consequences of the consultation are not so significant since they act as

both an LPA and LLFA, however, the following has received a general consensus amongst group members.

EPOA position on consultation

This group's overall response to the consultation is that it will not significantly change the current situation and will not lead to effective flood risk management from new developments compared to the proposals contained in Schedule 3 of the Flood and Water Management Act 2010 (**FWMA**) to establish SuDS Approval Bodies (**SABs**). The reasons for this can be summarised as follows:

- **Maintenance options:** As highlighted by the Pitt Review, the key barrier to implementation of SuDS is the lack of clarity for responsibility for maintenance. The new consultation does not put a duty on anyone to adopt so will not resolve this issue, whereas the SAB has a responsibility to adopt SuDS serving more than one property which it has approved and inspected.

- **Maintenance funding:** The key unresolved issue from the SAB approach is how maintenance was to be funded. The consultation document recognises at 3.12 that funding for local authorities (mainly second tier authorities who do not have adoption powers for public open space) remains an issue, so no proposal has been put forward to overcome this.

- **Clear responsibilities:** Under the new proposals there is a disjoint between the LPA who would ultimately approve SuDS and the LLFA who are responsible for managing risks from surface water including producing strategic flood risk documents and dealing with resultant flooding issues. The LPA could presumably choose not to seek expert advice and resource this area of work themselves, however there are economies of scale and benefits of consistency if the LLFA is given the clear responsibility to provide the expert advice. Government's Chief Scientific Adviser has produced a Peer Review of ECC's Canvey Island S.19 Investigation released on the 17th October this year. Recommendation 1 highlights the need for clearer responsibility between Risk Management Authorities, suggesting that the LLFA should manage and coordinate effective flooding responses so the opportunity could be taken to update legislation to allow this and make LLFAs statutory consultees to Planning.

- **Clear standards:** The new proposal is to update the Planning Practice Guidance-Flood Risk and Coastal Change document to reflect the SuDS National Standards. However, LPAs would not have to conform to these standards which would result in an inconsistent approach both across LPAs and nationally and would lead to uncertainty for developers as to the required standards as well as the risk of poor design.

- **Deliverability of SuDS:** The new proposals allow SuDS not to be implemented if:
    - they will increase maintenance costs which would impair the deliverability of the development; or

- there is no viable maintenance option, as it would be unreasonable to condition that they are implemented.

The consultation proposal does not guarantee that either scenario will be avoided so there will be a drop in implementation of SuDS compared to if SABs are established, because while the SAB proposals did allow for conventional drainage to be used to substitute elements of the SuDS system if SuDS were more costly, it didn't mean that SuDS would not be required at all.

- **Phasing:** The new proposals are only proposed to apply to major developments but the cumulative impact of minor developments can be significant and the recommendations of the Pitt Review to increase uptake of SuDS on new developments will not be realised if minor sites are not to be phased in, as they were proposed to be under the SAB proposals.

We also would like to highlight our frustration that such a radical change in policy direction has been made after considerable effort and resources have been committed in readiness for the introduction of SABs. Whilst the current consultation states that the Schedule 3 consultation found that partners were concerned about the separate approval process by two different authorities there is no evidence to suggest that this would create a problem. It states that there was a concern if local authorities were not fully prepared to take on their new duties, however the results of the Preparedness Survey showed that SABs overwhelmingly (between 80-90% depending on the specific question) said that they could be ready with 6 months' notice. It also states that local government is concerned about the mechanism for charging householders to pay for SuDS being unclear, but this remains an issue in the current consultation, so given that this and the above points can be negated the basis of the current consultation is unclear. There is also a national drive to reduce the amount of information required by conditions under planning approval which this consultation is at odds with since it proposes that LPAs condition the requirement for SuDS, SuDS inspections and SuDS maintenance.

In addition, we have sought the views of some of the large developers we are in discussions with about strategic developments within the county that were likely to require the SABs approval and they are of the view that the introduction of the SAB would have bought certainty to the development process and would have provided cross boundary consistency when applying for planning permission/SuDS approval. The latest consultation will mean that the approach to sustainable drainage will be decided upon individually by LPAs leaving the developer with much less certainty about what is expected from them. In addition, the consultation proposals also removed the duty from the LLFA to adopt approved features meaning that the developer must look to arrange maintenance themselves.

