

RIPARIAN RIGHTS – AN OVERVIEW

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AN OVERVIEW OF LEGAL ISSUES:

- Ownership – entitlement and extent
- Common law rights - the right of flow , the right to extract and the right to fish
- Duties and responsibilities of riparian owners – liability in tort, attending to vegetation and blockages
- The role of the Environment Agency
- Flood risk and management
- Trash Traps and Litter Traps

WATERCOURSES:

- A watercourse can be any stream of water flowing in a defined channel or through an underground pipe or culvert.
- It can be small or wide, natural, or artificial and includes channels that are dry for long periods of time and may not flow every year, but a dry channel only filled during temporary flooding is not a watercourse.
- Some watercourses in England are designated as 'main rivers - larger rivers and streams with the highest flood risk, although in some cases they can be small watercourses or drainage channels.
- The Environment Agency, using its permissive powers, can carry out maintenance, improvement, or construction work on main rivers to manage flood risk and protect the environment. Such powers are permissive only meaning the Environment Agency is not obliged to carry out either maintenance or new works on main rivers.
- The Environment Agency also has permitting and enforcement powers for the same purpose.

All other watercourses, (ordinary watercourses), similar powers lie with the lead local flood authority, local council, or internal drainage board.



WATERCOURSES:

Watercourses can be classified in 3 different ways:

- a) Natural vs artificial
- b) Surface vs underground
- c) Defined vs undefined channels

The rights and responsibilities of neighbouring landowners in relation to a particular body of water depends on its classification.

RIPARIAN OWNERS:

- Only riparian owners enjoy natural rights to water in a watercourse. A “riparian” owner is one.
- Whose land is either (a) intersected or (b) bounded by a natural watercourse. It can adjoin the stream either horizontally or vertically. So, ownership of the bed is a sufficient requirement, but not a necessary one.

BOUNDARY IDENTIFICATION:

- Legal boundaries tend to be invisible.
- What was intended when the boundary was created?
- Are there any references to existing physical features?
- Land Registry Title plans cannot be relied upon – due to Section 60 Land Registration Act 2002 and the general boundaries rule.
- The advice in *Pennock v Hodgson* [2010] EWCA Civ 873.

DEALING WITH BOUNDARIES:

- Make sure plans are accurate
- The test to identify a legal boundary is what was intended when the boundary was created.
- Refer to measurement, physical features, national grid co-ordinates.
- Consider the use of a formal boundary agreement.
- Consider a determined boundary application.
- If there is a boundary dispute familiarise your self with the Boundary Dispute Protocol.

RIPARIAN RIGHTS:

- Use of water for purposes connected with the riparian land consisting of use for
 - a) For “ordinary” purpose e.g. domestic/watering livestock The lower riparian owners cannot complain if by doing so he exhausts the water.
 - b) ‘Extraordinary’/secondary purposes as long as (a) the use is reasonable (b) it is connected with/incident to his land and (c) he returns it to the stream substantially unaltered in volume or character 1This includes ordinary (vs excessive) spray irrigation 2It does not matter that there is sufficient left for the lower owners own purposes3But what falls within each category can vary from place to place and time to time.

RIPARIAN RIGHTS:

- Use of water for purposes connected with the riparian land consisting of use for:
 - c) Flow: to have the water come to and go from him without interruption by the upstream- or downstream owners.
 - d) Purity: to have the water come to him unpolluted.

These rights are of course now highly circumscribed by statute, principally the Water Resources Act 1991 and the Land Drainage Act 1991.

STATUTORY LIABILITY AND LIMITATIONS:

Both natural rights and easements in relation to water are now subject to:

The Water Resources Act 1991 which mandates licensing for water abstraction and impounding, sets severe penalties for polluting "controlled waters," and establishes the responsibilities of the Environment Agency regarding flood defense and environmental management.

The Land Drainage Act 1991 ss.23 Prohibition on obstructions etc. in watercourses.

