

Back to basics: Highways, PROWs and VGs for planners

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Starting soon.....

Introduction

- **Part 1: PROWs and Village Green Issues (KB)**
 - Creation of PROW
 - Creation of VG rights
 - Enforcing rights of the public and stopping public rights from arising
- **Part 2: Highways Issues and Development (CC)**
 - Considerations for developers where highway works required
 - Considerations for developers where a PROW cuts through a development site (e.g. stopping up, diverting, incorporating)
 - Highways works brought about through HA 1980 orders and DCOs

PART 1- PROWs and Village Green Issues

Is site subject to a PROW?

1. PROW already formally recognised
2. PROW has accrued but not formally recognised



1. PROW already formally recognised

- Check the definitive map for the relevant area
- System for registering PROWs established by NPACA (concept of definitive map). Now carried over into WCA
- Section 53 WCA requires surveying authorities (ie highways authorities) to keep their definitive map and statement under continuous review Section 56 WCA: “[a] definitive map and statement shall be conclusive evidence as to the particulars contained therein”



2. PROW accrued but not formally recognised

31.— Dedication of way as highway presumed after public use for 20 years.

- (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.
- (3) Where the owner of the land over which any such way as aforesaid passes—
 - (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
 - (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

2. PROW accrued but not formally recognised

Summary: If 20 years of use by the public shown, then assumption is that landowner has dedicated the way to the public (unless evidence landowner did not intend to do so)

Key elements:

- Use by the public must be “as of right”. Public use must be without force, secrecy or permission (ie the public use apparent to the landowner who could therefore have stopped it)
- Use must be “without interruption”. Does not mean continuous use but the absence of some actual and physical prevention of the use (ie erection of a locked gate)
- Extent of the PROW will be dictated by the nature of the use (footpath, bridleway, restricted byway, carriageway/byway open to all traffic)

2. PROW accrued but not formally recognised

Key elements continued:

- Section 31(2) – not just any 20 year period but the 20 years immediately preceding the date when the public’s right was “brought into question” (ie physically blocked up, erection of notice seeking to prevent right accruing, app made for modification of DM under s.53(5) WCA)
- Section 31(3) – if any point during 20 year period landowner puts up notice making it clear no indication to dedicate land as PROW, then right will not accrue
- NB PROWs can also accrue under the common law. Essentially same principles but no set time period. BUT difficult to show in practice as reverse burden of proof – need to show positively landowner intended to dedicate land

Members of the public: seeking formal recognition of a PROW

- Apply (with supporting evidence) to surveying authority under s.53(5) WCA for a modification to the definitive map (ie for addition of the PROW)
- Procedure in Schedule 14
- SA will consult and investigate, and then determine application based on whether legal tests for creation of a PROW have been met
- If SA refuses to make order, applicant can appeal to the Secretary of State
- If SA decides to make order and it is opposed, needs to be confirmed by the Secretary of State (see Schedule 15)

Landowners/developers seeking to prevent accrual of PROW

- Lodge a notice under s.31(6) with LA. Recognises existing PROWs and makes it clear no intention to dedicate further land as PROW over next 20 years.
<https://www.gov.uk/government/publications/commons-act-2006-landowner-statements-highways-statements-and-declarations-form>
- Erect notice to rebut presumption of dedication (as per s.31(3)). Document notice with dated photographs. Wording on notice must be unambiguous (“No public right of way”)



Creation of VG rights

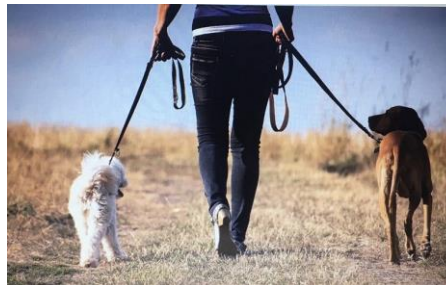
Section 15 Commons Act 2006: “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years”

AND

- Use continues at the time of the application (s.15(2)); or
- Use ceased before the time of the application but after the commencement of s.15 (6 April 2007), and the application is made within a period of 1 year after the cessation of use (England) and 2 years after the cessation of use (Wales) (s.15(3))

Creation of VG rights

- 20 years of use “as of right” - without force, secrecy or permission
- Continuity and sufficiency requirement – use must be continuous (ie frequent and without substantial breaks) and sufficient for landowner to be aware right being asserted) (Lewis v Redcar [2010] 2 AC 70; Sunningwell [2000] 1 AC 335). Breaks in continuity and/or insufficiency of use in spatial and temporal sense
- Use in the form of “lawful sports and pastimes” – interpreted broadly. Includes informal recreation as part of modern life eg dog walking and playing with children (Sunningwell)



