

On the road to urban recovery.....?

With towns and cities up and down the country experiencing regeneration, developers are reminded of the complex nature of the law surrounding highways and how they can tackle it.

As cranes dominate the skyline it can feel at times that the capital is a vast building site. However, such a sight is evidence of a developing city – a symbol of hope and urban recovery. This is by no means restricted to London as cranes are a feature of cities and towns up and down the country, and globally, representing a journey from austerity to prosperity.

While the skyline shows growth and commitment to exciting new building projects, it is often issues at ground level and, in particular, public highways that can be problematic for developers, leading to delays in developments. There are two main areas of concern for developers:

- The impact of highways within a development and the process of stopping up.
- Adverse possession of highways.

Once a highway, always a highway

This is the legal maxim - a highway will remain a highway whether it has fallen into disuse or remains obstructed for a long period of time (*Harvey v Truro Rural District Council [1903] 2 Ch 638*).

There is no clear statutory definition of a highway. According to common law, it is a defined route over which 'the public at large'

can pass and repass as frequently as they wish, without hindrance and without charge. Once a highway is established it can only be extinguished in very limited circumstances, so the legal principle "*once a highway always a highway*" should always be a consideration for developers.

Impact on development

Given the amount of urban regeneration, developers have to consider sites that are subject to public highways. Public highways are protected by law and exist in perpetuity. An applicant has to prove that any future development cannot be carried out unless the highway is stopped up or diverted.

The 'stopping up a highway' process allows the underlying land to be used for other purposes, which would not be possible if it were to remain as part of the public highway network. Stopping up extinguishes all public right of access as well as the highway authority's responsibilities for the area, effectively transferring responsibility for the land back to the original owner of the subsoil.

Where the highway crosses land in single ownership there is unlikely to be a problem because the owner of the subsoil will invariably be the owner of the surrounding land and, if the development is to proceed, that owner will need to be part of the project from the outset. Where the highway

divides two or more ownerships, consideration will need to be given to whether the rebuttable maxim 'ad medium filum viae' applies to make each adjoining owner the owner of the subsoil up to the centre line of the highway. In this case each would become the recipient of half of the land comprising the former highway when highway rights are extinguished.

The most common way of stopping up and diversion of highways is under sections 247 and 248 of the Town and Country Planning Act 1990 (incorporating changes to application requirements following the Growth and Infrastructure Act 2013). An order authorising the stopping up (removal of public rights of way) of any highway can be made, if the secretary of state is satisfied to do so, to allow development to be carried out in accordance with a valid and relevant planning permission granted under part III of the Act.

Stopping up process

Applications for section 247 and section 248 orders can be submitted in advance of planning decision notices being made or when the planning permission has been granted.

Applications can also be made if the planning decision is subject to a planning appeal or has been called in by the Secretary of State. In cases where the planning permission decision has yet to be made, any draft stopping up order published cannot be confirmed until planning permission has been granted.

The process of making an order takes about 13 weeks after receipt of all relevant documentation. However, it can take longer if a planning application has not been approved at the time of the order application or if objections are received; the time taken would be significantly longer when there are unresolved objections.

If objections cannot be resolved, then a public inquiry or a written representations procedure may be undertaken to enable the Secretary of State to decide whether or not to make the order.

The link below provides a useful flowchart setting out the stopping up process:

www.gov.uk

Can one adversely possess highway land?

Lady Justice Arden in the Court of Appeal in the case of *R (on the application of Wayne Smith) v Land Registry and Cambridgeshire County Council [2009] EWHC 328 (Admin)* deliberated on the number of ways in which a highway could cease to be a highway; it could be destroyed ("for example if a cliff path fell into the sea"), diverted, stopped up or extinguished under certain statutes. However, these are limited and certainly acquiring title by adverse possession, the court decided, is not one of them.

The claimant, Smith, made an application to the Land Registry for first registration of a piece of land. Smith claimed title to the land by adverse possession on the basis that his caravan and associated structures had been on the land for more than 12 years.

The application was opposed by Cambridgeshire County Council because the land formed part of a highway, which was recorded on the definitive map as a public highway open to all traffic. It was difficult for a judge to envisage any circumstances in which adverse possession could be established over a public highway without contravening section 137 of the Highways Act.¹

The judge held that, as a matter of law, adverse possession cannot be acquired over land over which a public right of way exists. Once more we are drawn back to the legal adage "*once a highway always a highway*" and this case emphasises again that there are only limited ways in which a public right of way can be extinguished.

Useful Tips

- Is the site subject to public highways? A highways search will reveal publicly adoptable and maintainable highways.

- Ensure that the council is in receipt of all relevant documentation to avoid any delay in making an order. Remember applications can be submitted at the same time as planning applications or in advance of planning permission being granted.
- Each borough or council may have its own specific requirements for information that must be provided as part of the stopping up order application process. To avoid any delay in the project timetable, ensure that these are adhered to.
- Is the underlying subsoil owned by a third party or unregistered? Transfer of legal ownership of the land, once the highways have been stopped up, will have to be considered as part of the site assembly – does the ad medium filum rule apply?

- Statutory undertakers who own pipes, wires or cables under the highway are covered by specific legislation and the cost of relocation of such apparatus can be extremely expensive.

¹ Penalty for wilful obstruction: (1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine.

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