



Compulsory Purchase Association Scotland

Flood Schemes in Scotland: Compensation issues

Tuesday 24th May 2022



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The Compulsory Purchase Association

The meeting begins at 4.00pm

03:38:29



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Welcome and Introduction from the CPA Scotland Chair

Keith Petrie, FG Burnett



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Legal powers and options to deliver a Flood scheme

Rob McIntosh, Aberdeenshire council



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Legal powers and options to deliver a Flood scheme

- Background Flood Risk Management (Scotland) Act 2009
- Duties - Act
- Powers - 2009 Act
- Implementing - Flood Schemes under Act
- CPO considerations
- Practical considerations & examples

Background Act

- System for assessing flood risk and managing it sustainably (transposing the European Union's Floods Directive into Scottish law)
- A national flood risk management plan produced by SEPA and approved by Scottish Ministers sets the overall national priorities for flood risk management in Scotland
- Local authorities are responsible for producing and implementing **local flood risk management plans in their areas-Aberdeenshire lead for NE** .
- Sections 18 and 59 placed new duties on local authorities, to assess bodies of water (watercourses such as rivers, ponds, farm drainage) for flood risk to properties or other public or private assets. assessment discloses a risk of flooding which could be substantially reduced by works of clearance or repair at a specified part of the watercourse, will draw up a schedule of inspections to inform potential works (at public or private expense)
- The change is the emphasis on managing flood risk in a sustainable way so from a predominantly reactive system to one where the impacts of floods are pre-empted using better information, and data, on the causes and impacts of floods.

Powers & duties under the Act

- Provides powers LA's build flood defences and make flood protection schemes
- It updates the law on flood warning systems operated nationally by the Scottish Environment Protection Agency, replacing the existing provisions in section 25 of the Environment Act 1995.
- It gives property-owners a right to compensation from SEPA (in the case of a flood warning system) or from the local council (in the case of flood defences or a flood protection scheme), if their property has dropped in value, or their enjoyment of their property has been disturbed.

Powers Act - Delivering a Flood scheme

- Section 56 - General power to manage flood risk .These powers are permissive; local authorities do not have a duty to use these powers.
- Emergency powers -In such cases, under section 56(1)(b) a local authority may do anything it considers necessary to reduce the imminent risk of flooding to avert the expected serious adverse consequences.
- Promote a scheme- Legal Order
- <https://www.gov.scot/publications/flood-risk-management-scotland-act-2009-local-authority-functions-under/documents>

All by agreement ?

- 56 General power to manage flood
- Risk- Without prejudice to the generality of subsection (1), a local authority may
- in particular(d) enter into agreements or arrangements with any other person -
Agreements are most suited to situations where simple flood alleviation works are required involving
- a single landowner when there is reasonable certainty that the landowner will not subsequently change their mind.
- Back up early binding agreement & promote Scheme in tandem
- Section 56(2)(d)(ii) also enables local - authorities to enter into agreements relating to the management of land in a way which can assist with slowing the flow or retaining flood water

Legal Order process Sch2 – Act

- Flood Order advertised
- Gather objections
- Meet with objectors
- Report findings to Council
- Recommendation – 3 options
 - Confirm Scheme – no modification
 - Confirm Scheme with modification
 - Reject Scheme
- Refer Scheme to Scottish Ministers
 - PLI or return to Council
- Confirm scheme or reject scheme depending on PLI

Implementing a Scheme- scheme confirmed

- Power entry undertake works
- 79(2)(e) of the 2009 Act, any person authorised by a local authority is entitled to enter any land on which “scheme operations” are to be carried out, for the purposes of carrying out the operations or for executing any temporary works in relation to them.
- NB – not given any property rights in effected land but instead rights to go onto land and carry out works.
- Wide power –covers flood protection scheme operations, temporary works, emergency flood protection work, maintenance operations or clearance and repair works aand for the purposes of maintaining flood prevention schemes constructed underthe 1961 Act
- Power limited - Must ensure works covered by Scheme or temporary works
- This main provision schemes rely upon

Taking entry

- Dealt with confirmation stage ?
- Not an absolute right- warrant allows the person authorised to use reasonable force it does not allow the use of force against individuals (see subsections section 80(2)(b)(i)
- if there are reasonable grounds for the exercise of the right in relation to the land the conditions are satisfied.
- Objection be basis not reasonable grounds
- If owner objects - requires a hearing - In terms of s.80(2) of the Act a warrant can only be granted after hearing evidence on oath. Then require an evidential hearing to be fixed
- Outcome of hearing
- What if lose hearing- confirmed scheme but no means access works

Maintenance & Repair

- Damage to flood protection work
- S69(1) creates a criminal offence intentionally or recklessly damages any flood defence work
- S67 - Recovery of expenses
- A local authority may recover any expense it incurs in carrying out—
- (a) any repairs or re-instatement to flood protection work done—
- (b) any work required under section 59, from the owner or, as the case may be, occupier of the land on which the work was carried out if such expense **is as a result of the actions of that person.**
- S79 (g) any land for the purposes of maintaining flood protection work carried out—
- (i) under section 56, or
- (ii) in accordance with a flood prevention scheme confirmed under section 4 of the 1961 Act,
- Land – mean land ancillary
- Inaction is not an action. Inaction, not clearing vegetation or sediment or repairing banks and defences, is not an ‘action’ -that’s authority expense

CPO

- **CPO – more robust but adds significant time delay -**
- First, the local authority must decide whether or not it requires to purchase the ground on which flood works are constructed. This may be desirable for some permanent works, but is not always essential. If it is deemed essential, compulsory purchase powers under section 66(1)(b) may be used **following confirmation of a scheme.**
- does not preclude the ability to construct the Scheme, 66 Acquisition of land
- (1)A local authority may—
- (a)by agreement, acquire land which it requires for the exercise of its functions under this Part,
- (b)with the authorisation of the Scottish Ministers, compulsorily acquire land (other than Crown land within the meaning of section 91(7)(a)) which it requires for the purpose of carrying out scheme operations.
- Timescales- - CPO – have go through whole cpo process
- Use CPO – only one - Huntingtowerfield Farm, Almondbank, Perth 2009 act

Huntly Flood Protection Scheme

- The scheme involve the raising of embankments along the River Deveron, Ittingston and Meadow Burns to reduce overland flow, and the construction of storage areas near Arnhall and to the west of the Meadows to slow down and regulate flows

