Development Land Part 2

The focus of this second look at development land is on ways in which the development potential of a plot can be lost or frustrated.

The usual reason for the loss of development potential is where a third-party objects to the proposed development and has interfered in some way, making a claim over the land that prevents it from being developed. There are a couple of main grounds on which such a person or group could do this. By claiming the land is either:

- A town or village green under the Commons Act 2006; or
- An asset of community value under the Localism Act 2011.

Town and village greens

Under s.15 of the Commons Act 2006, anyone can apply to register land as a town or village green where a significant number of the inhabitants of the locality have indulged as of right in 'lawful sports and pastimes' on the land for a period of at least 20 years and:

- either they continue to do so at the time of the application; or
- they ceased to do so before the time of the application, but the application is made within one year of the cessation.

The effect of registration is that, if land is a town or village green, you cannot drag vehicles across it of any kind; nor can you change the surface. So, in other words, you can't build on it. Needless to say, this is fairly catastrophic for a would-be developer of the land.

The user must be 'as of right', meaning that the old land law adage applies: *nec clam, nec vi, nec precario* (use without force, secrecy or permission).

Since the Commons Act came into force cases have been coming through the courts thick and fast. Of particular interest is the judicial review case of ***R (on the application of Lewis) v Redcar and Cleveland Borough Council*** **[2010] UKSC 11**, which concerned a local authority owned golf course. The land was earmarked for a mixed development including 300 houses in conjunction with Persimmon Homes. Four of the locals made a claim that the land should be registered as a village green based on dog walking and family recreational activities, including blackberry picking and non-linear walking (i.e. meandering!). Despite the fact that the locals always gave the golfers priority over their own activities, the Supreme Court held that the land had been used without force, secrecy or permission for the requisite time period and so the registration was allowed. There was no further requirement in the legislation in relation to deference to others, and so the giving of priority to golfers was an irrelevance.

Luckily, the recent 2019 Supreme Court decisions relating to the cases of ***R (Newhaven Port & Properties Ltd) v East Sussex County Council*** **[2015] UKSC 7** and ***Lancashire County Council v The Secretary of State for the Environment, Food and Rural Affairs and Another*** **[2016] EWHC 1238 (Admin)** have massively reduced the likely success of any village green claim against a government body. The court in both cases held that, where land is acquired by statute for a specific purpose which is inconsistent with the use of that land as village green, then the primary purpose will override any claim for village green that is made against it. This is known as the 'statutory incompatibility' ground.

The decisions will make future village green claims against statutory bodies difficult. But the risk is still high in respect of privately owned land, and private landowners who have traditionally taken a generous approach to locals habitually trespassing on their land should beware. All is not lost, however, if the landowner has erected signs forbidding entry onto the land, even where the signs have come down or been vandalised. See ***Taylor v Betterment Properties (Weymouth) Ltd and another*** **[2012] EWCA Civ 250**, in which the High Court accepted that, although signage put up by the landowner and forbidding entry had long since gone, locals would have realised that they were trespassing by virtue of the fact that they were entering the land through gaps in the fence.

Further restrictions are on the way. Section 13 of the Growth and Infrastructure Act 2013 (section not yet in force) proposes to insert a new section 15A in the Commons Act 2006 to allow a landowner in England to deposit a Town and Village Greens statement ('TVG') with the Commons Registration Authority, the purpose of which will be to bring to an end any period of use by locals that might later be claimed to amount to a claim of village green. The Commons Registration Authority will be required to keep a register containing prescribed information about deposited statements.

Section 16 and Schedule 4 of the Act propose to insert a new section 15C and Schedule 1A into the CA 2006, that will exclude the right to apply to register land as a TVG where certain "trigger events" relating to the past, present or future development of land occur. These trigger events, set out in Schedule 1A of the Commons Act, include publicity for a planning application, adoption of a development plan and the making of a neighbourhood development plan.

Schedule 1A also specifies "terminating events" which correspond to each trigger event and result in the right to apply becoming exercisable again. The Secretary of State may insert new trigger or terminating events or remove or amend existing ones.

Assets of community value

The Localism Act introduces a community right to bid in respect of 'assets of community value'. This aims to ensure that buildings and amenities can be kept in public use and remain an integral part of community life. Lots of pubs being bought under these provisions, becoming 'community pubs'.

Voluntary and community organisations and parish councils can nominate an asset to be included in a 'list of assets of community value' which the local authority will be required to maintain. A building or piece of land will be deemed to have community value only if:

- The use of the land or building currently, or in the recent past, furthers the social well-being or cultural, recreational or sporting interests of the local community; and
- This use of the building will continue to further the social well-being or interests of the local community.

The use of the building or land must not be deemed 'ancillary', meaning the use of the land or building to further social well-being or interests of the community must be its principle use.

If land is included in the list of assets of community value it will remain on that list for five years. During that time if the owner of a listed asset then wants to sell it, a moratorium period will be triggered during which the asset cannot be sold. This is intended to allow community groups time to develop a proposal and raise the required capital to bid for the property when it comes onto the open market at the end of that period.

If a building or piece of land is listed as an 'asset of community value' and the owner wants to sell, they must inform the local authority. This will then trigger a moratorium period during which the owner cannot conclude the sale of the asset.

