

Planning briefing note | May 2017

#10ThingsSH Overcoming tricky highways issues

Highway law is one of those areas of planning law that should be simple, but isn't. As planning lawyers here at Stephenson Harwood, we have a depth of experience having provided advice on highways law for over 10 years.

We assist with:

- **looking out for privately maintained highway (presumed highway) during an acquisition;**
- **advising on the stopping up process, often in conjunction with a planning application; and**
- **advising on highways agreements and the fixes that can ensure things run smoothly.**

In this briefing we have set out 10 commonly encountered highways issues and how we can assist client teams to overcome, or better yet, avoid the issues arising altogether.

1 Presumed highway

Presumed highway is one of those areas of planning law that can catch even the most experienced practitioner out. The creation of highway rights occurs in much the same way as an easement may be acquired by prescription over time. However, the key difference is that the right is not simply between two neighbouring properties, but a right to the public at large.

Presumed highway can arise where the land in question has been used "as of right" (without permission, force or secrecy) for a continuous period of 20 years. Therefore, by simply allowing the public to cut across your property you may, inadvertently, be allowing highway rights to accrue.

We have advised landowners and their consultant teams to take the following measures to prevent highway rights accruing over time:

- (1) erecting signs clearly stating that the property is not public highway and that access is only authorised by the owner of the property;
- (2) blocking access a few times a year, usually under the guise of maintenance; and
- (3) taking formal steps under the [Highways Act 1980](#) in order to prevent adoption of the relevant land.



2 Identifying presumed highway on acquisition

Alarming, presumed highway will not be revealed on the results of a search of the index map carried out by the Land Registry. This is because land that is classified as highway (whether it is publicly or privately maintained) does not change the ownership of the land. Further, and perhaps more startling, is that in some cases privately maintained highway will not even show up in the results of the highway search provided by the highway authority. Therefore, when carrying out due diligence, those undertaking site inspections should be careful to identify any thoroughfares or "shortcuts" on the property that are used by the public.

3 How to stop up highway

Landowners and their client teams come to us for advice on stopping up where unwanted presumed highway has been created, or where proposed developments need the land on which a publically maintained highway is currently located. There are two ways a landowner can stop up a highway:

- (1) the Planning Process, i.e. under the [Town and Country Planning Act 1990](#), is a far more user friendly procedure but can only be used when the stopping up is necessary in order to enable development to be carried out in accordance with planning permission. When using the Planning Process it is important to remember to apply for the stopping up order up front because there is a bar to using this process after the development has been substantially completed.
- (2) if the Planning Process is not available (because the development is substantially complete or because a planning application is not being made) then it is possible to use the "Highway Process" which requires the highway authority to obtain a stopping up order from the Magistrates' Court under the Highways Act 1980, however this is a less certain process.

4 Objection to stopping up

Client teams faced with an application to stop up highway may wish to object to that application. The key message behind any objection is to prove that the highway is necessary. The process being used to obtain the stopping up order will determine the precise test you have to meet and who you need to convince.

5 How to prevent objections to your stopping up order

In our experience, dealing with any possible objections before they are made is crucial to a smooth stopping up application. To do this we have some tips that may be useful:

- (1) liaise with all interested parties – e.g. all those with an interest in the land and any statutory undertakers;
- (2) use the tools available to you – e.g. the Planning Process (referred to above) contains a useful mechanism that preserves the rights of the statutory undertaker as if the highway was still in place;
- (3) locate a more convenient alternative route that potential objectors are comfortable with, or show that the highway is no longer in use; and
- (4) show that efforts were made to design the proposed development in a way that would allow the highway to remain but that the results were unsatisfactory.



6 S278 agreements

Section 278 agreements permit a developer to carry out works on a highway. The scope of section 278 agreements varies from the simplest dropped kerb to the most complex of highway redevelopment projects. There are often time pressures on completing these agreements as they will directly impact the programme. We have set out below a number of lessons we have learnt to ensure these agreements are in place ahead of contractor/highway reservations:

- (1) identify early on whether there will be any dedication of land as this will inform your ability to control/limit the number of parties to the agreement e.g. some highway authorities only require long leaseholders to be a party where the works are relatively minor and there is no dedication;
- (2) make sure your engineer is aware of the requirements including any lead in notice periods – we have seen a 3 month notice period before;
- (3) only push back on those elements that you really cannot comply with – the majority of highway authorities are unwilling to make significant changes to these documents so there is little point wasting time "trying arguments on";
- (4) make sure that the scope of the highway works are agreed early with the highways engineer and that the highway authority is restricted from late significant changes or additions; and
- (5) your goal is the issue of the "final certificate", so be aware of the proposed end of the maintenance period and rectify snagging items ASAP.