Creation of VG rights

- “Significant number” – enough to reasonably be regarded as the assertion of a public right (Leeds Group Plc v Leeds City Council [2011] 2 WLR 1010)
- “Neighbourhood within a locality” – a “neighbourhood” to be judged on the facts (eg existence of shared facilities such as shops, school; existence of distinct boundaries etc). “Sufficient degree of cohesiveness” (Cheltenham Builders [2003] EWHC 2803 (Admin)). Can be within one locality (administrative division known to law eg parish, electoral ward) or more
- Registration precluded if land held for statutory purposes which are incompatible with VG use (Newhaven [2015] AC 1547; Lancashire CC v SSEFRA [2019] UKSC 58). Careful consideration of this issue required if land held by public body.

Members of the public: formal recognition of VG rights

- Make application to LA for registration under s.15 CA 2006 supported by evidence showing statutory test for registration is met
- Commons Registration (England) Regulations 2008
- BUT right to apply for registration disapplied if a trigger event has taken place (s.15C read with Sch 1A). Trigger events include: when an application for planning permission in relation to the land is first publicised; when draft of development plan doc which identifies the land for potential development is first published
- Less strict in Wales (Sch 1B). Main trigger event is the grant of planning permission

Landowners/developers seeking to protect land

- Lodge statement under s.15A with LA:

“(1) Where the owner of any land [...] deposits with the commons registration authority a statement in the prescribed form, the statement is to be regarded, for the purposes of section 15, as bringing to an end any period during which persons have indulged as a right in lawful sports and pastimes on the land to which the statement relates.

(2) Subsection (1) does not prevent a new period commencing”

- Therefore if 20 years of the requisite recreational use has not yet passed, will not be possible to make successful TVG application (unless a further 20 years accrues without appropriate action being taken by landowner)
- If 20 years of the requisite use has passed, then successful application only possible if made within 1 year (s.15(3))
- Same form as for s.31(6) PROW (link above)

Landowners/developers seeking to protect land

- Also erect signs showing use is permissive: “the public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time” (Beresford [2003] UKHL 60)



PART 2 - Highways Issues and Development

WHAT IS A HIGHWAY?



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Legal Extent

- Right of the Public ‘at large’
 - rather than owners, occupiers and lawful visitors of property (see eg **Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs [2012] EWHC 1976** (Admin)).
- To Pass and Repass
 - See **Goodtitle d. Chester v Alker & Elmes (1757)** 1 Burr 133
 - as well as any other activity, otherwise lawful which does not obstruct highway; see **DPP v Jones [1999] 2 A.C. 240.**
- Known and Identifiable Route

Legal Extent

- Extent of User

Fortune v Wiltshire Council [2012] EWCA Civ 334; [2013] 1 W.L.R. 808; [2012] 3 WLUK 565 (CA (Civ Div)) at §11 – 18 ref to Lord Diplock in Suffolk County Council v Mason [1979] AC 705 , 709–710

“The law of highways forms one of the most ancient parts of the common law. At common law highways are of three kinds according to the degree of restriction of the public rights of passage over them. A full highway or ‘cartway’ is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A ‘bridleway’ is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles and sometimes, though not invariably, the exclusion of the right of driftway, ie, driving cattle, while a footpath is one over which the only public right of passage is on foot.”

Legal Extent

- Culs de Sac – exception to *terminus a quo* and *ad quem* – special circumstances (see Whitehouse v Hugh [1906] 2 Ch.283 - once user established then a highway: Attorney-General v Chandos Land and Building Society (1910) 74 J.P. 401)
- Vested Right in Highway Authority
HA 1980 s.263 describes right as vesting only so much of highway “*as is necessary for its control, protection and maintenance as a {highway} for the use of the public*” (see Herschell LJ in Mayor of Tunbridge Wells-v-Baird [1896] AC434).

Physical Extent – Horizontal (W)

- Typically
 - Carriageway
 - Verge
 - Roadside ditches
- ‘PROW – should be described in Definitive Map & Statement (s56 WCA 1981)
- ‘Presumption’ of “Hedge to Hedge” or “Fence to Fence” BUT....

Physical Extent - Horizontal

- R. v. United Kingdom Electric Telegraph Co (1862) 31 LJ (MC) 166 and Neeld v Hendon Urban DC (1899) 81 L.T. 405 ; Att.-Gen. v. Beynon [1970] Ch. 1 [a case involving a verge of considerable depth and of irregular form] presumption but depends on circumstances eg extent of margins; reasons for hedge or fence - rebuttable.