- 1) No person shall:
 - a) Erect any mill dam, weir or other like obstruction to the flow of any ordinary watercourse or raise or otherwise alter any such obstruction; or
 - b) Erect a culvert in an ordinary watercourse, or
 - c) Alter a culvert in a manner that would be likely to affect the flow of an ordinary watercourse.

without the consent in writing (which can be subject to reasonable conditions) of the drainage board.

STATUTORY LIABILITY AND LIMITATIONS:

- Both natural rights and easements in relation to water are now subject to:
- The Land Drainage Act 1991 ss.24 Prohibition on obstructions etc. in watercourses which concern obstructions in ordinary watercourses i.e., not part of a main river which provides Contraventions of prohibition on obstructions etc.
- (1) If any obstruction is erected or raised or otherwise altered, or any culvert is erected or altered, in contravention of section 23 above, it shall constitute a nuisance in respect of which the drainage board concerned may serve upon such person as is specified in subsection (2) below a notice requiring him to abate the nuisance within a period to be specified in the notice.



RIPARIAN RIGHTS – EASEMENTS:

A landowner can also acquire rights by way of easement riparian rights can acquire (by grant, reservation or prescription) an easement conferring water rights e.g. to:

- a) Divert water for extraordinary reasons which are not limited in the way described in the previous slides.
- b) Dam/artificially raise the water levels in the stream.
- c) Regulate the flow of water by means of a hatch or
- d) Divert the course of the stream.

RIPARIAN RIGHTS – EASEMENTS:

- Easements can allow a riparian owner to interfere with what would otherwise be the natural, riparian rights of upstream- and downstream owners if – but only if – they affect their use of the stream.
- As these rights are easements, they must comply with the requirements for acquiring rights by grant/prescription i.e., they must be for the benefit of some dominant tenement (land gross) and exercised “as of right” (without force, stealth or permission).
- The scope of the rights depends wording of the grant/reservation or the nature of the use giving rise to a prescriptive right.

FLOODING:

Where water simply dissipates over- or underground there are no riparian rights and the owner of the land on which it emanates can interrupt its natural undefined flow. Artificial rights are unlikely to exist, simply because of the nature of the flow.

It was thought that a lower landowner who would otherwise have received rainwater run off has no right to complain if the higher owner either diverts it or abstracts it for his own purposes. The right to abstract need not be exercised reasonably or in good faith and a landowner was unlikely to be held liable for acting maliciously or negligently.

This view is unlikely to exist today due to the imposition of:

- A duty of care for natural nuisance – see *Leakey v national trust* [1980] QB 484.
- A sometimes-positive duty of care in relation to loss of support, where liability (traditionally limited to instances of positive withdrawal of support) can now arise from a failure to take action – see *Holbeck hall hotel v Scarborough bc* [2000] QB 836.
- A duty of care could now be owed determined by the laws of negligence, not property - see *Ward v Coope* [2015] 1 wlr 4051 @ [37].

FLOODING:

- *Burnside v Emerson* (1968) - the Court of Appeal apportioned liability as to two-thirds against the defendant and one-third against the Highway Authority. Lord Denning stated, “When there is a transient danger due to elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain.”
- *Tarrant v Rowlands* [1979] RTR 144 - the trial judge held that the Defendant in this case was driving slightly slower than Mr. Emerson in the previous case and the A6 was an ancient highway and route between London and Carlisle which was a more important road than the road in *Burnside* and so apportioned liability equally between the Defendant and the Highway Authority.
- Section 58 Highways Act 1980 - Special defense in action against a highway authority for damages for non-repair of the highway.
- Section 100 of the Highways Act gives the Highway Authority powers to drain roads and prevent surface water from flowing onto them. Further, it permits construction on the highway or in land adjoining or lying near the highway such drains as they consider necessary as well as being able to scour, cleanse and keep open all drains situated in the highway or adjoining land.

ABSTRACTING WATER SECTION 1 WATER ACT 2003:

S1 (inserted section 24A of the Water Resources Act 1991).

- 1) Subject to exceptions a licence is required to abstract water from a source of supply i.e.
 - Any “inland waters” except “discrete waters” (ponds etc. Which do not discharge into other watercourses or underground strata).
- 2) A person may only apply for an abstraction licence if he has a right of access to land
 - Contiguous to the relevant inland water (surface waters) or consisting of or comprising.
 - The relevant underground strata (subterranean waters) from which he is to abstract and
 - Will continue to do so for at least 1yr.