Notwithstanding the above, if the new proposals are to proceed, we believe there are a number of additional issues which this consultation raises that mean that implementation by March 2015 would be very unlikely. To summarise, we feel that confirmation is needed of the following:

- **Who is the third party that will provide expert advice to the LPAs?** To ensure consistency and to tie to existing responsibilities this should be LLFAs.

- **How will the third party be funded?** If the third party is LLFAs we seek confirmation that these would be centrally funded through Government. If the third party is private consultancies the LPA will presumably have to pay for their advice through existing planning fees, however, as determination of the SuDS proposals would take a significant proportion of the overall time for determining a planning application (building on Defra estimates provided in the previous consultation it would take 14 hours to review SuDS for major developments and 24 hours to review SuDS for large-major developments) the fee charged by consultants is likely to be significant and unaffordable to LPAs given current planning application fees.

- **What is the role of the third party?** The role of and extent of advice provided by the third party would need to be agreed between the LPA and the third party unless it can be agreed nationally. The LLFA is already being relied upon by developers and LPAs to provide advice on both Local Plans and planning applications, particularly as the Environment Agency are no longer resourced to comment on surface water flood risk given the release of the FWMA which proposed SABs and have said they will no longer provide bespoke advice on applications from November this year. If the third party were to be anyone other than the LLFA this would cause potentially conflicting and confusing responsibilities.

- **What is the proposed revised wording to the NPPF?** This may need to be consulted on again prior to being changed.

- **Who would be responsible for construction inspections?** LPAs don't currently inspect developments during construction. They therefore don't have the resources or skills to do this or the same interest in ensuring that SuDS are built in accordance with the approval as the adopting body or the LLFA who will have to deal with any resultant flooding. Whilst Building Control is also a responsibility of lower tier authorities they would not necessarily be inspecting construction at the appropriate stages for checking the SuDS or looking at the site as a whole as they focus more on individual properties.

- **Scope of the consultation**
  Whilst the current consultation quotes the Pitt Review, it is not referring to the correct recommendation from the Pitt Report.

  Recommendation 10: The automatic right to connect surface water drainage of new developments to the sewerage system should be removed.
  Recommendation 20: The Government should resolve the issue of which organisations should be responsible for the ownership and maintenance of sustainable drainage systems.
  Recommendation 28: The forthcoming flooding legislation (now the Flood and Water Management Act 2010) should be a single unifying Act that addresses all sources of flooding, clarifies responsibilities and facilitates flood risk management.

  Defra's "Final Progress Report" on the "Government's Response to Sir Michael Pitt's Review", of 27 January 2012, noted that implementation of the above three recommendations were on track and was part of Defra's Departmental Plan to be

completed by December 2014. This consultation does not in any way answer the above quoted Pitt's recommendation and certainly does not meet Defra's own Departmental Plan. This consultation is replicating the existing scenario, whereby where Local Planning Authorities have the expertise in house for SuDS, are imposing a condition for those to be delivered as part of the new development. Those are then built unchecked and left to the developer to decide who should maintain them.

Response to consultation questions

Q.1 Do you agree that the proposed revision to planning policy would deliver sustainable drainage which will be maintained? If not, why?

No, we disagree because in some cases we don't believe SuDS will be delivered and in some cases we don't believe they will be maintained. This response covers these two areas.

Deliverability

As outlined in our covering letter there is an inherent issue with deliverability of SuDS given the current consultation proposals. Expanding on the above, namely:

SuDS exemptions

SuDS will not be required if they will increase maintenance costs which would impair the deliverability of the development. SuDS could increase maintenance costs in cases where the system outfalls into a public sewer (from a review of our records approximately 50% of SuDS outfall into sewers) and the WaSC doesn't adopt them. This is because the WaSC will charge homeowners on the site in the same way they would if there were public sewers on the site as the drainage is still dependent on the sewers. The maintenance of the SuDS themselves will need to be charged to either the developer (who it will pass on to homeowners) or directly to homeowners, depending on the adopter. In effect homeowners will therefore be double charged where SuDS outfall into public sewers. The consultation assumes, however, that if SuDS outfall into the sewer WaSCs will reduce the sewer rates (based on a reduction of surface water volumes entering the sewerage systems) which would reduce the effect of the double charge but unless LPAs specifically request betterment over the existing situation the SuDS will aim to replicate existing runoff rates and volumes and therefore there would not be a reduction in the charge and SuDS will cause an increase in costs. The developer would then have to show that these make the development unviable, which may prompt disagreements between the developer and LPA (or expert advisor) as exceptional maintenance costs can often be avoided through good design and the method of assessing viability would likely be debated. Where the WaSC adopt the SuDS there are not expected to be any additional charges above the flat fee to each household.

SuDS will also not be required if there is no viable maintenance option. LPAs can't attach conditions that aren't reasonable for the developer to comply with. Therefore they could not condition the requirement for SuDS to be implemented on a site if there is no-one available to maintain them. Because the consultation moves away from placing a duty on the SAB to adopt SuDS and instead proposes a range of options, if none of these options are possible

(especially since those that increase costs could be ruled out) the use of SuDS could not be required.

No other policy areas are subject to these clauses so it seems particularly strange that something as important as flood risk management is allowed to be relaxed if it will cause an increase in cost that makes the development unviable. If this is the case the site should be considered inappropriate for development.

With the implementation of Schedule 3 FWMA, Section 106 of the Water Industry Act 1991 would have been amended, such that there would have been no automatic right to connect to the sewers, without proving that connection through the proposed hierarchy in the National Standards (and Building Regulations) was not possible. By proposing to implement SuDS without Schedule 3, then primary legislation must be amended and new orders brought in by the Minister. Otherwise that would be direct non-compliance with recommendation 10 of Pitt's review. Developers would still use that argument to disprove the use of SuDS and be locked in an argument that SuDS would be too expensive to maintain, whilst they could simply connect into the sewers. As per the proposal under this consultation that would be sufficient argument to drop the use of SuDS.

Process for approval
Section 2.12 of the consultation document states that SuDS could be conditioned. This is of concern as best practice is for SuDS to be considered as early on in the design process as possible i.e. ideally at the masterplanning stage, to ensure that sufficient provision is made for SuDS to be implemented.

Responsibilities
LPAs have to consider and balance many different aspects of a development and therefore there is the tendency for SuDS not to receive as much consideration or be given as much importance as they would through the SAB approach. As LLFAs have responsibility for managing risks from surface water, the LPAs would not have an interest in ensuring appropriate SuDS are approved, inspected and maintained. Specifically in terms of maintenance, it's not in the LPAs interest to monitor maintenance since they wouldn't have to deal with the consequences of lack of maintenance as any resultant flooding would be reported to the LLFA.

Standards
The SuDS National Standards would only be guidance so this means developers would still have to design systems to Sewers for Adoption and highway specifications. This means that developers will look to split the drainage system into systems that can be adopted by the WaSCs and Highways with the remaining parts being open to the options outlined in the consultation. This potentially causes the developer more money as it is likely to result in more infrastructure being needed and reduces clear accountability and liability should part of the system fail. Separation of elements of the drainage system also goes against the holistic approach that should be used for SuDS design. Sustainable drainage will be most efficient when a train of features is used to treat and restrict flows. Systems designed for adoption by different maintenance organisations will necessarily break this train.

Maintenance

We also believe there are issues with ensuring maintenance of SuDS given the consultation proposals. These are:

Maintenance options

Taking each of the maintenance options in turn we are concerned that maintenance will not be carried out for the following reasons:

- Management companies- if the developer pays a commuted sum the management company will stop maintaining the system when the payment is used up. Otherwise, they are not a publicly accountable body so they may not be contactable, may go bust or simply may not deliver on the contract. Based on definitions in the Draft Guidance for The National Standards & Specified Criteria for Sustainable Drainage, the design life for a commercial development is normally 60 years and while the definition doesn't cover residential development we can only assume that this will be longer. Given the transient nature of most businesses it is unreasonable to expect that either the developer or management companies will be in the position to maintain the development for the life of the development. Whereas it can be reasonably assumed that the County Council will be in existence for life time of most developments.
- WaSCs- are only under a duty to adopt systems that cater for up to a 1 in 30 year return period rainfall event.
- Local government- lower tier authorities are responsible for public open space (**POS**), however the large majority of our LPAs have indicated that they no longer adopt new POS. Upper tier authorities who were proposed to become the SAB have no current systems in place to charge individual households (which is the preferred method of charging compared to commuted sums) and this issue has not been addressed in this consultation.
- Private individuals- whilst we agree that systems that only serve one property should be maintained by the individual property owner, under the current proposals, the option to designate features that are critical to the drainage of a new development still sits with the LLFAs, under schedule 2 of the FWMA. This means that it would be hard for the LPAs to ensure that larger, single owner developments e.g supermarkets etc., retained SuDS beyond the initial installation. Furthermore, systems serving small numbers of properties should not be left to the owners of those properties to agree to maintain the system collectively as this was historically the issue that led to the private sewer transfer in that multiple homeowners aren't able to agree when and how to maintain the systems and if one person disagrees and doesn't pay the system won't get maintained.

Responsibilities

As per our above point with regard to responsibilities, LPAs do not have the same interest as the LLFA to ensure that maintenance is carried out because if it isn't the flooding problems will be reported to the LLFA. The LPA should, in theory, enforce against lack of maintenance as a result of non-compliance with conditions but the LLFA then have overlapping responsibilities to enforce against poor maintenance to SuDS as they fall within the definition 'ordinary watercourses' which the LLFA can enforce under the Land Drainage Act. As the LLFA is not necessarily involved in the approval, inspection or maintenance it will have to set up a separate process to ensure all completed SuDS are

added to its asset register which it has a duty to maintain. In addition it will need to monitor sites to decide to designate any significant flood risk assets.

Q.2 How should the Local Planning Authority obtain expert advice on sustainable drainage systems and their maintenance? What are the costs/benefits of different approaches?

There are a number of reasons why we believe that LLFAs provide the most appropriate means for LPAs to obtain advice on SuDS and their maintenance. This could be made possible by LLFAs being given a statutory consultee role in the planning process (and given a duty to adopt- see Q.5). This will ensure consistency across the country, tie to the LLFA's existing duties to manage risks from surface water, groundwater and ordinary watercourses and address the issue of the Environment Agency no longer providing this advice. The LLFA has more ready access to the necessary background data, including being the body which would set a substantial amount of the guidance relating to the delivery of SuDS and other water related issues. LLFA's have an unrivalled interest in making sure that new developments within their administrative areas are adequately address flood risk because they are responsible for any resultant flooding. The LLFA may also be in the position to offer adoption of schemes so it makes sense for them to review the proposals rather than a third party who will not have to experience the consequences of system failure. The consultation mentions the SABs consultees needing to be consulted, ideally with a single contact point set up. This would work best if the LLFA co-ordinated these responses to be able to give an overall view on the acceptability of the SW proposals so that the LPA did not get conflicting responses back from different consultees.

LLFAs should be centrally funded to carry out this role, subject to confirmation from Defra/DCLG. The document 'Managing floods: supporting local partnerships' (http://www.lgiu.org.uk/wp-content/uploads/2014/10/MANAGINGFLOODS.pdf) has a recommendation which relates to this as follows:
'If councils are expected to coordinate and manage local flood risk strategies they will need greater control of the budgets allocated for flood protection. The government should therefore review the current distribution arrangements, which allocate 92% of the £656m to Environment Agency for flood risk management, leaving just 8% for councils, drainage boards and lead local flooding authorities. Given that over three million of the 5.5 million properties at risk from flooding in the UK are at risk from surface water, we recommend adjusting the budget so that 60% is controlled by lead local flooding authorities.'

If LPAs have to commission advice from either LLFAs or consultants they will need to fund this out of planning application fees which, in reality, will not be possible as it is a significant area of work. In particular if LPAs commission advice from a consultant this would be costly as they will need to charge with a view to making a profit and the benefits of consistency in the County and nationwide would be lost, therefore if LLFAs were not a statutory consultee they would still be the most cost-effective option to provide advice.

