

Residential Conveyancing Flood Risk in Property Transactions

Every property transaction requires us to consider the issue of flood risk. Our role is to make the relevant enquiries and searches to find out as much information as we are able and from this to inform our clients and lenders.

We encourage our clients to find out all they can for themselves: by looking at the property and its surroundings; speaking to owners; occupiers and neighbours and by researching resources such as the Environment Agency's website (<http://www.environment-agency.gov.uk/subjects/flood>).

If there is a risk of flooding revealed then we will help to establish the degree of risk and liaise with you and your lender and insurers to determine if cover is available and what the impact is on the premium for cover.

The context within which we are all working is set out below under relevant headings:

Key Issues

The consequences for property owners in the vicinity of a floodplain are extremely serious, particularly with regard to the sale of their property and the damage that flooding can cause.

Many people take the view that the July 2007 floods were a once in a lifetime event. However, can we be sure that with the onset of global warming and climate change, these perceived "once in a lifetime" events will not become much more common?

The Association of British Insurers has indicated that the cost and, in extreme cases, availability of insurance is directly dependant on the level of flood risk attributable to the property.

The Government has continually stated that there is a need for more housing to be built throughout the UK. This means that in order to create a reasonable quantity of affordable housing, building on flood plains must be a possibility.

The Pitt Review reported in June 2008 following the summer 2007 floods. Sir Michael Pitt made a wide ranging series of conclusions and recommendations relating to flood risk and the response of the various agencies and regulatory bodies with responsibility for dealing with it.

Different Causes of Flooding

- River Flood (fluvial)
- Surface Water Flooding (pluvial)
- Coastal Flooding (tidal)
- Foul Drainage Flooding
- Groundwater Flooding
- Reservoir/Canal Breach
- Water Main Burst
- Domestic Appliance Failure

The Consequence of Flooding

Some of the key consequences of flooding are:

- Death / personal injury
- Extensive damage to property
- Properties uninhabitable for long periods
- Properties cannot be sold
- Insurance unavailable or too expensive
- Expense of installing flood resilience measures
- Business interruptions

Responsibility for Flood Risk

As with many other areas of environmental law, European legislation has an impact on this topic, especially in the way that rivers are managed. In particular, one of the purposes of the Water Framework Directive was to mitigate the effects of floods. The Water Framework Directive is already being implemented into UK law and is followed by a Flood Directive promoting planning of flood risk management.

Government policy on flood risk is produced and developed by DEFRA. DEFRA has a key role to play in the funding of flood related work carried out by bodies responsible for implementing policy at a national and local level, such as the Environment Agency.

An example of DEFRA's policy development role is it's involvement in the strategy for flood and coastal erosion risk management, known as "Making Space for Water".

The aims of this strategy include:

- Providing the Environment Agency with an overview of all forms of flooding and coastal erosion.
- Identifying ways of tackling the causes of urban flooding.
- Encouraging uptake of flood resilience and resistance measures for individual properties especially where publicly-funded community defences are impractical.

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Local authorities also play an important role in managing flood risk for those watercourses that are not categorized as main rivers and thus fall outside the remit of the Environment Agency. For areas affected by sea flooding and coastal erosion, the local authority may also have powers to carry out works to manage the risk of flooding.

The Role of the Environment Agency

The Environment Agency has key responsibilities with regard to flood risk management and defence.

These include:

- A power to manage flood risk from designated main rivers and the sea
- A general supervisory duty for flood risk management
- Raising public awareness of flood risk
- Forecasting flood risks and issuing flood warnings as appropriate

The Water Resources Act 1991 gives the Agency powers to carry out maintenance and improvement works to main rivers. The purpose of these powers is to ensure that flood risk can be managed through the efficient flow of water and maintenance of suitable water levels. In more detail, these powers allow the Agency to:

- Construct and maintain defences against flooding, issue flood warnings and manage water levels.
- Dispose of dredging through deposits on land.
- Fail to maintain a watercourse for straightforward amenity reasons where there is no overall increase in the level of flood risk.
- Make byelaws to assist it in achieving its objectives.

Flood Risk and the Planning Process: PPS 25

One of the key areas in which the assessment and management of flood risk is particularly significant is in the planning process. In December 2006, the Department for Communities and Local Government published Planning Policy Statement 25, Development and Flood Risk.

The aim of PPS 25 is to:

- Ensure flood risk is taken into account at all stages in the planning process to avoid inappropriate development in areas at risk of flooding
- Direct development away from areas at highest risk; and
- Avoid development increasing flood risk elsewhere

PPS 25 sets out a statement of objectives and principles that should be followed by regional planning bodies and local planning authorities in preparing planning strategy documents to properly take flood risk into account.

These include:

- Regional planning bodies should ensure that regional spatial strategies contain a broad consideration of flood risk and strategies for managing it.
- Local planning authorities should prepare local development documents that provide policies on the allocation of sites and control of development to ensure that they avoid flood risk to people and property as far as possible and manage it in situations where avoidance cannot be achieved.

- Where climate change is likely to have a long term impact on a development due to an increased risk of flooding, local planning authorities should consider, through their local development documents, whether it is possible to relocate developments to areas with a lower flood risk.
- Consider flood risk alongside other spatial planning issues to recognise that avoidance and management of flood risk can make a positive contribution to development by improving quality of life and local amenities.
- Sustainability appraisals for regional spatial strategies and local development documents should reflect the flood risk assessments undertaken by planning bodies and accordingly support the government's objectives for the management of flood risk and development.
- Further, local planning authorities are also required to take issues of flood risk into account in determining planning applications in their area. In particular, local planning authorities should:
 - Have regard to the context of PPS 25 and policies in their regional spatial strategies to the extent that they supersede policies set out in existing development plans when they consider planning applications for development in flood risk areas before that plan can be amended to reflect PPS 25. This demonstrates clearly the importance of the assessment of flood risk in the planning process.