ABSTRACTING WATER:

- Subject to certain exceptions, under s.48A Water Resources Act 1991 a person who abstracts water from any inland water or underground strata must not, by doing so, cause loss or damage to another person.
- A breach of this statutory duty sounds in damages and is enforceable by the victim.
- The abstractor is liable for all resulting losses, whether/not they were reasonably foreseeable.
- The victim must show that he would not have suffered the loss but for the abstraction.
- This new duty replaces common law nuisance liability, but not negligence.

TRASH (GROSS POLLUTANT) TRAPS:

- In the UK, installing and maintaining Gross Pollutant Traps (GPTs) is legally required to prevent trade waste and stormwater pollution, under the Environmental Protection Act 1990 and Environment Act 2021. Businesses have a "duty of care" to manage waste to prevent fines or imprisonment.
- Relevant law may be found in the:
 - 1) Environmental Protection Act 1990.
 - 2) Clean Neighborhoods and Environment Act 2005.
 - 3) Anti-Social Behaviours, Crime and Policing Act 2014.
 - 4) Transport Act 1968.



RESPONSIBILITY FOR LITTER AND DEBRIS IN WATERCOURSES:

Councils: have powers to ensure that non-main rivers, becks and ordinary watercourses are maintained and can undertake clearance work and impose a charge for this if riparian owners do not fulfil maintenance duties.

Private landowners: Anyone who owns land above water or with a watercourse running through or adjacent to it is regarded as a 'riparian owner' and has duties and rights. Landowners (on which the watercourse runs) are principally responsible for clearing litter and other obstructions, from the rivers and banks, even if they did not come from the owner's land. Note watercourses and rivers may be owned and or managed by the Canal and River Trust or the Environment Agency.

Canal and River Trust: The removal of rubbish by canal owners is required only where it is interfering in navigation.

Environment Agency: The Environment Agency has responsibility for regulating water quality in rivers and managing the potential risk of flooding but does not have any specific duty to keep rivers and canals clear of litter or enforce against littering. It does have an annual maintenance programme to clear obstructions from rivers that might cause a flood risk (typically items which have been fly-tipped, such as tyres). The Environment Agency is the designated Land Drainage Authority for main rivers and has powers to ensure that rivers are maintained, undertake clearance work and charge riparian owners who have not fulfilled their duties of maintenance.

THE ENVIRONMENTAL PROTECTION ACT 1990:

Environmental Protection Act 1990 (EPA 1990):

- Part III of EPA 1990 creates statutory nuisances including polluted water.
- Any watercourse “in such a state as to be prejudicial to health or a nuisance” (e.g. carrying sewage or toxic discharge) can be declared a nuisance, compelling local authorities to require clean-up or risk abatement orders. A riparian owner therefore has a duty to avoid discharging wastes into the stream and generally to comply with pollution control laws.
- The Water Resources Act 1991 governs discharges to water, e.g. an Environment Agency permit is required to discharge trade effluent, but that is usually dealt with in environmental licensing regimes.)

THE LAND DRAINAGE ACT 1991:

- This legislation consolidates earlier drainage laws, the LDA 1991 imposes explicit duties on landowners.
- Section 72 LDA 1991 and related provisions require that a watercourse be kept clear so that the free flow of water is not obstructed.
- Local authorities also have powers to serve drainage maintenance notices if riparian owners fail to keep channels open.
- The Act requires landowners to apply for ordinary watercourse consents before performing most works (culverting, bank strengthening, etc.) on any stream. In short, the LDA 1991 makes it a statutory duty to maintain drainage and prevent flooding on riparian land.

FLOOD AND WATER MANAGEMENT ACT 2010:

- This Act reformed local flood risk management by making Lead Local Flood Authorities (county councils or unitaries) responsible for ordinary watercourses and sustainable drainage systems (SUDS) in new developments.
- It bolstered the powers of risk management authorities but did not remove riparian obligations.
- SUDS approval bodies (usually LLFAs) can require surface water drainage schemes on new sites, which interact with riparian rights if flows are connected to natural watercourses.

