

# UPDATE FOR DEVELOPERS AND LOCAL AUTHORITIES: SUSTAINABLE DRAINAGE AND FLOOD RISK

November 2009

## Stop Press: Government finds room for Flood and Water Management Bill in Queen's Speech

**Defra's Flood and Water Management Bill has been included in yesterday's Queen's Speech despite strong criticism of the draft Bill by those that responded to the consultation. It remains to be seen whether the Bill will be given sufficient Parliamentary time to make it through this short Parliamentary session.**

- Defra's ambitious draft Bill, which overhauls the legislative regime for flood and water management in England, was included in yesterday's Queen's Speech despite criticism that it does not achieve a coherent framework.
- Feedback on Defra's draft Bill since its publication in April 2009 has been mixed. Although there is wide support for an overhaul of the flood and water management legislation in England, the responses to the consultation contained numerous criticisms of the individual measures. The Parliamentary Committee for the Environment, Food and Rural Affairs (the "EFRA Committee") has also been critical of the draft Bill, describing it as a "*confusing mix of measures*" that was a far cry from the comprehensive overhaul of flood and water management that Defra is seeking to achieve. The EFRA Committee concluded that "*Defra still has a long way to go if it is to introduce into parliament a comprehensive Flood and Water Management Bill of which it can be proud*".
- As we reported in our email briefing of 17 July 2009, the draft Bill currently contains provisions to end the automatic right for surface water from new developments to connect into the sewerage system and to promote the use of sustainable drainage systems (SUDS) instead. The responses to the consultation were generally supportive of an increased use of SUDS but warned that SUDS are not a "*silver bullet*", and there were concerns about the costs to local authorities, questions over whether

water utilities or local authorities were better placed to manage SUDS in the future, and confusion over whether the details about the operation of SUDS were sufficiently fleshed out in the draft Bill.

- Notwithstanding these criticisms, the Bill has been included in the Queen's Speech. With the general election due by June 2010 at the latest, the forthcoming Parliamentary session will be shorter than usual, and there are questions over whether there will be sufficient Parliamentary time to consider all of the Bills proposed in yesterday's speech.

We will continue to monitor the progress of the Bill through Parliament.

## Developer and Local Authority both liable for flooding claim following residential development

**The case of *Lambert v. Barratt Homes Limited (Manchester Division)* demonstrates the continuing risk to both developers and local authorities that can arise from the flooding of neighbouring properties as a consequence of a development.**

- A recent High Court decision in a flooding claim arising from a new development continues the current trend in the Courts for holding developers and local authorities liable for damage caused by flooding where the potential consequences were known and where steps could have been taken to address the problem.
- *Lambert v. Barratt Homes Limited (Manchester Division)* [2009] EWHC 744 (QB) concerned the flooding of neighbouring homes following a residential development on an adjacent site. The claimant brought a claim against both the developer and the local authority. The claimant's case was that the developer was liable because it had filled in a drainage ditch during the development and this had caused the flooding. The claimant's claim against the local authority was that the water originated from

**Disclaimer:** This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

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the higher land owned by the local authority and the local authority was liable because it was aware of the problems, and therefore it had a measured duty of care to take steps to abate the nuisance even though there was no suggestion that the local authority had caused the problem.

- The Court found that the developer had caused the flooding by obstructing the drainage ditch and was therefore liable. The Court also found that the local authority was liable because it had a measured duty of care to take steps to prevent the flooding occurring. By failing to take action, it was liable for the damage caused to the neighbouring properties.
- This is the most recent in a series of cases that demonstrates a clear trend in the Courts to find landowners liable for failing to take steps to alleviate flooding even when the landowner has not caused the problem. The Courts have held that landowners have a measured duty of care to take steps to alleviate flood risk once they are aware of the problem. The liability is measured, not absolute, and the costs of the steps required to alleviate the problem and the means of the landowner are all factors that are taken into consideration. However, in the case of both local authorities and developers, the Courts are likely to consider that there will be sufficient funds available to carry out preventative works once the problem has been identified.
- Flooding litigation is a complex area of law that is constantly evolving. Burges Salmon's environmental litigation team recently acted in the unreported case of *Latimer v. Carmarthenshire County Council*, another flooding claim against a local authority. That case concerned the issue of culverting a watercourse, which has its own distinct case-law. The established position is that a party that culverts a watercourse has an absolute duty to ensure that it remains sufficient for carrying the water. In the case of *Bybrook Barn v Kent County Council* (The Times, 5 January 2001), the local authority was found to have a measured duty to improve a culvert that it inherited when factors outside of its control led to an increase in water flowing through it. The Latimer case went further, establishing that, where a local authority had caused the additional floodwater that contributed to the flooding, it had an absolute, rather

than a measured, duty of care to ensure that the culvert was maintained or improved to a sufficient degree to carry those floodwaters away from neighbouring properties.

- Developers and local authorities should be aware of the risks of flooding litigation brought by neighbours aggrieved by new developments and the increased surface water run-off that may result from those developments, and should seek specialist advice at an early stage.

**For more information on the Flood and Water Management Bill or on flooding litigation and the risk to developers and local authorities, please contact:**



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