Newsletter
September 2016

nplaw
Public Sector Legal Expertise
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Here we are in autumn already, Keats' season of mists and mellow fruitfulness, the summer far too quickly over. Autumn seems the right time of year to reflect on the past, but at nplaw we spent part of the summer looking back in time at the history of two rights of way. Or rather, as we report below, one right of way. Our researches related to the extinction of a public right of way and the existence of a private right of way. In addition to looking at rights of way, this edition of our newsletter includes articles on:

- the changes made with effect from April this year by the Self-build and Custom Housebuilding Act 2015, the Housing and Planning Act 2016 and associated regulations, and by draft regulations due to come into force from 31 October 2016; and
- local authority Appeals Committees, the last avenue of the internal appeal procedure for disciplinary and grievance proceedings.

We have also been looking to the future, and on 15 September 2016 had a helpful meeting with the SRA to discuss an application to set up an alternative business structure. We hope to submit a full application in the next couple of months and to receive a licence early in the new year.

Rights of way

The Way through the Woods - Rudyard Kipling

They shut the road through the woods
Seventy years ago.
Weather and rain have undone it again,
And now you would never know
There was once a road through the woods
Before they planted the trees.
It is underneath the coppice and heath
And the thin anemones.
Only the keeper sees
That, where the ring-dove broods,
And the badgers roll at ease,
There was once a road through the woods.

Yet if you enter the woods
Of a summer evening late,
When the night-air cools on the trout-ringed pools
Where the otter whistles his mate,
(They fear not men in the woods,
Because they see so few.)
You will hear the beat of a horse's feet,
And the swish of a skirt in the dew,
Steadily cantering through
The misty solitudes,
As though they perfectly knew
The old lost road through the woods…
But there is no road through the woods.

The extinction of public rights of way

At the risk of the worst kind of pedantry, was Kipling right? At common law, the maxim is, "Once a highway, always a highway". This applies even if the highway has not been used for many years, is blocked or, as in the case of Kipling's road, it is no longer apparent on the ground. A highway only ceases to exist if:

- the land it passes over is no longer there (for example, as happens quite often along the North Norfolk coast, it falls into the sea); or
- it is closed or diverted by statute or statutory procedure.

Kipling wrote The Way Through The Woods in about 1910, at which time the woods were very much there, so the question is, when "they" shut the road through the woods in about 1840, were they authorised to do so by statute and did they follow the correct statutory procedure?

In the past, highways were closed under a variety of statues, often local Acts of Parliament, such as those enabling the enclosure of land and the building of canals and railways. In the present day, highways are usually closed or diverted under the provisions of the Highways Act 1980 or, where the closure or diversion is necessary to enable development, under the provisions of the Town and Country Planning Act 1990, but closure may take place under the Defence Acts or other legislation. The Countryside and Rights of Way Act 2000 requires all local highways authorities (except the Inner London Boroughs and the City of London) to compile definitive maps of public rights of way in their areas: rights of way not recorded on the relevant definitive map by 1 January 2026 and which have been in use since 1949 will, with some exceptions, be deemed closed with effect from that date.

nplaw was recently asked to advise on whether a footpath remained in existence. We were told that the landowner did not dispute that the footpath had once existed, but claimed that, as a matter of law, it could no longer exist because the use of the land as a dock had been sanctioned by a local Act of Parliament and the passage of the public along the footpath would interfere with that use. As we have seen, there is no such legal principle. The question, as in the case of Kipling's road, was: did the local act extinguish the footpath, either expressly, or implicitly because the continued existence of the footpath would have rendered use of the land as a dock unfeasible? Or so we thought…

In fact, the situation is more complicated. The footpath in question is shown as Martham FP1 on the definitive map of the area compiled by Norfolk County Council. An application to vary part of it was made by a landowner who proposed an alternative route which avoids land known as Cess Staithe. The applicant claims that the footpath cannot pass through the staithe, because the Award of 1812 (made pursuant to the Martham Inclosure Act of 1807) granted rights to deposit goods on the staithe for transport by riverboat and the footpath could be obstructed by such goods. The evidence shows that the footpath is incorrectly shown on the definitive map, but that the footpath that is in customary use (and has been for many years) crosses the staithe rather than following the alternative route proposed by the applicant. The Council proposes to make an order modifying Martham FP1 so that it correctly shows the footpath in customary use.