THE TORT OF NEGLIGENCE:

- A landowner owes a measured duty in both common law nuisance and negligence to take reasonable steps to prevent natural occurrences, such as floods, on its land from causing damage to neighbouring properties. The landowner's liability is subject to the concepts of reasonableness between neighbours and reasonable foreseeability. It has also been suggested that the resources and abilities of both the claimant and the defendant are relevant. The measured duty applies to removing or reducing them for a neighbouring landowner or occupier.
- Where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works to protect a few individuals against a modest risk of property damage.

NUISANCE:

Liability for nuisance arises when:

- 1) There is a foreseeable risk of the type of damage that occurred; and
 - 2) Either the user of land is not reasonable / the interference is unreasonable or the landowner fails to take reasonable care (in effect, negligence).
- Whereas liability in negligence cannot be established on proof of an unreasonable interference: it requires proof of a foreseeable risk of damage and a failure to take reasonable care.
 - In reality however most cases of flooding in this context involves uses which are per se, reasonable. It follows that liability in nuisance/negligence is likely to be co-extensive. That is liability for flooding (particularly naturally-occurring flooding) requires proof of negligence.
 - Non-naturally occurring nuisances.

FLOODING:

- What is the purpose of the ditch?
- Field Drain
- Highway ditch
- Boundary
- Watercourse

DITCHES:

- What is the purpose of the ditch?
- Field Drain
- Highway ditch
- Boundary
- Watercourse

DITCHES:

- What is the purpose of the ditch?
- Field drain
- Highway drain
- Water course



DITCHES:

- The Highway Authority can compel the landowner to clean and empty the dish.
- The Highway Authority can enter the adjoining land to clear the ditch.



RESPONSIBILITIES:

- If constructed by the HA (or most likely to have been so) responsibility lies with the HA, to retain land above the highway or to support the highway.
- Common law right to take access to repair or reconstruct.
- See S291 for powers to take entry.
- If natural support removed by the landowner, potential for attributing responsibility for that person?
- See S167 for walls above the highway - controls vested in the local authority in consultation with the HA. Default power for HA.

DITCHES AND DRAINS:

- Who is responsible for looking after a roadside ditch?
- 1835 Powers to drain
- Now S100 – to drain or otherwise prevent surface water flowing onto the highway, the HA can:
 - a) Construct or lay in the highway or in adjoining or nearby land such drains “as they consider necessary”.
 - b) Erect barriers on the highway or on such land to divert surface water into or through drains.
 - c) Scour , cleanse and keep open all drains in the highway or in such land.

DRAINAGE:

- The natural right to drain downhill
- Artificial alteration of the natural flow
- Nuisance to the highway
- Loss of agricultural ditches – impact?
- Land Drainage responsibilities
- Liability for standing water on the highway
- S101 power to fill in or pipe roadside ditches

ROADSIDE DITCHES:

- The Presumption in Law.
- Unless evidence exists that the highway authority dug the ditch to drain the highway, the ditch belongs to the adjacent owner.
- See *Hanscombe v Bedfordshire CC* 1938 and other cases.
- Ancient highways – where is the evidence to rebut the presumption?
- Medieval origin e.g. 1364 inquest requiring the Lord of Bildeston to clear 2 ditches.

DO YOU HAVE ANY QUESTIONS?