Huntly Flood Protection Scheme





Huntly Flood Protection Scheme



Legal Mechanisms to deliver scheme

- Scheme implemented under ACT
- Voluntary agreement with farmers – additional storage capacity to flood fields
- Initial payment compensation
- Further payments payable event of flood loss damage to crops
- Reservoir act – creation reservoir

Implementation complex schemes require legal support

- Promotions scheme and Hearings
- Internal Governance – reports – standing orders and schemes of delegation, and may have other policies that impact on the general power, which need considered in taking forward works and schemes. i.e procurement process
- Acquisition rights in land - advice & implementation
- Access – warrants
- Contracts – significant capital contracts
- Road closures and restrictions

Governance – transparency

- The Scheme is developed under the auspices of the Flood Team but the notification process and receipt/collation of objections is by the Legal and Governance Service.
- Thereafter, advice on objections including possible modifications, may be sought from the Flood Team, but the report for committee on the proposals and accompanying representations is monitored by the Legal Team.
- Any subsequent referral to Scottish Ministers, the administration of a
- hearing and notification of decisions arranged by the Legal

Land identification & interests

- Complex scheme require accurate mapping and identification property interests
- Part 4 of the Act, a local authority may require land owners or occupiers to state their interest in that land in writing
- searchers produce map

Stonehaven flood scheme – legal input – servitude Culvert



Benefits to all





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Stonehaven Flood Protection Scheme

Rachel Kennedy, Aberdeenshire council



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Stonehaven Flood Protection Scheme

Overview

Rachel Kennedy

24 May 2022

Aberdeenshire
COUNCIL



The delivery of the Stonehaven & Huntly Flood Protection schemes using Flood Risk Management Act (Scotland) 2009



Stonehaven – urban, hard engineering

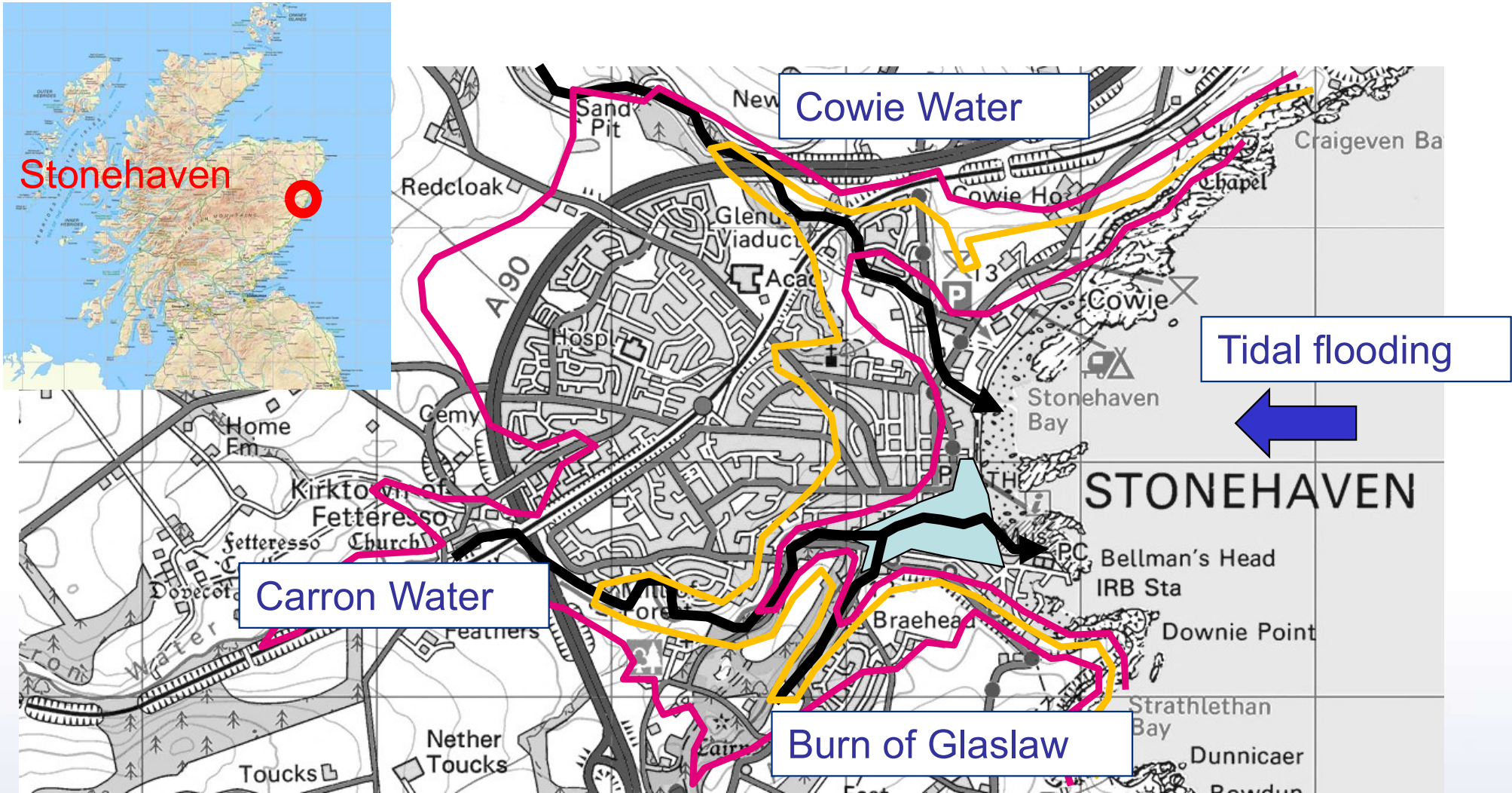


Huntly – Rural, large scale earthworks

Flood History – River Carron & Glaslaw Burn

- Extracts from various publications
 - 1829 – Houses flooded on Cameron St, Arbuthnott St, Ann St, Barclay St
 - two wooden bridges on River Carron swept away (Aberdeen Journal 12 Aug)
 - 1873 – Houses flooded to considerable depth (Scotsman 8 Nov)
 - 1882 – Houses flooded to 2-3 feet (Scotsman 18 Dec)
 - 1906, 1907, 1934, 1938, 1946, 1947, 1956, 1979, 1988, 1995...2009, 2012