7 Dedication of land as public highway

A landowner may dedicate a road (constructed to an adoptable standard) as highway to be maintained at the public's expense under section 38 of the Highways Act 1980. If your intention is to dedicate new roads as highway then it is important to discuss this with the highway authority as it will have particular specifications that will need to be met before the works are signed off and adoption is completed. Further, a section 38 agreement is similar in form to a section 278 agreement so the bullets we have set out above are equally relevant.

In our experience it is important to also consider adoption of highway as a purchaser because if you are purchasing a property on a new estate with new internal roads, and those roads are not at adoptable standard, the maintenance will not become the responsibility of the highway authority, rather you and your neighbours could remain responsible for maintaining that road.

8 Providing a bond to the highway authority

A bond is ordinarily required for agreements under s278 or s38 of the Highways Act 1980 and its purpose is to protect the highway authority should the developer fail to carry out the works sufficiently. The amount of the bond is based on the costs of the works, so the earlier you can provide this to the highway authority the better.

The bond is usually released in two stages: the first at practical completion of the works (when between 70-90% of the bond will be released); and the remainder being released on issue of the final certificate.

It is important to have the bondsman approved by the highway authority early as delays may be incurred if the highway authority rejects the bondsman late in the day. Equally, ensure that your bondsman agrees to the form of bond before you finalise the agreement otherwise you will be contractually bound by the highway authority to provide something that you can't achieve in the market.

9 TROs

Traffic Regulation Orders can be a magic wand for highways problems, particularly for larger developments. TROs are the principal means of regulating traffic and can perform a number of tasks: from prohibiting or restricting waiting, setting speed limits, or prohibiting or restricting vehicular traffic – e.g. for pedestrianising highway. Certain statutory tests need to be passed in order for a TRO to be set by a traffic authority, but these are generic and rarely hard to meet. As with stopping up orders, there is a strict procedure to be followed, involving consultation of potentially affected residents, freight transport/haulage associations and the emergency services amongst others. Proposals need advertisement and objections can be made, which may result in a public inquiry being held – although this is not common in our experience. Following the making of a TRO, details must be published in a newspaper and objectors notified. The process is generally quick and can be a useful tool in the developer's armoury.

10 Oversailing and building over highway

Oversailing and building over highway requires a licence under the Highways Act 1980. Failure to obtain a licence can lead to a fine and in the worst case the highway authority may require the building or oversail to be removed. Recently we assisted a client with the purchase of a shopping centre that had a number of ornamental features attached to the facade of the main building. Those features oversailed the highway. We advised our client of the risks of enforcement that it could face as a result of those oversailing features and on possible mechanisms to regularise the property under the Highways Act 1980.

How can Stephenson Harwood help?

Stephenson Harwood's planning lawyers provide quick and commercial advice to our clients to enable them to maximise their chances of planning success. Planning law cannot be given in isolation to our clients' commercial objectives; we work closely with all members of our clients' professional team to secure the best results, delivered in a timely fashion and in an accessible format.



Ben Stansfield

Partner
T: +44 20 7809 2500
M: +44 7584 515 251
E: ben.stansfield@shlegal.com



Anita Kasseean

Senior associate
T: +44 20 7809 2509
M: +44 7827 353 106
E: anita.kasseean@shlegal.com



Lorrae Hendry

Associate
T: +44 20 7809 2602
M: +44 7711 347 439
E: lorrae.hendry@shlegal.com



Patrick Senior

Associate
T: +44 20 7809 2614
M: +44 7825 981 926
E: patrick.senior@shlegal.com

Follow us on twitter @SH_EnviroPlan

To keep track of further news and insights into planning law issues in the UK, look out for our "Top Ten" series #10ThingsSH