

***April 2011***

## **EASEMENTS**

### **Introduction**

1. The purpose of this Note is to give a brief overview of the law relating to easements in England and Wales. The Note will describe what easements are, how they are created and issues that are particular to local councils. One type of easement is of particular importance to local councils is a right of way. Rights of way and easements over common land and village greens are the subject of a separate Legal Topic Note (LTN 57- Easements over Common Land and Village Greens).

### **What are easements?**

2. An easement is a right enjoyed by one owner of land over the land of another. There are a number of rights that one person can enjoy over the land of another. Examples include:
  - a right of way;
  - a right to light;
  - a right to have a building supported;
  - a right to a flow of air or water; and
  - a right to park.

### **How are easements created?**

3. Easements are usually created in one of three ways:
  - expressly (i.e. by a written grant – usually by Deed);
  - by implication; and
  - through long use.

**i Easements by express grant**

4. This is the most usual form of easement. If one party wishes to acquire an easement over the land of another (e.g. a right of way) he can simply negotiate with the land owner and agree terms which must be put in writing (usually a Deed). Written easements are usually the most satisfactory type of easement as there is less scope for disagreements and disputes. Parties are free to negotiate:
- repairing obligations (without which no positive burden to do so is generally imposed on the owner of the land over which the easement is exercised);
  - terms of use (e.g. type, number of vehicles in the case of a vehicular right of way); and
  - a price.
5. Councils considering granting or acquiring an easement are advised to ensure that it is in writing so that the likelihood of disputes is reduced.

**ii Easements by implication**

6. A person might want to argue that he has an implied easement when he cannot point to an express grant. This type of easement is quite rare and, consequently this Note will be restricted to the most common example – an easement by necessity. An easement by necessity will be implied where a property cannot be used at all unless an easement is implied. A classic example is a sale of land which is landlocked. If a person purchases land from another and the only means of accessing the land is via the land of the vendor, the law states that the purchaser will have an implied easement of necessity over the vendor's land.

**iii Easements through long use**

7. If a person who does not have the benefit of an easement uses land the land of another for long enough he may acquire one through long use. In law such easements are known as 'easements by prescription'. Some of the legal principles in respect of prescriptive easements are quite arcane and complex. As a rule of thumb local councils should be aware that individuals may claim that they have acquired an easement through long use if they have used the land in question for 20 years or more. There are, however, a number of conditions. If one or more of the following conditions are not met

the owner of land would be able to defend a claim for an easement through long use. The conditions are:

- no force must be used in order to enjoy the claimed right, nor must the use of the land take place under protest from the owner;
- use of the land must not be secret – as the owner would not have an opportunity to protest; and
- the owner of the land has not given permission (important).

8. The last condition can frequently be the most important because councils, when faced with a claim for an easement through long use, are able to defeat it if they can point to some licence/permission or consent given or granted to the individual in question.

### **The difference between Easements and Licences**

9. The nature of a licence is set out in LTN 48 (The Difference between Leases and Licences). Shortly stated, a licence gives a person legal permission to do something which would otherwise be a trespass. Councils have the power to grant licences to individuals to allow them vehicular access to their properties. Granting a (written) licence could be one way of ensuring that individuals do not acquire easements through long use because, as stated in paragraphs 7 and 8 above, an easement cannot be acquired by prescription where the owner of the land has given permission for the use.

### **Different types of easement**

#### **i Vehicular rights of way**

10. The nature of vehicular rights of way and the issues that arise from a local council's perspective are set out in LTN 57 (Easements over Common Land and Village Greens).

#### **ii Parking easements**

11. Councils may, in certain circumstances, allow individuals to park on commons but not on village greens. Further details in this respect are set out in LTN 18 (Local Councils' Powers to Provide Parking Spaces). Occasionally, however, NALC is asked to advise where an individual claims that he has acquired a parking easement through long use (i.e. by prescription).