There are two moratorium periods to note:

1. *'Interim moratorium period'* – this is a six-week period during which a community group wishing to bid for the asset must notify the local authority that they wish to be considered as a potential bidder. If this does not happen the owner can proceed to a sale.
2. *'Full moratorium period'* - this is a six-month period during which a community group can develop a proposal and raise the capital required to purchase the asset.

There is also a 'protected period' of 18 months from the same start date to protect the owner from repeated attempts to block a sale.

The tribunals so far appear to be taking a liberal view on assets of community value. In ***Matterhorn Capital v Bristol City Council* (2015)** Matterhorn purchased the land, terminated the lease with the scouting association and knocked down the scout hut. Despite this, the scout hut was listed as an asset of community value. The argument was that there was still a prospect of the scouting association obtaining a new lease and funding to reinstate through charitable donations.

Village greens and asset of community value go hand in hand if you want to scupper a development. The benefit of assets of community value is that you don't need the 20 years value, and you don't need to comply with the *nec clam, nec vi, nec precario* provisions.

Other issues that may impact on the development potential of land

There are a couple of additional points worth mentioning here: Variations in the extent of easement and the Crichel Down Rules.

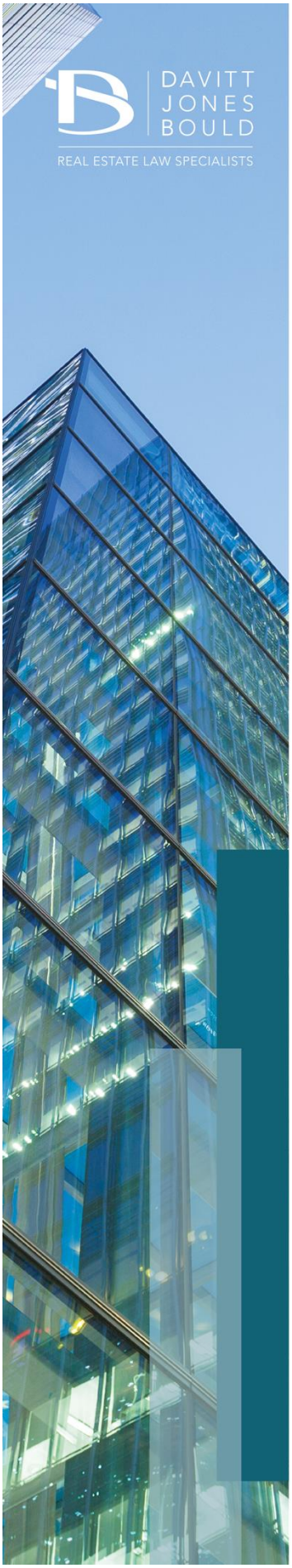
Variation in the extent of an easement

Where the land to be developed benefits from an easement over servient land, any proposed development must bear in mind the amount of user the easement permits, and whether the servient landowner will permit an alteration to the extent of the easement. In other words, how much are you going to use the access/drainage etc. and is this in excess of what was reasonably envisaged at the time the easement was granted?

There are two completely opposing cases on this. In ***Graham v Philcox* [1984] QB 747** the dominant owner acquired neighbouring property which he then incorporated in his own land. It was held that he was still able to claim an easement over the servient land even though the amount of user had been increased. But the court recognised that, if the change to the dominant tenement was such as to impose an excessive burden on the servient land greater than that which might have been reasonably contemplated at the date of grant, the increased user would not be permitted. Thus, in ***Jelbert v Davis* [1968] 1WLR 589**, when the dominant tenement was converted from agricultural land into a caravan site, the consequent massive increase in traffic over the servient land was successfully prevented by means of an injunction.

The more recent case of ***McAdams Homes Ltd v Robinson and another* - [2004] All ER (D) 467 (Feb)** considered the previous conflicting cases and held that two factors need to be established in order for the easement to continue to be enjoyed for the purpose of the land as developed. These are:

a. whether the development of the dominant land represents a radical change in the character or identity of the land, as opposed to a mere change or intensification in the use of the site; and
b. whether use of the site once redeveloped would result in a substantial increase or alteration in the burden on the servient land.



Crichel Down rules

The rules particularly relevant to government bodies. If an authority purchasing under a CPO, or threat of the same, subsequently wishes to dispose of the land, they must give first refusal on the purchase to the original owners or their successors in title. This is subject to the proviso that the character of the land has not materially changed since acquisition. The character of the land may be considered to have "materially changed" where, for example, dwellings or offices have been erected on open land, mainly open land has been afforested, or where substantial works to an existing building have effectively altered its character.

The general obligation to offer back will not apply to compulsorily purchased land that becomes surplus after 25 years of purchase.

There are a number of exceptions to the general obligation to offer back including, amongst others:

1. It is decided on specific Ministerial authority that the land is needed by another department; and
2. Dwellings are bought for onward sale to a Registered Provider of Social Housing.

So, it is always worth looking at the rules to check whether there is an out here. If the obligation to clawback does not arise then no offer need be made to the previous owners or their successors. However, from a belt and braces point of view a “minded to” letter may be advisable, with contracts being exchanged and completion based on provisions which relate to a possible judicial review by the previous owners. The government body should also adopt a consistent approach on its disposals in order to avoid judicial review.

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