Creation of a public right of way

A right of way over land can be created by:

- dedication of the land over which the way passes, and acceptance of the right;
- agreement between the landowner and a local authority or parish council under sections 25 or 30 of the Highways Act 1980;
- order made by a local authority under section 26 of the Highways Act 1980.

Dedication may be express, or arise by presumption under statute or common law. In all cases, use by the public is a sufficient acceptance. At common law, a right of way is deemed to exist where the evidence proves public use, unless anyone denying its existence can show that the landowner did not intend to dedicate a right of way. There is no requirement that the use take place over any specific period. Under section 31 of the Highways Act 1980, the dedication of a route as a public highway is presumed after public use, as of right and without interruption, for 20 years, unless there is sufficient evidence to show that there was no intention during that period to dedicate it. Use as of right must be without force, secrecy or permission.

Both at common law and under statute, use must be by the public at large. Where use is only or mainly by local people, that may suffice, but use by a section of the public will not. *"There may be a dedication to the public for a limited purpose… but there cannot be a dedication to a limited part of the public" (Poole v Huskinson [1843]).* The use must be sufficient to alert an observant landowner to the fact that a public right is being asserted.

At common law, a landowner must undertake *"some overt acts … such as to show the public at large that he had no intention to dedicate" (Fairey v Southampton City Council [1956])*. The Highways Act 1980 provides that certain actions on the part of a landowner (such as erection of a suitable notice or deposit of a map and declaration of admitted rights of way at twenty year intervals) will constitute sufficient evidence of lack of intention to dedicate.

Since the Natural Environment and Rural Communities Act came into force in 2006, a public right of way for mechanically propelled vehicles will only be created if there is express provision to that effect or where the right relates to a road constructed for the use of such vehicles.

The existence of a private right of way

In a case heard by the Great Yarmouth Land Registration Tribunal in May this year, nplaw acted for the respondent, Martham Parish Council. We instructed Vivian Chapman QC, an acknowledged expert on commons and village greens, to represent the parish council at the hearing. The tribunal's decision was released in August. The applicant was the owner of an eighteenth century cottage which fronts Martham village green. He claimed a vehicular right of way entitling him to drive across the village green to his property (otherwise inaccessible by car) and, in 2013, applied for the land register to be altered so as to record this right of way.

The cottage is believed to have been built in the mid-eighteenth century. Despite a large amount of background research into ancient parish documents and maps carried out by local historians acting for both parties, no details of the original grant of the land on which the cottage is built were found. The earliest reliable map of the area dated 1797 shows no adjacent roads, nor do any subsequent maps. In modern times, vehicular access to the cottage was through a courtyard which fronted a road running behind the cottage. Access via the courtyard was cut off in 1953, when a shop fronting the road was extended.

The village green was originally vested in the lord of the manor as waste land. The Martham Inclosure Act of 1807 and Award of 1812 vested the green in Special Commissioners to hold on trust for the lord of the manor and the commoners of Martham. For many years thereafter, the green was managed by the parish council under a series of agreements with the Special Commissioners. In 1968, it was registered as a village green under the Commons Registration Act 1965. The parish council continued to manage the green, and in 2010 it was registered as proprietor with qualified title, with the following entry in the proprietorship register: *"The estate was vested in the first proprietor as a result of the registration of the first proprietor as owner of the land under s.8 CRA 1965. This registration (under LRA 2002) does not affect the enforcement of any estate, estate, right or interest averse to, or in derogation of, the proprietor's title subsisting at the time of registration under the CRA 1965 or then capable of arising and which exists despite that registration"*.