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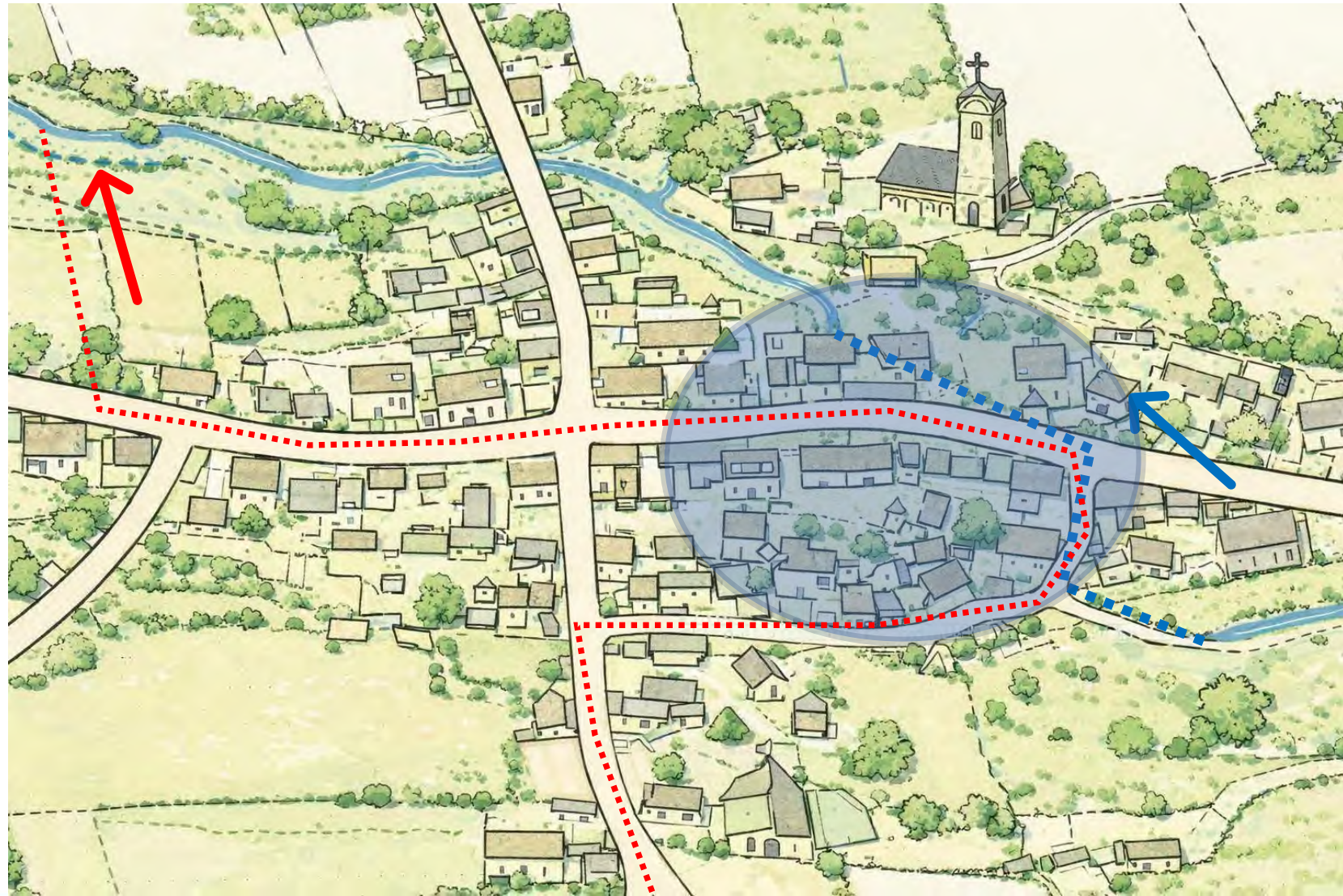
