

# Insurance Implications of Over Station Development

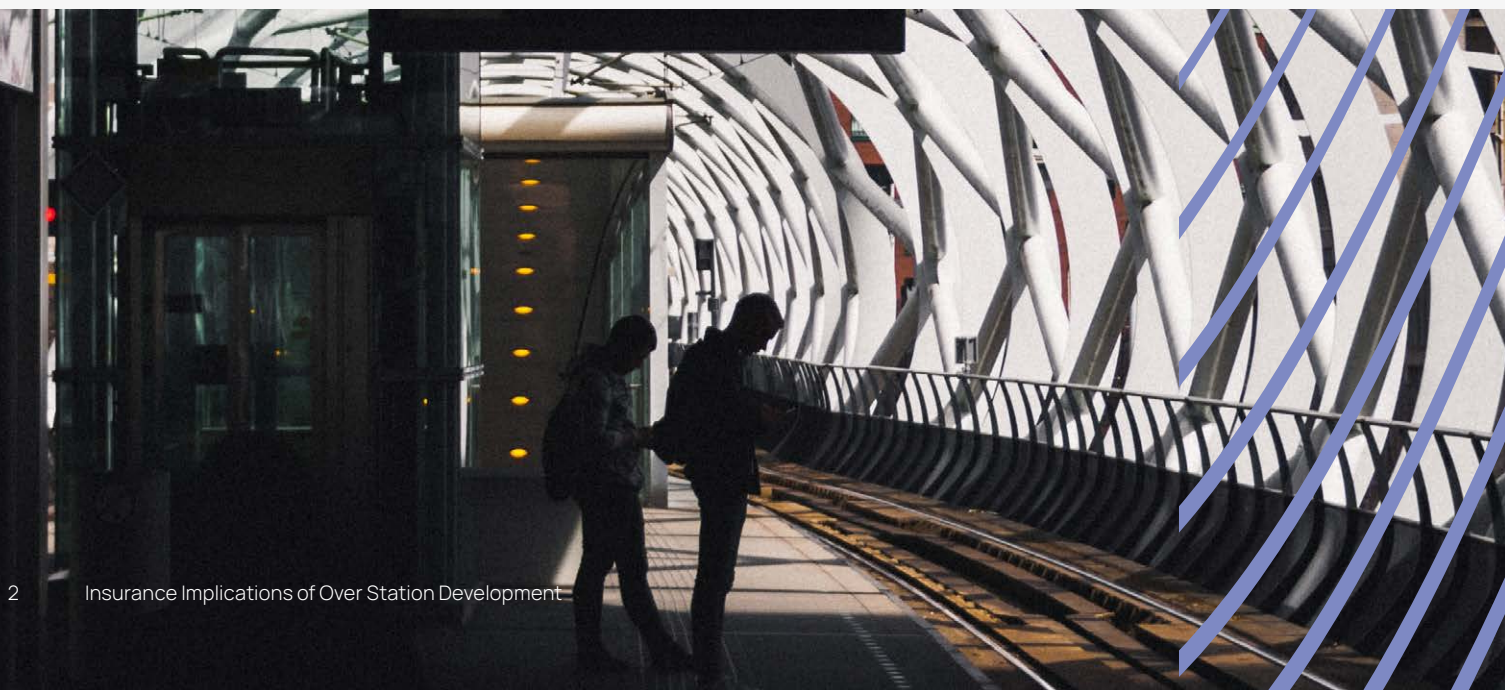
# In 2017, WSP (via its publication “Out of Thin Air”) conservatively estimated that 250,000 new homes could be built over and around existing stations in London alone.

Whilst there have been some landmark developments, with notable examples including the areas around London Bridge, Kings Cross, Edinburgh Haymarket and New Street, Birmingham, these have sometimes been complex and expensive to deliver and consequently such developments have been relatively rare.

The need for new housing combined with the requirement of transport authorities to deliver greater value from their assets has given new impetus to these developments, and there are many major projects now in the pipeline on or around TfL and Network Rail property.

To evidence value creation, Crossrail estimated in their “Crossrail OSD Collaboration and Property Value Capture” document that within areas of influence (defined as those within 1000 metres of a station entrance) property values have outperformed other property in London by as much as 20%. The added cost and complexity of such projects therefore may become less of a hindrance in light of the potential upsides.

Such developments clearly have many complexities in relation to engineering, buildability and infrastructure protection, but they also bring with them many insurance implications, which require careful consideration.