The applicant initially based his claim on modern user but, in the absence of any evidence of this, relied on historical documents at the hearing, arguing that either:

- the principle of non-derogation from grant entitled him to an implied easement giving him a right of vehicular access; or
- he had an immunity from suit (resulting from the obligation imposed on the grantor of land not to use his land in a way which would render the land granted less fit for the purpose for

Enclosure

The enclosure of common land was achieved by different means during different periods. In its Definitive Map Orders: Consistency Guidelines, the Planning Inspectorate identifies five phases:

1500s onwards	Enclosure by agreement
1600s onwards	Local enclosure acts
After 1801	Local enclosure acts operating together with the provisions of the Inclosure Consolidation Act 1801
After 1836	Local enclosure acts operating together with the provisions of the General Inclosure Act 1836
After 1845	A few local acts, mostly under the Inclosure Act 1845

It is estimated that by 1876 when enclosure of common land was discontinued, 5200 local acts had been passed enclosing almost seven million acres. Following the passing of a local act, commissioners would be appointed to survey the land, advertise the proposals, hear objections and make a final award allotting the land to individuals. The award had to be enrolled and a declaration made by the Justices that any highways created had been satisfactorily made up. Thereafter such highways were publicly maintainable.

which it was granted) which meant that the parish council could not disallow him vehicular access, and that such an immunity was an estate, right or interest capable of registration under the LRA 2002.

The tribunal found that the facts did not support the applicant's argument based on the principle of non-derogation from grant: there was no evidence that vehicular use was required when the cottage was first built and lack of vehicular user did not make the cottage unfit for residential purposes. It rejected the applicant's argument that the Award of 1812 did not provide for access to the cottage over the green because such a right already existed, since the land was outside the scheme of enclosure and *"the cottage either had a right of vehicular access by then or the Applicant has to show, independently of the Award, how it acquired one".* Although there was evidence of pedestrian access, the tribunal found that there was no evidence of user "as of right" because the green had always been open to the public. Furthermore, the applicant did not claim a right of way over any defined route across the green and such use *"with its lack of terminus ad quem"* could not support his claim to an easement.

The tribunal also found that immunity from suit was not "an estate, right or interest excepted from registration" within the meaning of paragraph 5(c) Schedule 4 LRA 2002 which would allow the register to be altered to give effect to it. Paragraph 5(c) links to section 11(6) of the LRA 2002 which provides *"Registration with qualified title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest which appears from the register to be excepted from the effect of registration"*, and the rights and interests it refers to are therefore proprietary in nature. Immunity from suit is not an interest in land, but a defence or personal right of action.

nplaw undertook the case on a "no win, no fee" basis. The case lasted for three years and our final fees were substantial. Fortunately, the tribunal ordered that costs should follow the event. Without such an arrangement, Martham Parish Council would not have been in a position to defend the case and to preserve the village green for public enjoyment. We are pleased to have played a part in preserving the green for the benefit of the public.

Appeals Committee Proceedings

nplaw's Andrew Brett is a specialist employment lawyer who regularly gives talks on employment law to our local authority clients. In this, and future editions, he shares his experience of advising local authority Appeals Committees, the last avenue of the internal appeal procedure for disciplinary and grievance proceedings.

Procedure

It is vital that the procedure adopted by an Appeals Committee is fair and complies with the ACAS Code. Key requirements before the hearing are to ensure that:

- those hearing the appeal have not previously been involved in the case;
- all relevant documents have been obtained and all relevant witnesses have been interviewed;
- the employee is given enough time to prepare but there are no delays in the process and, in particular, any suspension is no longer than necessary;
- committee members have sufficient time to read all the papers in advance.