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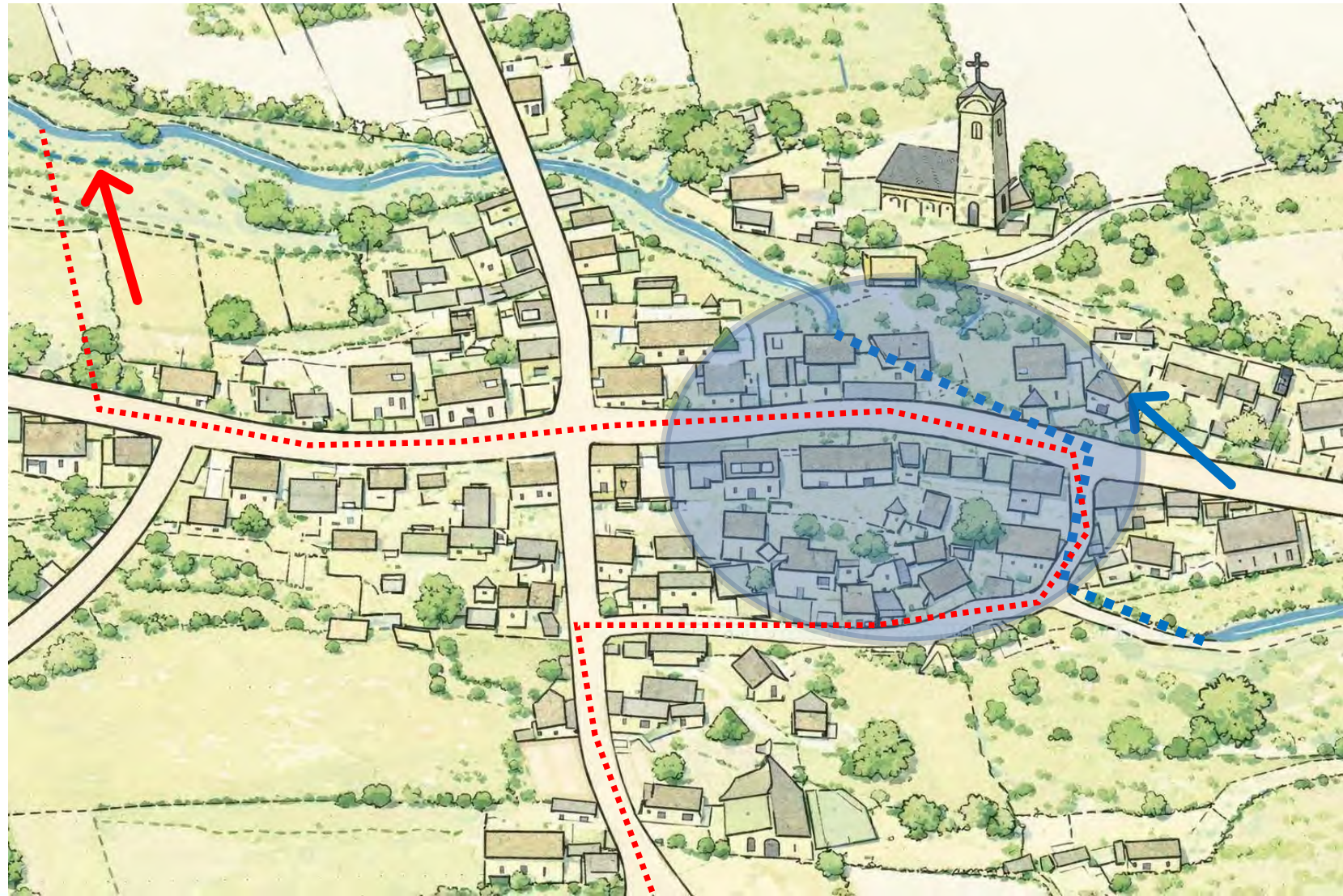
Case Study – Water Lane