We discuss some of the main insurance issues below:



### Damage and Disruption to Rail Infrastructure

Clearly there is potential for the over-station development to cause damage and disruption to the operational rail infrastructure. Normally the rail operator will attempt to protect their position under contractual arrangements which:

- Ensure that wide indemnities are included in development agreements, leases or asset protection agreements
- Stipulate high levels of third party liability coverage

A major fire or water damage event does have the potential to close a station for some time and any liability limit should be high enough to cater for both the possible cost of reinstating third party damage and liability for any bodily injury but also the other consequential losses due to any disruption arising from the damage. An example of this is interruption to a busy Network Rail line. On the busiest lines and stations, this can cost several millions per day in relation to Track Access charges that Network Rail will need to rebate to the train operating and freight operating companies, so this is a key risk issue to be considered.

It is interesting that in the UK at least, indemnities under Asset Protection Agreements (or equivalent) are often wider than just damage events and include any disruption to the operational running of the network. Another issue for developers is that invariably these indemnities are uncapped. Sometimes the indemnity lasts only as long as construction activities are ongoing, but some operational leases also include such provisions.

Most standard third party liability policies do not react very well (or at all) to non-damage related liabilities (generally termed “pure financial losses”) where the only reason the liability is incurred is the fact that a party has signed up to a contractual indemnity.

We understand that the current position in English common law is that these types of pure financial losses are not generally accepted by the courts. At one point in the 1980’s the law seemed to be moving in that direction (cf. *Junior Books v Veitchi*), but since that time the courts have generally been reluctant to award liability for such losses apart from in quite limited instances. This is evidenced by the key insurance-related case of *Tesco Stores Limited vs Constable and others*. In this case, amongst other issues, the court decided that a purely contractual financial loss was not recoverable under the public liability policy arranged for the Project.

Standard public liability insurance policies either do not cover pure financial losses at all, or have extensions which give cover at common law only and exclude any financial losses incurred solely by virtue of the signing of a contract (for example a Network Rail Asset Protection Agreement).

Specialist non-damage financial loss cover is available to cover this gap, at least in the construction phase, and has been purchased by developers in relation to many schemes involving Network Rail, TfL, CTRL and Crossrail.

The available limits of cover are lower than the standard third party liability market and cover is normally only available subject to a significant monetary or time deductible applying for each loss. It can, however, provide valuable balance sheet protection that can facilitate the undertaking of these complex developments.



## Inherent Defects

This policy applies for many new developments and provides structural defects cover for damage arising out of latent or inherent defects, normally for a period of 12 years post completion.

However, an inherent defects policy normally only covers the building being insured itself and a standard policy would not necessarily respond to losses to third party property arising from inherent defects.

This can be an issue if the supporting structure itself fails due to an inherent defect causing damage to the building. If the supporting structure has been constructed by a third party it is possible that the inherent defects policy covering the new development will not respond.

Non-standard solutions have been negotiated in certain instances, for example by including the supporting structures in the cover for the new building to ensure the inherent defects policy is triggered.

However, inherent defects insurers are normally reluctant to provide cover for structures that have already been completed or where they have not had the opportunity to undertake technical surveys during the construction period, so there may be resistance to providing full cover if supporting works have completed sometime in the past.



## Property Insurance

The question arises as to how a property insurance policy would respond in the event of a supporting structure belonging to a third party failing.

If careful consideration is not given as to how the policy is structured, there may be issues on some wordings arising from the following standard property exclusions.

Losses caused by:

- faulty or defective design materials or workmanship
- inherent vice
- latent defect
- gradual deterioration  
deformation or distortion or wear and tear
- subsidence ground heave or landslip by virtue of being on made-up ground
- a building's own collapse or cracking

To avoid potential arguments over such claims, we would recommend a dialogue with your property insurer in advance to clarify how they intend cover to apply in the event that the supporting structure fails leading to damage to the building they are insuring.

However, in the current harder market environment, obtaining agreement to non-standard interpretations has been increasingly challenging and this clarification may be difficult to obtain.





### Freeholder Responsibilities

Under the lease there will normally be an ongoing right to support and quiet enjoyment of the property. Therefore if the supporting structure owned by the Freeholder fails, there should be some recourse under the lease, as long as the new development remains within the agreed technical and loading parameters.



### Reinstatement

Clearly if the new development suffers damage, this will need to be repaired, but how and when do you do this if the structure you are relying on for support is not there? From a property or latent defect insurer's point of view, they may need to wait months or years before the repair works on the structure they insure starts and consequently the cost of reinstatement could be much higher than for a normal build.

Commonly, operational property policies will allow for reinstatement to be undertaken elsewhere than on the original site, which could be a solution, but again one which is likely to add to both the cost and delay.

Added to this is the issue of business interruption cover, where it is quite likely that much longer indemnity periods than normal would be required.



We have only scratched the surface of some of the subjects that should be considered, but it is clear that thought should be given to the contractual and insurance drafting at an early stage to cater for issues such as those mentioned above.



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