Key requirements at the hearing include:

- make introductions;
- check that the employee understands the issues, has received all the paperwork, and the grounds for appeal are as stated (the employee does not wish to alter them or to add new grounds);

- if the employee is unaccompanied, make sure that they understand that they have the right to be accompanied by a union representative or work colleague and ask them to confirm that they are happy to proceed in the absence of one;
- check that the employee does not object to the composition of the Appeals Committee and has seen a copy of the procedure;
- clarify whether the employee wishes to call any witnesses;
- ask the employee what their desired outcome is;
- record all decisions in writing and include proper reasoning.

Scenarios to make you think!

1. The employee's work colleague/union representative fails to turn up to the hearing. Should it go ahead?
2. On the day of the hearing, one of the parties wants to introduce new evidence. What should you do?
3. The Council appoints an independent investigator to prepare a report into a conduct charge against an employee. This investigator used to work in the HR department of the same Council and only left six months previously. What are your thoughts on this?

In future editions of this newsletter, Andrew will be considering appeals where an employee has been dismissed by reason of misconduct, sickness or ill health, performance, redundancy or other substantial reasons, as well as appeals relating to grievances.

Top tips for Appeals Committee Members

Once the Appeals Committee has started hearing the evidence, its members must attend the whole hearing. Andrew's top tips for Appeals Committee Members include:

- Stick to the issues both when interviewing witnesses and when deliberating;
- Do not badger or argue with any witness;
- If a witness is upset, have a temporary adjournment;
- If you think that you need further documents, ask for them to be produced;
- If you think that you need additional witnesses, ask for them to attend;
- If you need HR or legal points clarified, ask for clarification straightaway;
- If evidence can't be obtained until a later date, adjourn and reconvene;
- Ask yourselves how credible each witness is. Are there inconsistencies? Does the witness seem defensive?
- Don't discuss the case with anyone except your fellow committee members and advisers;
- Allow plenty of time to deliberate and agree a decision;
- Base the decision on the evidence alone.

Self-build and Custom Housebuilding

Background

The Self-build and Custom Housebuilding Act 2015 as amended by the Housing and Planning Act 2016 imposes statutory duties on local planning authorities ("LPAs") to:

- compile a register of individuals, or associations of individuals, who are seeking to acquire land in their area for the purpose of building their own home ("the self-build register");
- have regard to the self-build register when carrying out their planning, housing, land disposal and regeneration functions; and
- grant suitable development permission in respect of sufficient serviced plots to match the demand shown by its self-build register. A "serviced plot of land" must have access to a public highway and connections for electricity, water and waste water.

These provisions came into force in April 2016. They are supplemented by the Self-build and Custom Housebuilding (Register) Regulations 2016 (*SI 2016/105*) which set out the requirements that LPAs must follow in preparing and keeping their registers, and the Self-build and Custom Housebuilding: Planning Practice Guidance published by the Department for Communities and Local Government ("the DCLG"). Both came into force on 1 April 2016 and apply only to England.

The self-build register

Each LPA must keep its own self-build register, but an LPA may share the administration of its register with neighbouring authorities. The self-build register must set out individual applicants' names and addresses. In the case of an association of individuals, the self-build register must show the name and address of the association (and, if different, of its lead contact) and the number of serviced plots the association wants to acquire. Applicants must meet all of the eligibility criteria for entry on the register. The eligibility criteria are that all individuals must be: 18 or over; a British citizen or a national of another European Economic Area State or of Switzerland; and seeking (either alone or with others) to acquire a serviced plot of land in the LPA's area to build a house to occupy as their sole or main residence.

LPAs cannot currently adopt additional eligibility criteria. An LPA can request additional information (such as general location, preferred plot size and housing type), but it must ensure that any additional information requested is relevant, proportionate and reasonable, and it cannot refuse to register an individual who fails to provide such information. Applications must be determined within 28 days of receipt, and the LPA must notify the applicant of the outcome in writing and provided reasons where the applicant is not successful.

An LPA is not required to publish its self-build register, but must publicise it. The DCLG recommends that, as a minimum, an LPA should have a page on its website dedicated to self-build and custom housebuilding, which sets out what the LPA is doing to promote opportunities for self-build and custom housebuilding in its area, and explains the purpose of the self-build register and how to apply for entry on it. LPAs are encouraged to publish information from the register, such as the number of registered individuals and associations, the number of serviced plots sought and preferences regarding type of plot.

