

Putting it all together

Ann Ebberson highlights the importance of ascertaining rights of way and covenants before purchasing land for redevelopment



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Acquiring land for development can be a bit of a legal minefield. To ensure that this is managed successfully it is important that the developer seeks all appropriate advice: not just from lawyers but also from all other appropriate advisers, including surveyors, valuers, planning advisers and architects, to ensure that every issue is considered from each adviser's perspective. Examples are rights of light and planning conditions, and some few of the most frequent legal issues that arise are rights of way and positive and restrictive covenants.

We will consider these further below. It is important to consider these from both legal and other perspectives such as valuation.

Rights of way

When it comes to rights of way, a number of matters need to be considered.

Look at the title plan

It is important to look carefully at and compare the land on the ground with the title plan of the land being purchased. It is vital to ensure that the title plan boundary does not fall short or that there is not more land which appears to be part of the site but is not included in the title. There should not be any gap between the property and the highway. More generally it is important to ensure there are not any discrepancies in the boundaries and that the developer does not end up building on land it does not own.

Consider access

Consider if the land adjoins a public highway and, if not, how is the land

reached? If the access is via a private road or a private footpath the question would be does the developer have rights of way over that road or footpath? The title of the land should provide for such rights, but if it does not then you would need to consider the position further.

Prescriptive rights

If there is no legal right of way, has the seller obtained a prescriptive right of way? Has the seller had 20 years' continuous user without force, secrecy or permission? A prescriptive right of way should be very carefully investigated and statutory declarations obtained from the seller and, if need be, its predecessors as to the extent of its use, for how long it has been used and for what purpose.

Remedying a lack of a right of way

The safest course of action to remedy a lack of a right of way would be for the developer to require the seller to obtain a deed of easement from the owner of the right of way, if the owner can be found. This would ensure that there is no question in the future as to the ability to use the right of way and the extent of the right of way. This is particularly important if the use of the land is changing as this could affect any right acquired by way of prescription. It is even possible that a prescriptive right of way will be lost if there is to be a substantial change in the use or character of the land you are acquiring with the benefit of the right of way.

'Unlike restrictive covenants, positive covenants do not run automatically with the land and there needs to be a mechanism in the title to ensure that such covenants pass on to successors in title.'

The devil is in the detail

Even if the land has the benefit of a legal right of way, a number of matters still need to be considered. For example, is the physical extent of the right of way clear? Does it extend from the edge of the site

connected his house, the Granary, to Church Street in Pangbourne, Berkshire. The Naheeds owned 4-8 High Street and the driveway ownership was divided between various parties. In a conveyance from 1921 the Granary was granted

The Naheeds use the driveway for deliveries to their premises. Mr Gore has a garage next to the Granary and the garage is built on land that once formed part of the driveway but which had been acquired by adverse possession many years ago. Because of the size of the driveway, when the Naheeds had deliveries, this often meant that Mr Gore could not access or exit his garage. Mr Gore brought an action for a declaration that the Naheeds were obstructing his right of way. Mr Gore obtained an order in his favour but the Naheeds appealed this. Their argument followed case law decisions (starting with *Harris v Flower* [1904]) in which a right of way could only be used for the benefit of the dominant land and not for other land. Mr Gore's argument followed other case law in which it had been acknowledged that a right of way can extend to additional and, if that land is used for ancillary purposes, to the dominant land. In this case,

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all the way to the public highway? Is it wide enough for the use required? Is the right of way for both vehicles and on foot? Are any vehicles restricted? Is the right specific to the land that will benefit from the right of way?

Gore v Naheed [2017]

In *Gore*, a common point was considered on rights of way. This case related to the use by Mr Gore of a driveway which

a right of way to Church Street over the driveway:

... with or without horses, or other animals carts or wagons laden or unladen to go and return along and over the private entrance road or way coloured yellow on the said plan for all purposes connected with the use and occupation of the said Granary but not further or otherwise.

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the court found in favour of Mr Gore on the grounds that the garage was used in conjunction with the Granary.

Positive and restrictive covenants

Here, some of the key things to consider are:

- Is the covenant in fact restrictive and will you be bound by it? Restrictive covenants are covenants that are negative in substance, even though they may be expressed in positive terms. The test is whether a covenant restricts the use and enjoyment of the land. If it does then it is a restrictive covenant.
- Restrictive covenants may limit possible uses of the land. Examples are:
 - no residential use;
 - prohibiting use for particular trades or businesses such as selling liquor or any trade or business;
 - prohibiting removal of any gravel or minerals from the land;
 - in older titles it is very common to see very specific restrictions such as a restriction on hanging out washing or keeping caravans on the property;
 - forbidding use for undesirable activities or potential nuisances;
 - restricting the number or type of buildings that can be erected: for example, in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] a covenant restricted the number of houses that could be built on a plot to just one;
 - requiring observance of a building line; or
 - restricting the height of buildings: for example, in *Queen Elizabeth's School Blackburn Ltd v Banks Wilson*

Solicitors (a firm) [2001] a covenant purported to prohibit any new construction above the height of existing buildings.

- It is normally straightforward to obtain indemnity insurance

automatically with the land and there needs to be a mechanism in the title to ensure that such covenants pass on to successors in title. This is often dealt with by:

- the requirement for successors in title to enter into a deed

It is normally straightforward to obtain indemnity insurance against enforcement of restrictive covenants because of the age of most covenants.

against enforcement of restrictive covenants because of the age of most covenants. However, there is a risk that somebody may still have the benefit of such covenant. The better option is to try to obtain a release of the covenant.

- A deed of release can be obtained from the beneficiaries of the covenant, if indeed the beneficiaries can be identified and located. However, if an approach is made and the beneficiaries decline to grant the release, then an insurer may be less likely to issue an indemnity insurance policy following this approach and refusal.
- Restrictive covenants should not be confused with positive covenants. Positive covenants are by their nature positive, ie they require the person who is subject to them actually to positively do something.
- Examples of positive covenants include such things as:
 - to repair and maintain roadways/driveways;
 - to contribute towards the cost of repair and maintenance of a roadway/driveway; or
 - to repair and maintain fences or boundaries.
- Unlike restrictive covenants, positive covenants do not run

of covenant on the terms set out in the original transfer; or

- inserting a rent charge in the original transfer. If such a mechanism is used, it is usual to have a fixed rent charge of say £1 along with a yearly variable charge. In this way contributions towards upkeep and maintenance can be collected.
- If positive covenants are not properly documented or protected on the title, this will mean that the positive covenants do not run with the land. This means that the covenants cannot be enforced against subsequent owners. This can be an issue with such things as a requirement to contribute towards the cost of shared driveways or private roadways on estates.

These are only a few parts of the jigsaw that need to be put in place when considering any development. ■

Crest Nicholson Residential (South) Ltd v McAllister [2004] EWCA Civ 410
Gore v Naheed & anor [2017] EWCA Civ 369
Harris v Flower [1904] 74 LJ Ch 127
Queen Elizabeth's School Blackburn Ltd & ors v Banks Wilson Solicitors (a firm) [2001] EWCA Civ 1360