- In Beynon Hale LJ:

“... the presumption of dedication of all the land running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground. In a conventional road running between hedges or fences, even if the verges are of varying widths and shapes, this may well be the obvious conclusion. It is not surprising, therefore, that the cases regarded this as the prima facie position. But that is not the same as elevating this preliminary factual question into a presumption of law.”

Physical Extent - Vertical

- “Top 2 spits” or “Zone of Ordinary Use”
- ‘top two spits’ see **Tunbridge Wells Corp v Baird [1896] A.C. 434, [1896] 5 WLUK 11** and **Tithe Redemption Commissions-v-Runcorn UDC [1954] 1 CH 383** (also ‘Baird’ principle)
- ‘zone of ordinary use’ see **London Borough of Southwark and another v Transport for London[2018] UKSC 63**
- SC described it by reference to it including [9]
“ ... the surface of the road over which the public had highway rights, the subsoil immediately beneath it, to a depth sufficient to provide for its support and drainage, and a modest slice of the airspace above it sufficient to enable the public to use and enjoy it, and the responsible authority to maintain and repair it, and to supervise its safe operation”.

OTHER COMMON 'CLASSIFICATIONS'

- PATH
- FOOTWAY OR PAVEMENT
- ROADs (A OR B)
- STREET
- TRUNK ROAD
- SPECIAL ROAD & MOTORWAY
- UNCLASSIFIED COUNTY ROAD
- HIGHWAYS MAINTAINABLE AT PUBLIC EXPENSE –
S36 HA 1980
- HIGHWAYS NOT MAINTAINABLE AT PUBLIC
EXPENSE

Highway Authorities

Section 1 HA 1980

- STRATEGIC HIGHWAY AUTHORITY – the SSfT through Highways England Co Ltd responsible for Strategic Road Network
- LOCAL HIGHWAY AUTHORITY (TFL in London for **GLA roads** and LB Councils – and County or MDC Councils (or if delegated the DC))

Functions Powers & Duties of Highway Authority

- LHAs authorities for all non strategic highways whether or not maintainable at the public expense (see S1(2)(3) and (3A) HA 1980.
- General duty - to facilitate safe and unobstructed use of the highway by the public
- Duty to maintain s.41 HA 1980
- Duty to protect and assert the rights of users of the highway s.130 HA 1980
- Similar duties under Part III of the Wildlife and Countryside Act 1981

Creation of Highway

- Common Law

Dedication of a way by person with capacity to do so and user *nec vi, nec clam, nec precario* – as of right.

- Statute

s.31 HA 1980 – dedication deemed after user as of right enjoyed by public without interruption for 20 years (retrospectively from date use brought into question) unless sufficient evidence that there was no intention during that period to dedicate it.

Identifying What is 'HIGHWAY'

- Definitive Map and Statement PROWs -
- Lists of highways
- Maps LHAs hold showing extents also maintenance (whether LHA or delegated)
- Also s31A HA 1980 requires register containing information on maps and statements deposited, and declarations lodged, by landowners in relation to public rights of way on their land

Development Issues I

- Assessing Traffic Impact on Highways
 - NPPF Section 9 § 109 “ *Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.*”

Development Issues 1

- Need for offsite highways and/or access works
- NB need for planning permission for such works;
- Seek early engagement with LHA or where relevant HE {old circ 02/07 has useful guidance still};
- Check extent of redline and blue land of 'highway'
- Check LTP

Development Issues 1

- S38 and s278 HA 1980 agreements
 - s38 generally used when a developer proposes to construct a road for subsequent adoption by the authority e.g internal estate road(s).
 - It allows a privately maintainable highway to become a highway maintainable at public expense by way of agreement.
 - S278 allows HAs to enter into agreements with developers for the execution of highway works at the developer's expense. This must be on the basis that the HA are "*satisfied it will be of benefit to the public*"

- What if HA objects and won't engage?
- What if LPA takes different view to HA?
- What if s38 roads do not get adopted?

Development Issues 2

Where PROW runs through Development Site

- s. 247 TCPA 1990 provides general power (see also s116 of HA 1980 s.116) to stop up highways carrying vehicular rights of passage if ss(1) *“if satisfied that that it is necessary to do so in order to enable development to be carried out (a) in accordance with planning permission granted under Part III or section 293A, or(b) by a government department.*
- Provides only for making of order.
- **NB** power does extend to footpaths and bridleways but S of S has indicated only expects to address this in exceptional circumstances whereas....