- Significant winter flooding event in 2013.
- Large Section 19 investigation initiated.
- Foul water overwhelmed and water surcharging
- Lack of basic maintenance discovered and river culvert in poor condition
- Traditional Flood Defence Scheme not viable.
- Repeat flooding from 2014 led to more investigations.
- Historical sewer repurposed to carry land drainage, surface water and highway drainage away from the village.



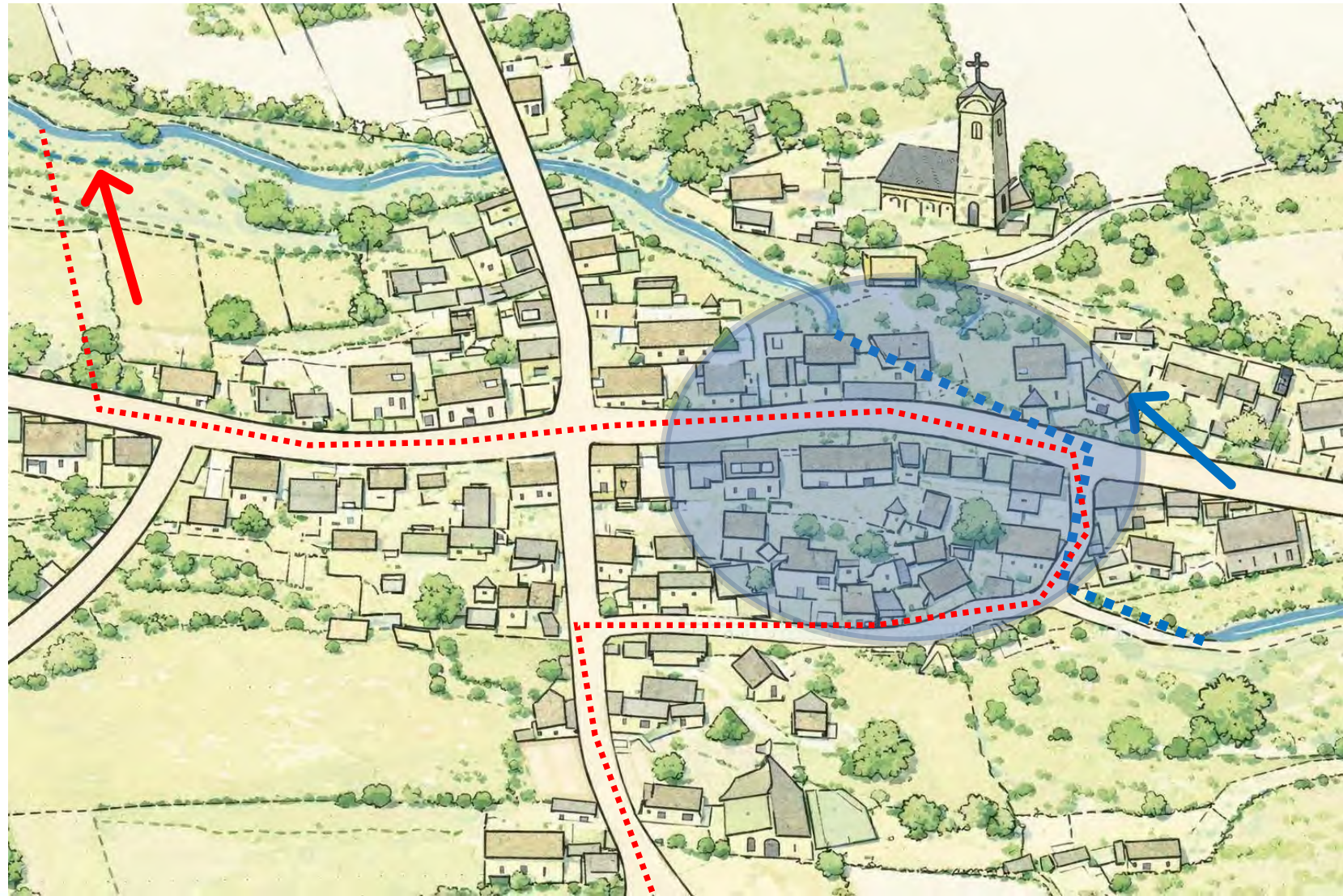
Problems for the LLFA/Council

- River classified as a Main River
- River culvert riparian owned
- Upstream and downstream river not currently maintained
- Not enough properties at risk to secure Flood Defence Grant in Aid funding
- Discovery of re-purposed culvert problematic
- Highway drainage discharging into orphaned asset.
- Repeat flooding with moderate rainfall



Steps taken by the council

- Published updated Sections 19 Investigations after repeat significant flood events
- Collaborative working - worked with the Parish Council to access archives of Meeting Minutes and Documents
- Supported a Flood Working Party with technical support – provided access to the National Flood Forum
- Played a significant role in stakeholder engagement across multiple Risk Management Authorities, Parish Councillors and the MP.



Actions taken by the council

- Partnership of upstream and downstream channel vegetation removal
- CCTV survey and repair undertaken of repurposed asset
- Established flood working party now present, with a maintenance budget available between landowners
- Long term Natural Flood Management Strategy to store water upstream in the catchment.

