



Using Legal Planning Tools to Manage Flood Risk: A Guide for Local Authorities

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Planning policy requires local planning authorities (LPAs) to mitigate flood risk by avoiding inappropriate development in flood risk areas. Where development does take place in a flood risk area, they must ensure that it is safe and does not increase flood risk elsewhere. This brief discusses the main legal planning tools that LPAs can use to enable them to fulfill these requirements.

Article 4 Directions

Where the cumulative impacts of a particular type of permitted development, such as the paving over of gardens, would increase the flood risk in a specific area, the LPA can use an Article 4 Direction to remove the relevant permitted development rights. This enables the LPA to control the number of that type of development and ensure that flood risk mitigation measures are taken, such as the use of permeable surfacing and suitable drainage in the case of paving over gardens.

Article 4 Directions are, however, only suitable for use in limited circumstances. Whilst they may be appropriate for use in relation to individual buildings or streets, the Government has disapproved of their use over large areas. There is also the risk that the LPA will have to compensate anyone who is refused planning permission for development following the introduction of an Article 4 Direction unless 12 months' prior notice of the withdrawal of the permitted development rights has been given.

Local Development Orders

LPAs can use LDOs to encourage location appropriate development and help ensure optimal use of all land, including flood risk areas, by extending permitted development rights for water compatible and less vulnerable development/use in high flood risk areas and for vulnerable development in low flood risk areas. This will require a flood risk assessment and technical advice, plus additional resources to raise public awareness of the LDO. However, the knowledge gained by the LPA during preparation of the LDO can be used in the wider planning process, such as preparation of the development plan, and the costs of implementation and maintaining public awareness will be off-set by the longer-term benefits of the LDO in encouraging the delivery of location appropriate development.

Conditions

When granting planning permission, LPAs can use conditions to require the developer to address the flood risk associated with the development. The exact condition(s) required will need to be assessed on a case-by-case basis, but examples of the types of conditions that can be used include:

- For development in areas liable to flooding, a requirement that the developer incorporate property level measures to protect the property from flooding, such as the fitting of flood guards over doors.
- For residential development in areas liable to flooding, a prohibition on use of the basement and/or ground floor for living accommodation.
- For development that may increase flood risk due to surface water run-off, requirements regarding the use of permeable hard surfacing, the installation of suitable drainage, surface water run-off limits, and the removal of permitted development rights for the laying of hard surfacing.
- For larger developments sites, a requirement to provide on-site flood risk management infrastructure, such as flood water storage ponds.
- Where the developer owns or controls additional land that would be more suitable than the development site for the provision of flood risk management infrastructure, a requirement that the developer provide off-site flood risk management infrastructure on the additional land.
- Where off-site work is required to address the flood risk associated with the development, such as the installation of flood defence barriers by the Environment Agency or improvements to the off-site drainage system, a prohibition on the development being commenced until that work has been carried out.
- Where a trial run is needed to assess the effect of the development on flood risk, a condition limiting the planning permission to a specified period of time and requiring the flood risk impacts of the development to be monitored.

LPAs may wish to develop standard or model flood risk management conditions in order to improve efficiency and consistency.

Conditions cannot be used to require the developer to address existing flood risk issues that neither affect nor are affected by the proposed development and, in order to comply with Government policy and guidance, LPAs should keep the use of flood risk management conditions to a minimum, in terms of both their number and scope. Standard conditions should not be used as a matter of routine without assessment of their need in relation to the development in question. There needs to be strong justification for any condition that undermines the deliverability of the development, requires work to be carried out on land that the developer does not own or control, or removes permitted development rights. And, whilst conditions can be used to make improvements and minor amendments to a proposed development to address flood risk concerns, they are not appropriate for use where substantial changes are required, in which case planning permission ought to be refused.



Planning obligations

Planning obligations (Section 106 Agreements) are a tool that LPAs can use to require developers to take or pay for measures to address the flood risk associated with their developments. In particular, they can be used to:

- Require the developer to provide or pay for the provision of compensatory flood water storage areas where the development will reduce the capacity of the development site to hold or drain flood water.
- Require the developer to pay for or contribute to the costs of the provision of any off-site flood risk management infrastructure needed to either mitigate the effect of the development on flood risk elsewhere or to protect the development from flooding. This includes requiring the developer to contribute to the provision of flood risk management infrastructure in other local authority areas.

Like conditions, LPAs cannot use planning obligations to require a developer to address flood risk issues that are not connected with the proposed development, although for planning obligations the connection need only be minimal. LPAs also need to be mindful of the impact that planning obligations can have on the viability of development. A balance needs to be struck between the requirements placed on developers regarding the provision of flood risk management services and infrastructure and the need for development to be deliverable.

Community Infrastructure Levy

The CIL regime gives LPAs the ability to determine what flood risk management infrastructure is needed in the area and fund it through CIL revenue. An advantage of the CIL is that neighbouring LPAs can work together in the preparation of their flood risk management infrastructure plans and use the CIL to contribute to infrastructure in each other's areas. However, the problems with the CIL have been well documented and the Levelling up and Regeneration Bill provides for replacement of the CIL (and planning obligations) with a mandatory Infrastructure Levy. However, it is likely that the fundamental problems of how to set the charging rate at a level high enough to generate sufficient income whilst not undermining the viability of development will remain. And LPAs will continue to have to justify spending the revenue on flood risk management infrastructure rather than other infrastructure that the public may view as more important. It therefore remains to be seen whether the new regime will increase the role that developer contributions play in funding flood risk management infrastructure.

Conclusion

Whilst there are limitations to each of the legal planning tools described in this brief, they do have the potential to enable LPAs to reduce flood risk, particularly if used together as part of a co-ordinated strategy for flood risk management. They work largely on the basis of ensuring that the burden/cost of flood risk management is borne by the developer and the biggest challenge for LPAs is therefore how to use them in a way that effectively manages flood risk but does not undermine deliverability of the development required to meet the needs of the area. In order to overcome this, so far as is possible within the Government's requirements regarding the delivery of development (particularly housing) and how to measure viability, LPAs need to take a long-term view of the development needs of the area. In doing so they should take account not just of the short-term costs to the developer of addressing flood risk but also of the longer terms costs of not addressing it.

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McClean, A 'Planning for Floods: An Analysis of Planning Law and Planning Practice in Flood Risk Management' (PhD thesis, Newcastle University 2022)

McClean, A 'Using Development Plans to Manage Flood Risk: A Guide for Local Authorities' (Research Briefing, 2023)