12. There have been a number of cases in the court in recent years which have demonstrated that it is extremely difficult to obtain a parking easement by prescription. In *Batchelor v Marlow (2001)* the Court of Appeal decided that such an easement could not be acquired by prescription where it would exclude the owner's reasonable use of the land. *Batchelor* was also followed by the Court of Appeal in the case of *Central Midlands Estates v Leicester Dyers Ltd (2003)*.
13. Usually, however, these cases always turn on their own particular facts and NALC would be happy to advise further if councils have any queries in this regard.

### **iii Rights of way by foot**

14. A pedestrian right of way can be acquired in exactly the same way as a vehicular right of way. In the 2001 case of *Smith v Brudenell-Bruce (the Earl of Cardigan)* the court decided that it was possible to acquire both at the same time. If members of the public can claim that they have used a way as a footpath for twenty years or more they may be able to claim that a way is, in fact, a public right of way pursuant to s.31 Highways Act 1980. Although such a public right of way is very similar in nature to an easement it is not because it does not require the public to own any land.

### **Issues particular to local councils**

15. The grant of an easement falls within the definition of a 'disposal' of land pursuant to s.127 of the Local Government Act 1972. Consequently, the following issues will arise:
- the need to obtain the best price for the easement (or to obtain the consent of the Secretary of State to grant an easement at an undervalue);
  - the need to advertise the proposed grant of an easement in a local newspaper for 2 consecutive weeks if the land is 'open space' (defined by s. 336(1) Town and Country Planning Act 1990 as any land laid out as a public garden, used for public recreation, or land which is a disused burial ground);
  - whether there are any other restrictions preventing the grant of an easement (e.g. the terms of a trust if the land was gifted to the council);
  - the need to obtain the consent of the Charity Commissioners, if the land forms a part of the assets of a charity; and
  - whether any payment in respect of the grant falls to be applied in accordance with any directions given under the Charities Act 1993.

16. Further information is set out in LTN 45 (Disposal and Appropriation of Land by Local Councils and Parish Trustees).

### **Charging for an easement**

17. As easements fall within the definition of a 'disposal' of land (as mentioned above) local councils must (i) obtain the best price or (ii) obtain the consent of the Secretary of State to grant the easement at an undervalue (as set out in more detail in LTN 45). There are a number of different types of easement and the value of the same type of easement can vary considerable from one region to another. Consequently, it is not possible to give blanket advice concerning the payments that should be sought in respect of different types of easements. NALC takes the view that local councils are only ever likely to know whether a proposed payment in respect of an easement is the best price or an undervalue if the services of an appropriately qualified valuation surveyor are obtained.
18. Some of the land in question will be land held by a charity and, consequently the council will need to comply with s. 36 of the Charities Act 1993. Before charity trustees enter into an agreement for the sale or (as the case may be) for a lease or other disposition, of the land, they must obtain and consider a report on the proposed disposition from a surveyor who satisfies the requirements of s. 36(4) and who is instructed by them and acts exclusively for the charity. The report prepared for these purposes must contain such information, and deal with such matters, as may be prescribed by regulations (s. 36(4)).
19. Although not required by law to do so, NALC considers that local councils considering the grant of an easement should act *as if* s. 36 of the Charities Act 1993 applied in all circumstances. Councils who instruct surveyors who prepare reports in accordance with the Charities (Qualified Surveyors' Reports) Regulations 1992 (1992/2980) will almost certainly (i) comply with their duty to obtain the best price or (ii) have a reasonable valuation with which they can seek the consent of the Secretary of State to grant an easement at an undervalue.

**Other Legal Topic Notes (LTNs) relevant to this subject:**

<b>LTN</b>	<b>Title</b>	<b>Relevance</b>
18	Local Councils' Powers to Provide Parking Spaces	Sets out further information in respect of parking matters.
45	Disposal and Appropriation of Land by Local Councils and Parish Trustees	Describes councils' statutory obligations when disposing of property.
48	The Difference between Leases and Licences	Clarifies the nature of a licence.
57	Easements over Common Land and Village Greens	Explains the nature of easements specific and relevant to common land and village greens.
75	Lease Negotiations	Confirms that councils should be clear as to any easements (and other rights) they require before entering into a lease of land.
77	Public Rights of Way	Sets out the rights and responsibilities for a Footpath, Bridleway, Byway Open to All Traffic (BOAT), or Restricted Byway.

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