Topography



Flood History

Green Bridge - 1979



Green Bridge - 2009



Flood History

Barclay Street - 1979



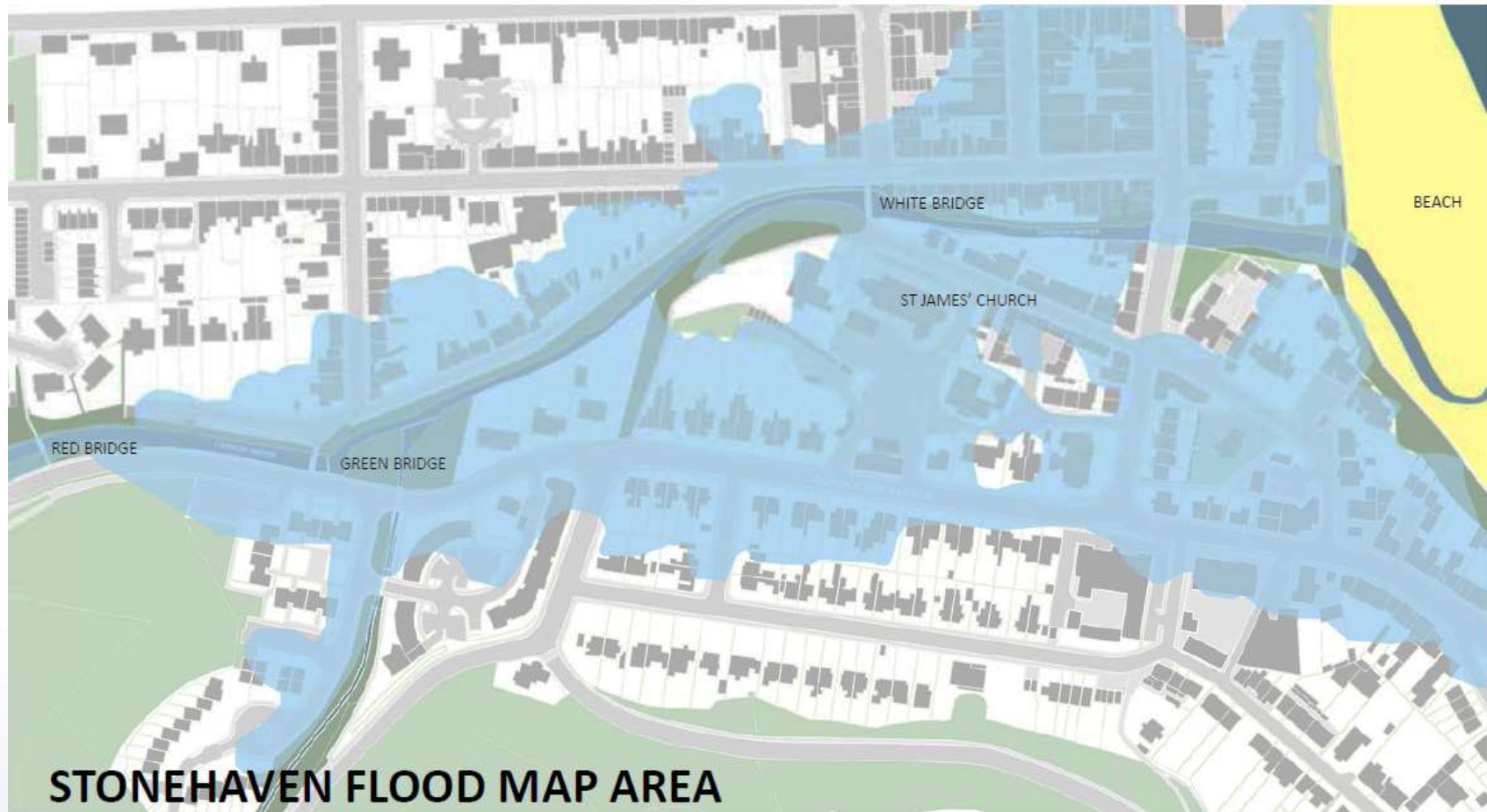
Barclay Street 2009



Flood History



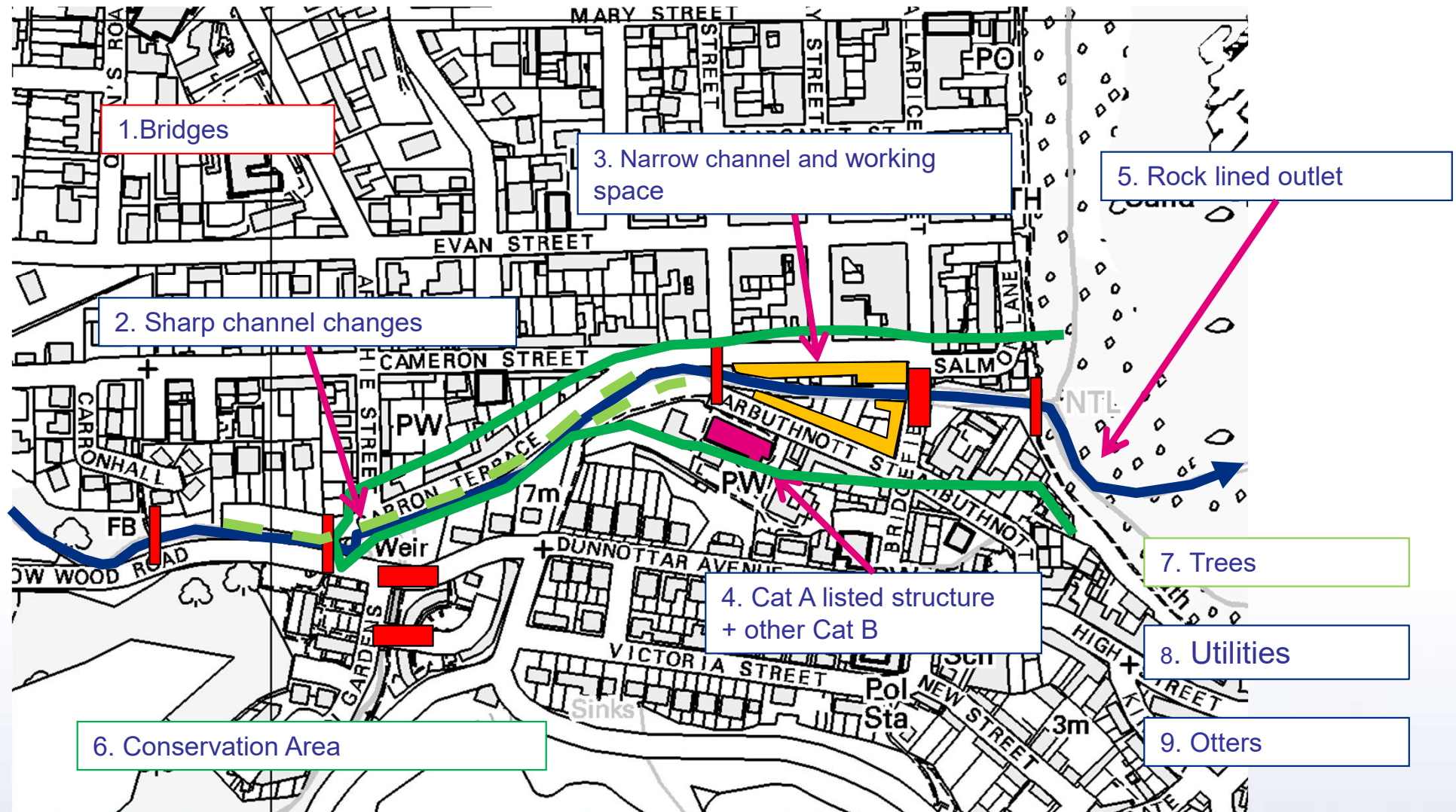
Stonehaven Flood Map



Option Assessment

- Do nothing – Not acceptable
- Resilience measures – Not practical
- Catchment measures – Not sufficient
- Diversion – No practical options
- Works through town
- Storage
- Combination of measures

Key constraints



Challenges

- Urban Centre (Utilities, people)
- Construction Space
- Historic buildings
- Conservation Area
- Environmental
- Ground conditions

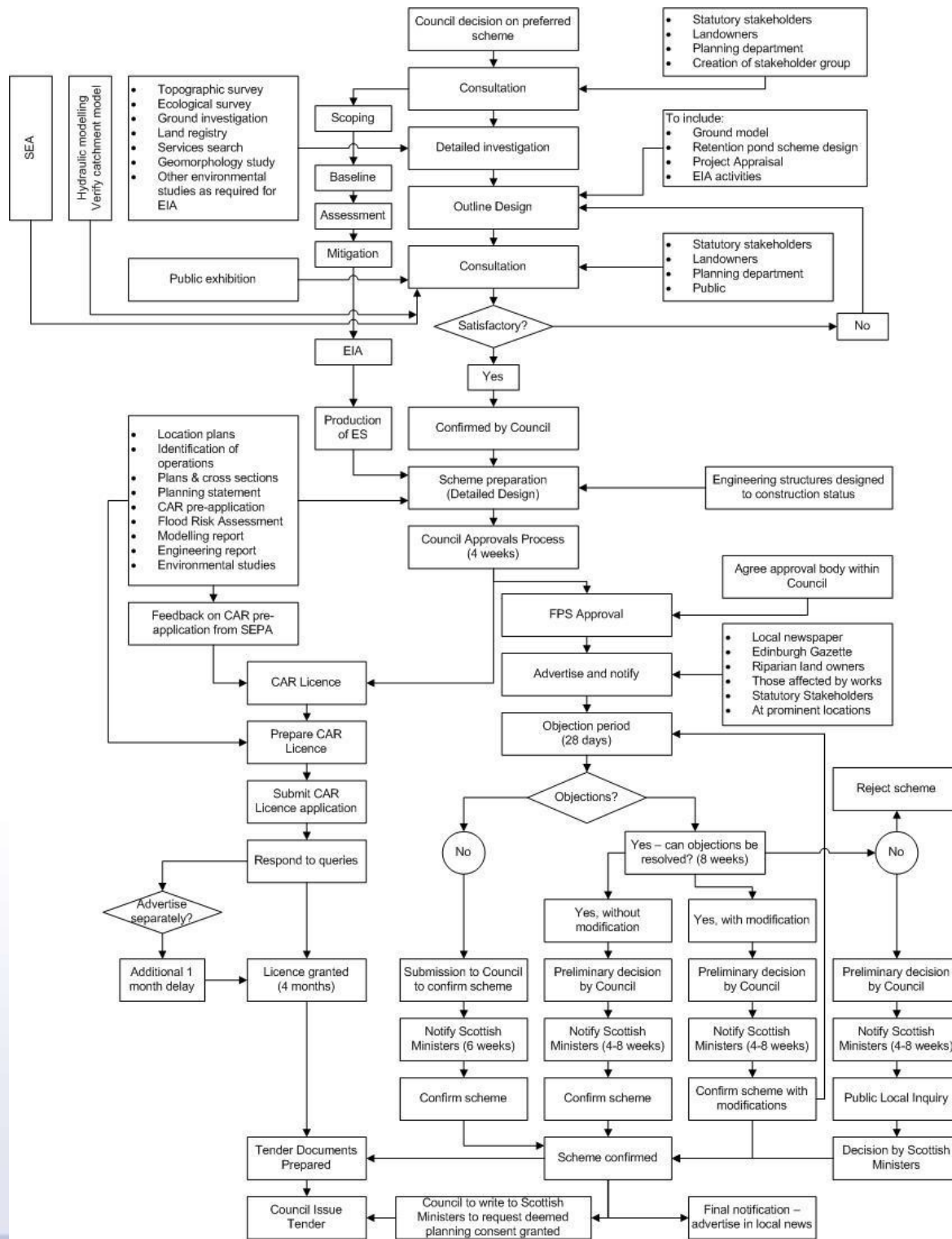


Indicative stages

- Preliminary design approval
- Stakeholder engagement
- Design constraints and refinement
- Detailed design
- Consents – planning, SEPA, HES
- Legal order – Flood Risk Management (Scotland) Act 2009
- If confirmed – construction stage
- Consultation - throughout development; quarterly, monthly, website, newsletters social media, library docs

Legal Order process

- Flood Order advertised
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- Recommendation – 3 options
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 - Reject Scheme
- Refer Scheme to Scottish Ministers
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- Stages involved in the order process...