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- Make sure that applications are supported by site specific flood risk assessments as appropriate.
- Apply a risk based approach to considering planning applications in areas affected by flood risk. The precise detail of the risk based approach is set out in PPS 25.
- Ensure that new developments in flood risk areas are carried out in a way which makes them resistant to flooding and where risk still exists, it is managed safely.

The Role of the Environment Agency in the Planning Process

The Environment Agency is now a statutory consultee on all planning applications where flood risk is an issue. Having the status of a statutory consultee means that the Environment Agency must be consulted on planning policies and applications where flooding is an issue.

However, the Agency only comments on the implications of the application or policy from a flooding perspective. It does not have a power to decide the issues. However, it is important to note that the Secretary of State for Communities and Local Government can now call in applications where a planning authority is looking to approve proposals for developments where the Environment Agency has made sustained objections on the ground of flood risk.

The Pitt Review

Pitt noted that the 2007 floods were of a different nature to the common perception of flooding. The 2007 floods features a significant amount of flooding caused by surface water – often referred to as flash flooding. Pitt identified the fact that, at present, no organisation has responsibility for overseeing and planning for the impact of surface water flooding.

The Report identifies the fact that the planning process is a key aspect of the process of managing flood risk. Where possible, development in risk areas should be avoided. Where this is not possible, risks should be reduced. To achieve this, planners and developers should pay particular attention to the risks associated with flooding and the provisions set out in PPS 25 should be applied strictly. If PPS 25 fails to achieve this aim, as has been alleged in some instances, it should be strengthened to enable it to do so.

The Report indicates that where permission is granted for development on the floodplain buildings should be constructed to ensure that they are flood resilient.

The Report suggests that this be achieved most easily by including requirements in Building Regulations.

The law relating to drainage systems and flood risk is derived from a wide range of different sources including:

- Land Drainage Act 1991
- Water Resources Act 1991
- Water Industry Act 1991
- Environment Act 1995

Existing legislation generally gives powers regarding flood defences. However, the EU Flood Directive promotes a risk based approach which focuses on the overall management of flood risk.

The Report recommends that current legislation be consolidated into a single act with the objectives of:

- Addressing the different sources of flooding
- Clarifying responsibilities between different agencies
- Facilitating flood risk management

The Government has indicated that it will consult on legislation, in the form of the draft Floods & Water Bill, to achieve this aim in spring 2009. The Report indicated that such legislation should be given priority to ensure that it becomes law as soon as reasonably practicable.

The Report recommends that flood risk information should be made part of the mandatory search requirements of the HIP.

Flooding and the Conveyancing Transaction

Following the recommendations made in the Pitt Report, the Property Information Questionnaire which forms part of the HIP from April 2008, includes the following questions:

- “Are you aware of any flooding at the property since you have owned it or before? If “yes”, please give details.

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- Have you checked the freely available flood risk data at the Environment Agency's website (<http://www.environment-agency.gov.uk/subjects/flood/>)? If "yes", please give details.
- If "no", the buyer is advised to check the Environment Agency website for an indication of flood risk in the area."

Specific enquiries can also be raised regarding insurance claims relating specifically to flooding because the Property Information Questionnaire asks about fire and storm related claims.

The Lender's Consent

It is necessary to consider the position of the lender with regards to flood risk. The lender may be concerned that:

- If the property could be affected by flooding, is it good security for the loan?
- If the client can't get insurance then we may not be able to lend the money.

The Council for Mortgage Lenders gives general advice regarding searches.

The Council for Mortgage Lender's Advice

The Council for Mortgage Lenders advice regarding searches is as follows. The conveyancer must:

"make all usual and necessary searches...in addition [the Solicitor] must carry out any other searches which may be appropriate...taking into account [the Property] locality and other features."

Although the advice of the Council for Mortgage lenders fails to give clear guidance on the issue of flooding, there are compelling reasons for obtaining information about flooding in appropriate cases.

The ABI Statement of Principles

In 2002, the Association of British Insurers agreed a policy with the Government regarding the provision of flood insurance cover. This is normally provided as part of buildings insurance cover.

The current statement of principles states that flood insurance cover will be provided as standard on households and small business policies where the risk of flooding is no greater than 1 in 75 years.

The cost of the 2007 flooding has had a huge impact on the insurance sector. As a result, the ABI is reviewing the current statement of principles with the Government.

The ABI Advice

The ABI has provided guidance to homeowners living in areas at high risk of flooding to assist them in obtaining information and providing this to insurers.

The advice is as follows:

"If you live in a high risk area you should discuss with your local Environment Agency office whether there are plans to improve protection in your area – and when – before either:

- Letting your insurer know of these plans to improve protection, if you are an existing customer, or telling your prospective insurer or broker when seeking a quote, or
- Contacting your MP to ask them to lobby for urgent action to be taken AND writing to the Chancellor or the Prime Minister to ask for the announcement of more funding for flood defences to take effect as soon as possible.
- Contact your local authority to make sure that local drainage, such as highways drains, are being maintained properly and that this is being coordinated with the Environment Agency's work
- Consider installing flood protection devices to prevent flood water entering your property. You should take professional advice on whether this is suitable in your circumstances and, if so, which type would work best."

In every property transaction we will consider the issue of flood risk and carry out the necessary due diligence.

Please contact us on 01284 767766 for any further enquiries.