Duty to have regard to the register

When developing local plan policies, an LPA should have regard to the demand for self-build and custom housebuilding evidenced by its self-build register. LPAs should also feed data from the self-build register, supported by data from other suitable sources, into their Strategic Housing Market Assessment. Local housing authorities ("LHAs") should have regard to self-build registers when preparing local housing strategies and planning for new housing on LHA land. Local authorities should also consider the demand for self-build and custom housebuilding when developing plans to dispose of local authority land or regenerate their area.

Duty to ensure sufficient plots consistent with local demand

Permission is considered suitable if a development could include self-build and custom housebuilding. The level of demand is evidenced by the number of entries added to the self-build register during a base period. The first base period ends on 30 October 2016. Subsequent base periods run for 12 months.

The Self-build and Custom Housebuilding (Time for Compliance and Fees) Regulations have been laid before Parliament in draft. They:

- specify that an LPA must comply with its duty to ensure sufficient plots consistent with local demand as evidenced by the number of register entries in a base period within three years beginning immediately after the end of that base period; and
- allow LPAs to charge applicants a fee to be entered on the self-build register.

The draft Regulations provide that they will come into force on 31 October 2016 and apply to England only.

Self-build and Custom Housebuilding Seminar

nplaw is holding a free seminar on Self-build and Custom Housebuilding on the morning of Wednesday 19 October 2016 at County Hall in Norwich. The morning will start with coffee and registration from 9 until 9.30am, and we aim to finish by 11.30am. Our senior lawyers will take you through the key changes brought about by the Self-build and Custom Housebuilding Act 2015, the Housing and Planning Act 2016 and associated regulations.

Compulsory purchase orders

nplaw's CPO Consultancy Service continues to go from strength to strength. Since our last newsletter, it has won a tender to provide advice to Amber Valley Borough Council on the preparation of a repairs notice and (if required) an urgent works notice, preliminary work in connection with a CPO, procurement issues, advice on a back to back/indemnity agreement and general advice.

We have been overwhelmed with applications for places at the seminar that we are holding in London on 23 September 2016. This date is now fully booked, but we have arranged to repeat the seminar on "Compulsory Purchase Orders – Their effective use for regeneration projects" on Friday 11 November 2016 at Friends House, 173 – 177 Euston Road, London NW1 2BJ . The seminar looks at the specific issues that arise when acquiring land for regeneration projects, both large and small, and will take into account the recently updated government guidance and the changes put forward in the Housing and Planning Act 2016. The speakers are Chris Skinner and Jane Linley, both solicitors with nplaw who between them have over 60 years' experience of dealing with CPOs. Full details of the seminar are set out on our website at http://www.nplaw.co.uk/events/cpo-seminar-sell/

Training

Optional since April last year, the SRA's new continuing competence regime becomes mandatory from November this year. There will no longer be any requirement for solicitors to record CPD hours. Instead, all solicitors will be required to:

- reflect on their practice to identify their learning and development needs;
- address those needs;
- record the learning and development they undertake; and
- evaluate whether the learning and development they have undertaken has addressed their needs.

The SRA Competence Statement defines continuing competencies of solicitors and sets out the legal knowledge that solicitors are required to maintain throughout their careers. Development plan and development record templates are available from the SRA's website.

For details of all the training that nplaw can offer, please contact Fiona Anthony at fiona.anthony@norfolk.gov.uk or on 01603 222943.

Our next newsletter

We hope that you have found this edition of our newsletter useful. The next edition of our newsletter is due out in November 2016. If you are a new reader and wish to subscribe to future newsletters, just enter your email address in the box on the news & events page of our website at http://www.nplaw.co.uk/news-events/.

If you have any queries relating to this newsletter or wish to seek advice, please contact:

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