Indicative Timescales from Prelim design

- Funding received August 2022
- Appoint a dedicated Project Manager Dec 2022
- Appoint a consultant by Spring 2023
- Surveys throughout 2023
- Land and title searches throughout 2023
- Prelim design delivery end 2024
- Consultation
- Detailed design – 2024/2025
- Legal Order 2025/2026
- *PLI 2026 (however may not be required)
- Confirmed scheme 2026 (deemed planning at this stage)
- Construction tender 2027 onsite 2028
- **Engagements throughout, including general public & stakeholders**

* timescales unknown, dependant on objections

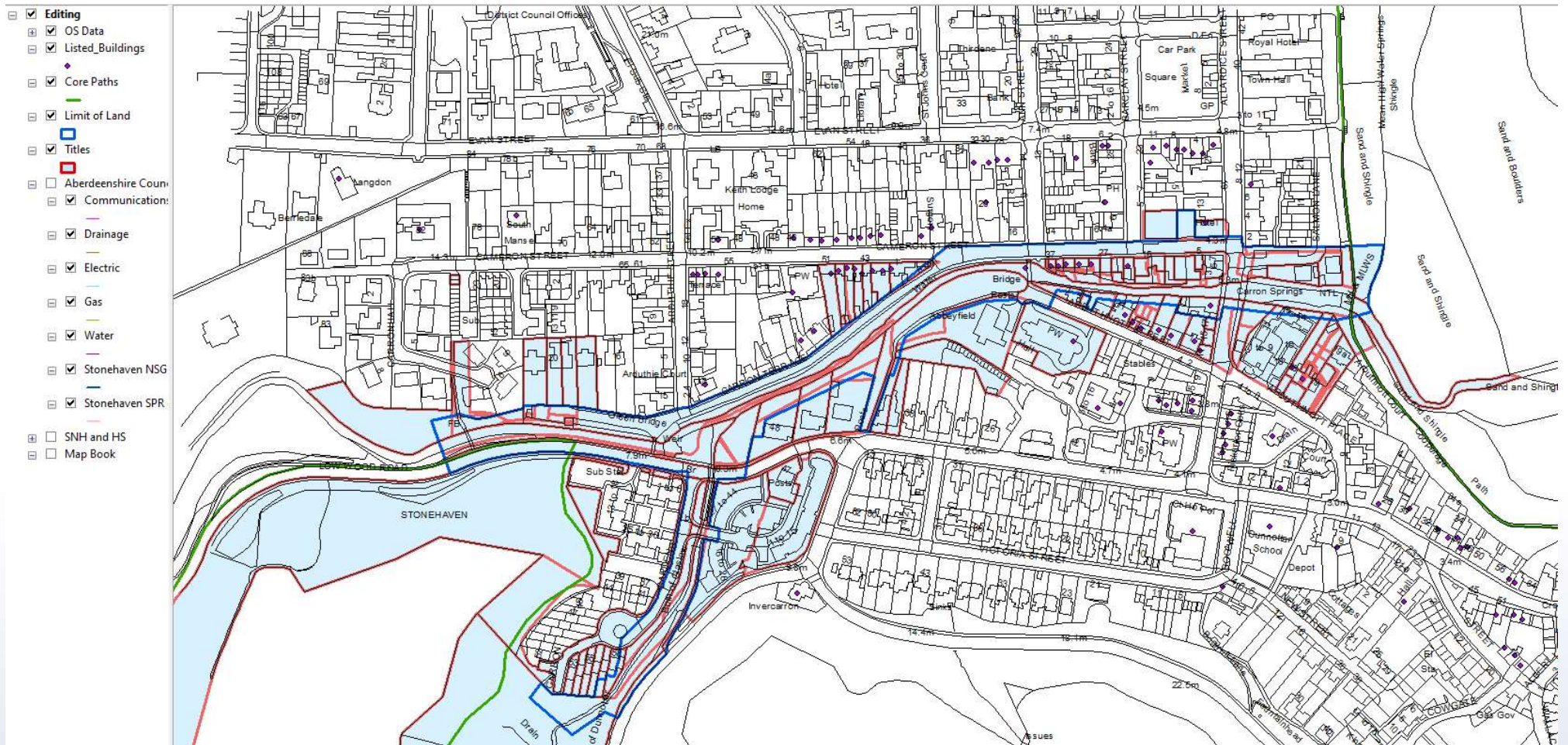
Consultation and community

- Stonehaven Flood Action Group - monthly meetings
- Public quarterly meetings
- Website/social media/paper copies
- Various community group meetings
- Official notifications, press adverts, publications etc
- Statutory consultation
- Individual residents and business contact
- FPO notification at various stages
- During construction –
 - Full time community liaison officer
 - Newsletters
 - Vulnerable individual checks
 - Targeted information

Public Information

- <https://www.aberdeenshire.gov.uk/environment/flooding/stonehaven-fps/>
- <http://publications.aberdeenshire.gov.uk/dataset/stonehaven-flood-protection-scheme-public-hearing>