Development Issues 2

- s.257 TCPA 1990 is confined to footpaths and bridleways and similarly (to s247) provides power to stop up or divert exercisable by LPAs subject to confirmation by the Secretary of State *“if satisfied that that it is necessary to do so in order to enable development”* etc
- Provides for making and confirmation of order

Development Issues 2

- Leading case on ss 247 and 257 :

Vasiliou v Secretary of State for Transport (1991)
61 P&CR 507 (on ss247 and 257) which looked at impact of SUO of rights of user (see 4 Vasiliou tests)

- Considered in:

(R (oaoNetwork Rail Infrastructure Ltd) v SSEFRA
[2017] EWHC 2259 (Admin).) – dealing with Grampian condition requiring order

Development Issue 2: SUO and Vasiliou

(i) S of S cannot make order under s 247 or confirm s257 order unless satisfied that a planning permission exists (or under sections 253 or 257(1A) will be granted) for development and that it is necessary to authorise the stopping up (or diversion) of the public right of way by the order so as to enable that development to take place in accordance with that permission (see also language to the same effect in section 259(1A)(b)); (**"necessity" test**)

(ii) But even so satisfied, SofS not obliged to confirm the order/ has a discretion and may refuse

Development Issue 2: SUO and Vasiliou

iii) In the exercise of that discretion SofS obliged to take into account any significant disadvantages or losses flowing directly from the SUO raised the public generally or for those individuals whose actionable rights of access would be extinguished by the order. In such a case the Sof S must also take into account any countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantages or losses are of such significance or seriousness that he should refuse to make the order ("merits" test.)

(iv) No opportunity to re-open the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision.

Development Issue 2: SUO and NR

- In *Vasiliou* the SUO was necessary to enable the development to be carried out physically – not so in *NR* case
- Holgate J in *NT* held that §53 -55 ““*necessary*” *does not mean “essential” or “indispensable”, but instead means “required in the circumstances of the case.” Those circumstances must include the relevant terms of the planning permission”* - here the terms of the Grampian in the case

Development of Highways

Permitted Development GDPO 2015

Class A and B Para 9 Sch 2

“Development related to Roads” by HA for “maintenance or improvement of the road or ... , on land outside but adjoining the boundary of an existing highway of works required for or incidental to the maintenance or improvement of the highway.”

Development of Highways

Highways Act 1980 -

- **s.26 – Public Path Creation Order** (
 - based upon need and expediency having regard to—
 - (a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and
 - (b) the effect which the creation of the path or way would have on the rights of persons interested in the land, account being taken of the provisions as to compensation contained in section 28 .

MJI (Farming) Limited v Secretary of State for Environment, Food and Rural Affairs [2009] EWHC 677 (Admin) test includes width and route.

Development of Highways

- Part XII HA 1980 Acquisition, Vesting and Transfer of land for highways

(see in particular Ss 239 & 240, 246 & 250 HA 1980 and Sch 18)

- S239 and 240 CPO powers for HA to acquire land for construction, improvement etc. of highway
- S246 acquisition of land for mitigating adverse effects of constructing or improving highway
- S250 land acquisition powers for creation as well as acquisition of rights.

- CPO powers and orders frequently combined with Side Roads Orders re the stopping up etc of such side roads
- See in particular s14 and 125 granting power to HA of a Trunk Rd
- to stop up, divert, improve, raise, lower or otherwise alter a highway that crosses or enters the route of the road or is or will be otherwise affected by the construction or improvement of the road;
- to construct a new highway for purposes concerned with any such alteration as aforesaid or for any other purpose connected with the road or its construction, and to close after such period as may be specified in the order any new highway so constructed for temporary purposes;
- S125 – to stop up private means of access in connect with above

- See also **TCPA 1990 Pt X** Highways for stopping up or highway diversion powers if “necessary to do so in order to enable development to be carried out—
 - (a) in accordance with planning permission granted under Part III, or
 - (b) by a government department.

- Planning Act 2008 – Highways DCOs (and DCOs affecting highways) - s104 and 105 of PA 08
- National Infrastructure Planning website
- NPS National Networks
- Road Investment Strategy (RIS 1 now RIS 2)
- Recent examples:
 - A303 Stonehenge - HE promoted scheme;
 - Aquind Interconnector – impact upon Portsmouth roads – within and sub highway construction works (ExA has submitted report to SofS)



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