Planning Law does not cater fully for the enforcement and rectification of poorly built SuDS. If a system fails after more than 4 years in existence then no action can be taken. Any enforcement action taken before this would be taken against the property owner not the developer because the planning permission would transfer to them once the property was

sold. This would not have been the case under previous recommendations, where we would have seen responsibility sit with whoever had maintenance responsibility.

Q.3 What are the impacts of different approaches for Local Planning Authorities to secure expert advice within the timescales set for determining planning applications?

The districts have raised concerns about the additional time that planning officers would have to spend assessing the drainage element of planning submissions. Planners already feel that they are struggling to meet determination targets so increasing their workload will only put increased pressure on them, increasing the likelihood of missed deadlines.

If LLFAs are made a statutory consultee we would expect there to be the usual 21 days for comments. There would therefore be no impact on the timescales set for determining applications. The LLFA would have to be resourced to have the ability to respond within these timescales so it is important that funding is allocated to them to take on this extra role.

If LPAs sought expert advice from consultants there would need to be an agreed timescale for this to be provided that would not necessarily be constrained by the same 21 day timescale for consultees. Consultant's views would need to be sought as to whether they could respond within a timely manner to see if the determination time would be impacted.

To ensure SuDS design meets the criteria dictated by the SuDS National Standards will require a significant amount of time (as per our covering letter, 14 hours for major sites and 24 hours for large major sites). In order for private consultants to put forward competitive bids they may reduce the time spent on each consultation, so while quick turn-around times may be possible there is no guarantee of the quality of the work, whereas it is in the interest of the LLFA to ensure that good design is followed for every development.

Q.4 Do you agree that minor size developments be exempt from the proposed revision to the planning policy and guidance? Do you think thresholds should be higher?

No, we disagree that minor developments be exempt from the proposed revision to planning policy and guidance because the cumulative impact of multiple smaller developers can be hugely significant and the principle that surface water should be managed appropriately is applicable to all sites, regardless of size. In particular, infill developments can contribute to relieving localised flooding as identified in Surface Water Management Plan's Critical Drainage Areas. Excluding minor developments would appear to be at odds with the recommendations of the Pitt Report which identified that surface water flood risk needed to be addressed in new developments.

In theory LPAs have resources in place already that would be dealing with minor applications and could co-ordinate the third party's response, but it may be beneficial for the LLFA, if it is to be made a statutory consultee, for the requirement to be phased in for minor sites so that it can steadily build resources and expertise.

Although minor sites are more constrained in terms of available space there are still benefits to be gained from partial implementation of SuDS systems and requiring this to be considered will only improve the overall quality of development.

In light of our views above we do not think thresholds should be higher. If they were to be higher there would need to be another national definition above ‘major’ development as ‘large-major’ development is currently determined locally.

Q.5 What other maintenance options could be viable? Do you have examples of their use?

Another maintenance option that could be viable is the LLFA (being the statutory consultee) having a duty to adopt. Whilst this contains a risk because the LLFA may object to an application and ultimately the decision to approve is being made by the LPA, in the vast majority of cases the LPA currently takes the Environment Agency's objection on board and will not approve the application until the objection is withdrawn. This would mean there would not have to be the separation between highway and private drainage as the LLFA and Highway Authority (**HA**) are the same authority and this would reduce the cost to developers because they wouldn't have to design and build two separate systems. LLFAs have responsibilities for surface water and groundwater flooding at present so it is in their interest to ensure proper maintenance is carried out to prevent flooding occurring which would in turn be reported to the LLFA. They may have existing expertise in the HA that could be applied or otherwise upskill those staff to undertake SuDS maintenance or the LLFA could enter into an agreement with an experienced third party to carry out the works.

This would be a similar model to highways whereby the County Council as HA is consulted by the LPAs, the LPAs determine the application, and the HA then has a duty to adopt, subject to technical approval under Section 38 of the Highways Act. Some form of technical approval may be required further to the detail available at the planning stage such as evidence pertaining to the construction of the drainage system. This could be carried out in the same way the Building control would assess the quality of the built development.