Mapping

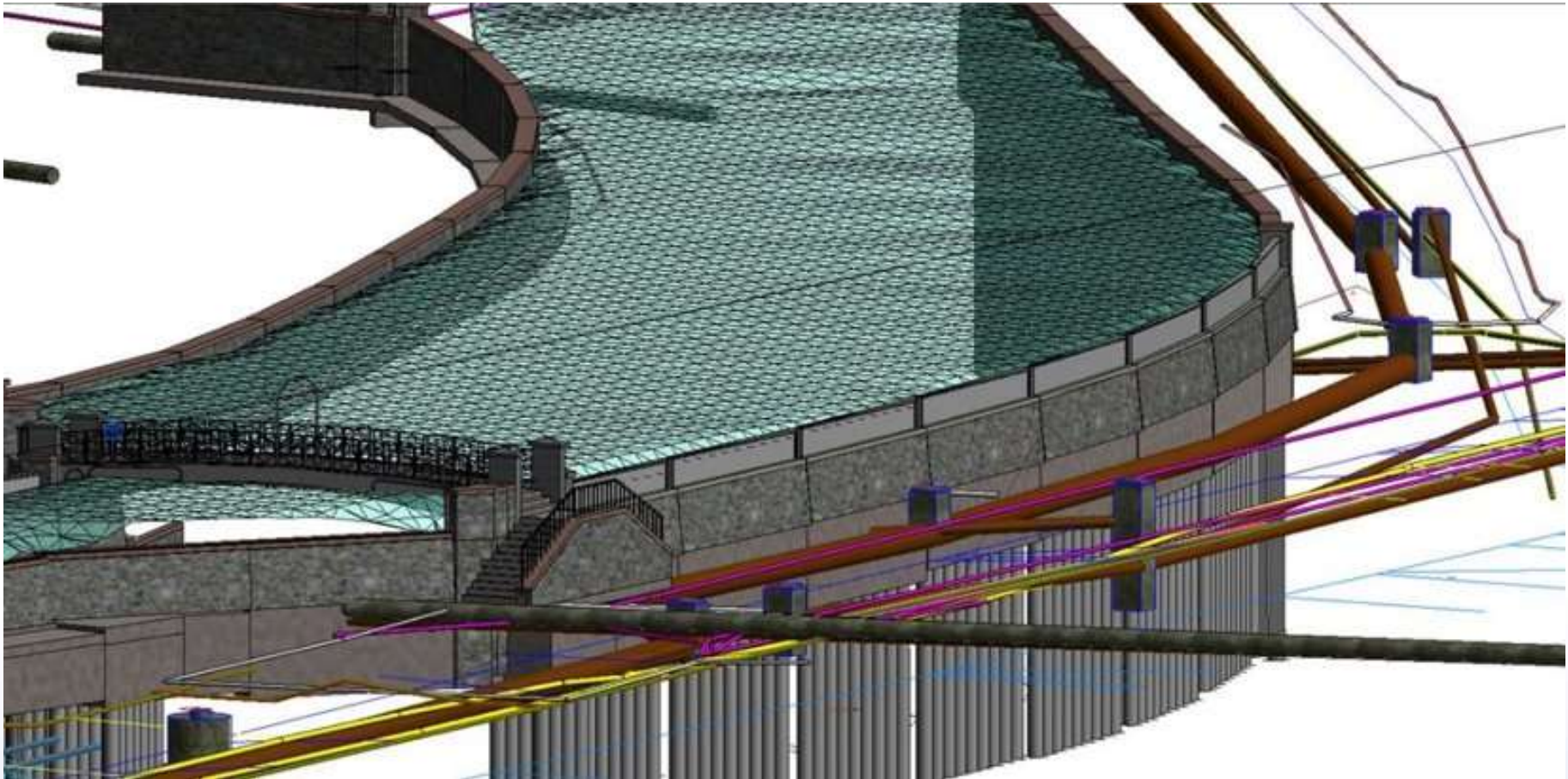


BIM Design Development

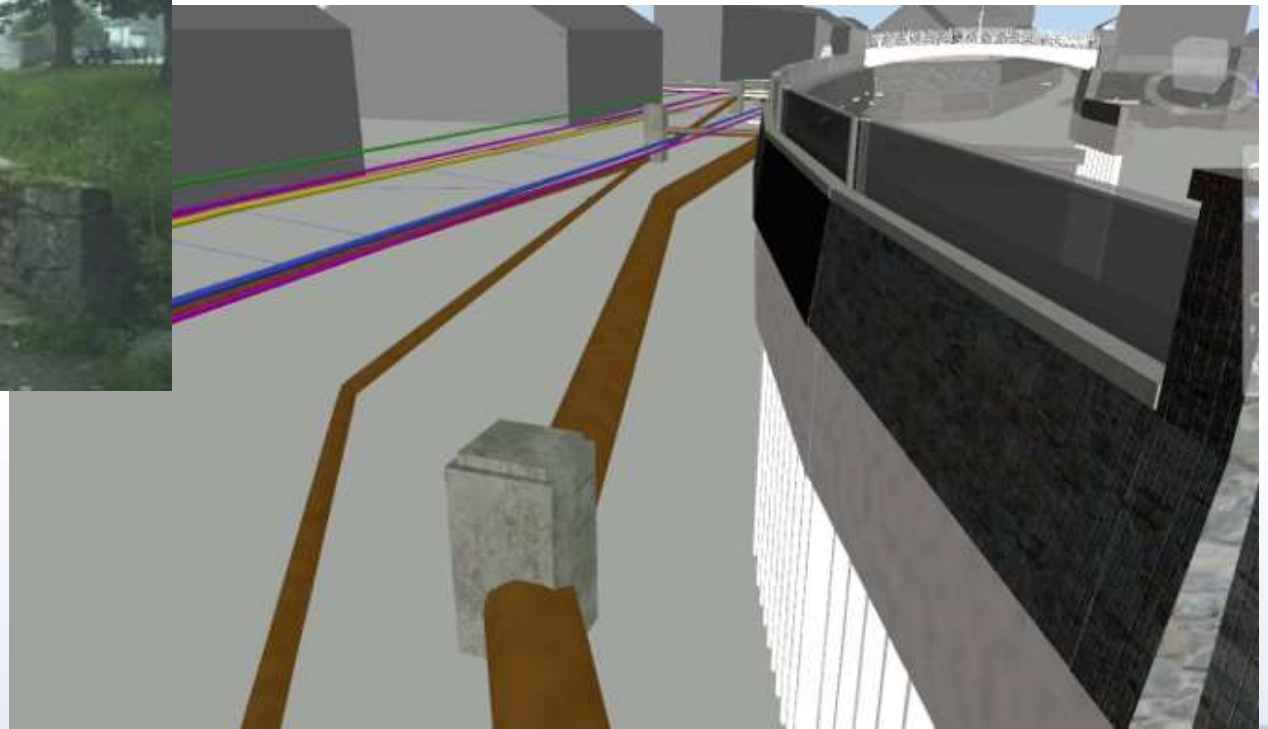
- Visualisations



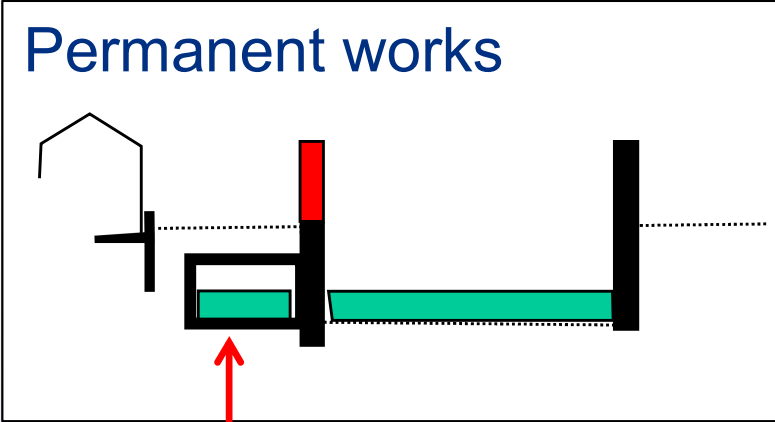
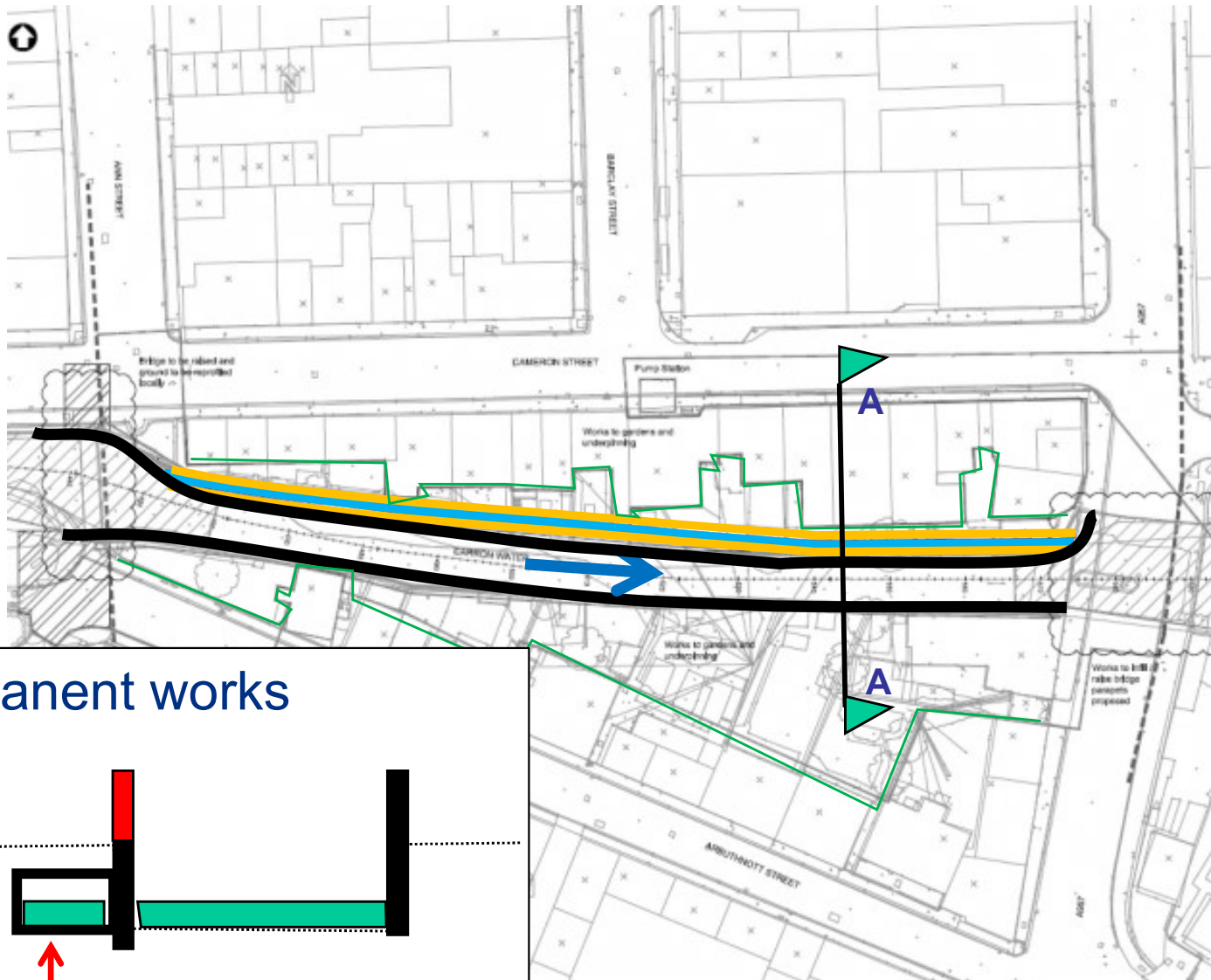
BIM design development



BIM design development



Narrow Channel



Culvert under gardens

Challenges



Challenges



New Beach Bridge



New Green Bridge



Pics of construction



New culverts under road



New culvert under residential gardens





Animation





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Flood Schemes in Scotland: Compensation issues

Dougie Bowers, Valuation Office Agency



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Contents



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- Procedures
- Pros & Cons
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- Lessons learned

History



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- Legislation since 1961
- Flood Prevention (Scotland) Act 1961
- Not aware of much use until 1990s
- “An Act to enable the councils of counties and burghs in Scotland to take measures for the prevention or mitigation of flooding of non-agricultural land in their areas; and for purposes connected with the matter aforesaid.”

History



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- Legislation replaced 2009
- Flood Risk Management (Scotland) Act 2009
- “An Act of the Scottish Parliament to make provision about the assessment and sustainable management of flood risks, including provision for implementing European Parliament and Council Directive 2007/60/EC; to make provision about local authorities' and the Scottish Environment Protection Agency's functions in relation to flood risk management; to amend the Reservoirs Act 1975; and for connected purposes.”

Procedures



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- History of flooding indicates need for scheme
- Research required
- Scheme design
- Multi coloured handbook?
- Value for money?
- Promotion of scheme
- Objections

Pros & Cons



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Benefits to wider areas generally clear or can be established/measured

BUT – for specific properties

It can be difficult to show whether the scheme is a benefit or a disbenefit

HOW does the market deal with flood risk in valuations?

Dunfermline



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Legal issues flowing from delays

“Total compensation around £240,000” –
Fife Council quoted in Dunfermline press

Dunfermline



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Edinburgh



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Braid Burn

Numerous works across city

Open space utilised as Flood Storage Reservoirs

Water of Leith

Initial phase – Stockbridge Colonies etc

Second phase – Murrayfield – again using open space

Elgin



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The £86 million Elgin Flood Alleviation Scheme is the largest civil engineering project to be undertaken in Moray.

Provides protection from flooding from the River Lossie, affording protection to 860 residential and 270 commercial properties in Elgin. The scheme is designed to provide a current-day standard of defence of 1 in 200 years, which equates to a 0.5% chance of occurring in any given year.

The scheme was officially opened on 8 March 2017

Elgin



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- Around 20 flood events have been recorded in Elgin since 1750. Most recent floods were in 1997, 2000, 2002, 2009 and 2014.
- In 2002 over 200 households were evacuated and in the 1997 and 2002 floods key transport links were severed.
- In 2014 whilst only partially completed, the Elgin Flood Alleviation Scheme protected approximately 270 residential and 75 commercial premises from flooding, avoiding damages of an estimated £29 million
- Other Moray Council schemes include
 - Dallas FAS
 - Forres (Burn of Mosset)
 - Forres (Findhorn & Pilmuir)
 - Lhanbrydes FAS
 - Rothes FAS
 - Newmills FAS

Almondbank



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- Almondbank and Lochty have experienced a long history of flooding from the River Almond and the East Pow Burn, with serious flooding events taking place in 1993, 1999 and more recently in January 2011.
- With average annual flood damage estimated at £1.2 million by the Scottish Environment Protection Agency (SEPA), Perth & Kinross Council needed to invest in more robust flood defences that would protect the community and mitigate flooding in the area.
- The River Almond is a tributary of the River Tay and is designated a Special Area of Conservation. As this is an environmentally sensitive area, before work could commence, government bodies were consulted to ensure the works met the legal and contractual requirements for protecting the local area.