The issue remains about how LLFAs would be funded to undertake the maintenance but this remains an issue in the current consultation which states at 3.12 that 'we intend to cover during the course of this consultation whether and in what form charging arrangements might be put in place'. It is disappointing that a proposal has not been outlined in the consultation as this was the next step needed to progress the SAB approach. We have therefore set out below a number of potential options we believe could be possible.

LLFA maintenance funding

There are a number of options for maintenance funding. Bearing in mind the highway model, the HA are in theory centrally funded to adopt highways and associated infrastructure.

However, we agree with government that the beneficiaries should pay so as not to put a further burden on developers. If the LLFA had a duty to adopt they cannot charge under the Local Government Act as this is only for discretionary services. Enabling legislation

would therefore be needed for LLFAs to charge homeowners, and this should include the ability to re-charge set-up costs (estimate set up cost could be estimated per household based on numbers expected to be billed per year). There are several ways billing could be done:

- WaSCs to add SuDS charge to bills (in areas where it charges) or send out bill on the LLFAs behalf. We accept that there has been some rebuttal from WaSCs to this idea but we intend to discuss this option locally as the WaSC benefits from being provided with the property information (as they currently rely on homeowners contacting them before sending bills) and they would already have processes in place for instances of non-payment. We also believe that if WaSCs were presented with this as the nationally identified preference they would be open to setting up local arrangements and the costs in doing so for the LLFA would be minimised.
- Alternatively LLFAs are able to gather the property information so would need to resource a team to send out bills and chase non-payment, which if the set-up costs could eventually be re-charged would be possible.

The overall benefit of this option is that it addresses the recommendation in the Pitt Review which was to centralise maintenance with a single body which, if the LLFA, will maintain in perpetuity given that as a local authority there is no risk of them being dissolved and can be held accountable.

The consultation proposes that WaSCs could also act as a management company which may be a viable option given that water companies are probably best placed at present to maintain drainage systems and be able to charge for this. WaSCs are also easily identifiable. Defra should share the response of WaSCs on this point with us.

Q.6 What evidence do you have of expected maintenance costs?

Whilst we have adopted a couple of schemes in the County, they have only been our responsibility for a short time and therefore no pro-active maintenance has been carried out to date.

The only evidence we may have of expected maintenance costs has been provided by other authorities who should respond to this question appropriately.

Q.7 Do you expect the approach proposed to avoid increases in maintenance costs for households and developers? Would additional measures be justified to meet this aim or improve transparency of costs for households?

No, there is no guarantee that the proposed approach would avoid increases in maintenance costs for households and developers. For example, as outlined in response to Q.1 in the instance where SuDS outfall into a public sewer, the WaSC will charge householders the surface water sewerage rate and the SuDS maintenance itself will need to be funded (either by developer who will pass costs on directly or through house prices to the homeowners or directly by the homeowners), so effectively homeowners will be double-charged. Where the WaSC adopts SuDS the document states that as the costs of maintaining SuDS are generally cheaper all bill payers would benefit, however the proportion of new developments in the WaSC's area would be minimal so the reduction

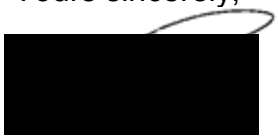
would be minimal, and this relies on Ofwat monitoring costs to ensure the reduction in charges is realised.

Whilst if LLFAs adopt SuDS it does not overcome the double-charging issue, the LLFA could be required as a statutory consultee to recommend approval/refusal of SuDS in line with the SuDS National Standards which should lead to better designed SuDS with less of a maintenance burden and hence lower cost.

Under the current proposals the cost could be borne by the developer who is likely to pass this cost on directly to the residents of any development. Moreover, under a maintenance system administered by the LLFA costs would be expected to be monitored to ensure that no more than the amount incurred is charged to the householder or developer. This would not be the case if the systems were maintained by unregulated private companies, whose goal would be to create a profitable business and therefore will charge for the maintenance of the system as well as to generate profit.

In relation to the second part of the question, if developers were to manage the maintenance of SuDS features we strongly recommend that any costs passed on to the residents of the development were capped or were able to be made publically available.

Yours sincerely,



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