Almondbank



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- Over 150 properties in Almondbank were at risk from surface water and river flooding from both the River Almond and the East Pow Burn.
- The project involved the creation of a series of flood defences and a temporary flood storage area that would provide protection for the area for a 1:200 year event.
- Works included:
 - **Installation of 1,150 linear metres of sheet-piled flood walls**
 - **1,600 metres of reinforced concrete flood walls**
 - **50 metres of earth embankments**
 - **2,000 metres of erosion protection measures**
 - **Raising and replacement of two vehicle access bridges**
 - **Relocation of the existing pedestrian bridge**
- To ensure the village and surrounding areas were fully protected, the existing highway drainage system was improved and additional drainage facilities created nearby. A temporary flood water storage reservoir also provided protection during the works.

<https://www.scape.co.uk/case-studies/almondbank-flood-protection>



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Compensation



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82 Compensation

- (1) SEPA must compensate any person who has sustained damage in consequence of—
 - (a) any exercise of the power in section 76(1)(c) or (d), or
 - (b) the exercise of a right of entry conferred by section 79(1) (including the ancillary rights mentioned in section 81(1) and (2)).
- (2) A local authority must compensate any person who has sustained damage in consequence of—
 - (a) scheme operations carried out by or on behalf of the local authority,
 - (b) the subsequent maintenance of any such operations by or on behalf of the local authority,
 - (c) any other exercise of the power in section 56(1),
 - (d) the carrying out of works under section 59,
 - (e) the variation or revocation of an improvement order under section 61, or
 - (f) the exercise of a right of entry conferred by section 79(2) (including the ancillary rights mentioned in section 81(1) and (2)).

83 Compensation: supplementary

- (1) In section 82, a person sustains damage if—
 - (a) the value of the person's interest in land has been depreciated, or
 - (b) the person has been disturbed in the person's enjoyment of land.
- (2) SEPA or, as the case may be, a local authority must pay compensation under section 82 to a person only if—
 - (a) the damage is not attributable to an act or omission of the person,
 - (b) the act or omission causing the damage would have been actionable at the person's instance if it had been done or omitted otherwise than in exercise of statutory powers,
 - (c) the person gives notice to SEPA or, as the case may be, the local authority of the person's claim stating the grounds of the claim and the amount claimed, and
 - (d) the notice is given no later than the earlier of—
 - (i) 2 years after the depreciation first becomes apparent or, as the case may be, the first occurrence of the disturbance, and
 - (ii) 10 years from the completion of the scheme operations, maintenance, exercise of a right of entry or, as the case may be, exercise of another function mentioned in section 82.
- (3) Subsection (2)(b) does not apply where the damage has been sustained in consequence of circumstances falling within section 82(2)(e).
- (4) Any question of disputed compensation under section 82 is to be determined by the Lands Tribunal for Scotland.

Case law(1)



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- [Rubric: McEwan v East Dunbartonshire Council \(lands-tribunal-scotland.org.uk\)](https://lands-tribunal-scotland.org.uk)

Held, the costs of repair or reinstatement, while not irrelevant to the assessment of compensation, could not be recovered directly, and the claimants would require to amend their application. It was not possible to give the extended meaning for which the claimants contended to the expression, 'damage by being disturbed in his enjoyment of land'. The concept of disturbance in possession was well recognised and distinct from questions of actual damage to property. There might be damage without disturbance. The meaning was so clear that if there was any apparent hardship it must be taken to have been intended by Parliament in the light of the statutory purpose.

Damage might, or might not, produce a depreciation in value. The cost of repair or rebuilding could be relevant to the assessment of depreciation in value. Provided fair notice of the formulation of the claim was given, evidence of repair or reinstatement costs, along with other considerations including market value evidence, might be considered. It might also be relevant that the wording of this provision, 'value of an interest of any person in land has been depreciated', differed from Rule 2 in Section 12 of the 1963 Act, which refers in terms to open market value.

While it might be correct that Article 1 of the First Protocol covered disturbance as well as complete deprivation of property, on any view this provision did compensate for disturbance. Given the margin of appreciation in providing a fair balance and proportionality, it could not be found on the material available that this compensation scheme, as interpreted by the Tribunal, produced a measure of compensation which did not bear a reasonable proportion to the aim sought to be realised.

Case law (2)



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- [Brown v The Natural Resources Body For Wales | \[2016\] UKUT 514 \(LC\) | Upper Tribunal \(Lands Chamber\) | Judgment | Law | CaseMine](#)



Case law (2) cont.



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- Prior to the works the property had a 1:25 year risk of flooding (although owner note no recent flooding)
- After the works the outlook was onto a tall “stone effect” wall on opposite bank
- Flood risk reduced to 1:100 BUT only if a heavy flood gate installed by occupier
- £3,000 “disturbance” had been paid
- Compensation determined at £5,000 which was around 5%
- View of “notional prospective purchaser” considered

Lessons learned



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- In some cases CPO powers could be used in addition
- Betterment does not apply
- Lack of guidance in statute
- Lack of case law
- Substantial engineering challenges – can mean time overruns and cost issues
- Works outwith “red-line” boundary
- Works not part of the approved scheme
- Impact on business properties

References



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- [Flood Prevention \(Scotland\) Act 1961 \(legislation.gov.uk\)](#)
- [Flood Risk Management \(Scotland\) Act 2009 \(legislation.gov.uk\)](#)
- [Rubric: McEwan v East Dunbartonshire Council \(lands-tribunal-scotland.org.uk\)](#)
- [Brown v The Natural Resources Body For Wales | \[2016\] UKUT 514 \(LC\) | Upper Tribunal \(Lands Chamber\) | Judgment | Law | CaseMine](#)
- [Almondbank Flood Protection | Scape](#)
- [Flood Management - Moray Council](#)



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Question and Answer Session



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Thank you for attending today's event.

We look forward to welcoming you back to our next event, very soon!

In the upcoming days, you will receive a email which will include your post-event documentation. This email will include the following: CPD, online Questionnaire and a link to the event recording.



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We look forward to seeing you very soon!

This event has now finished.



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