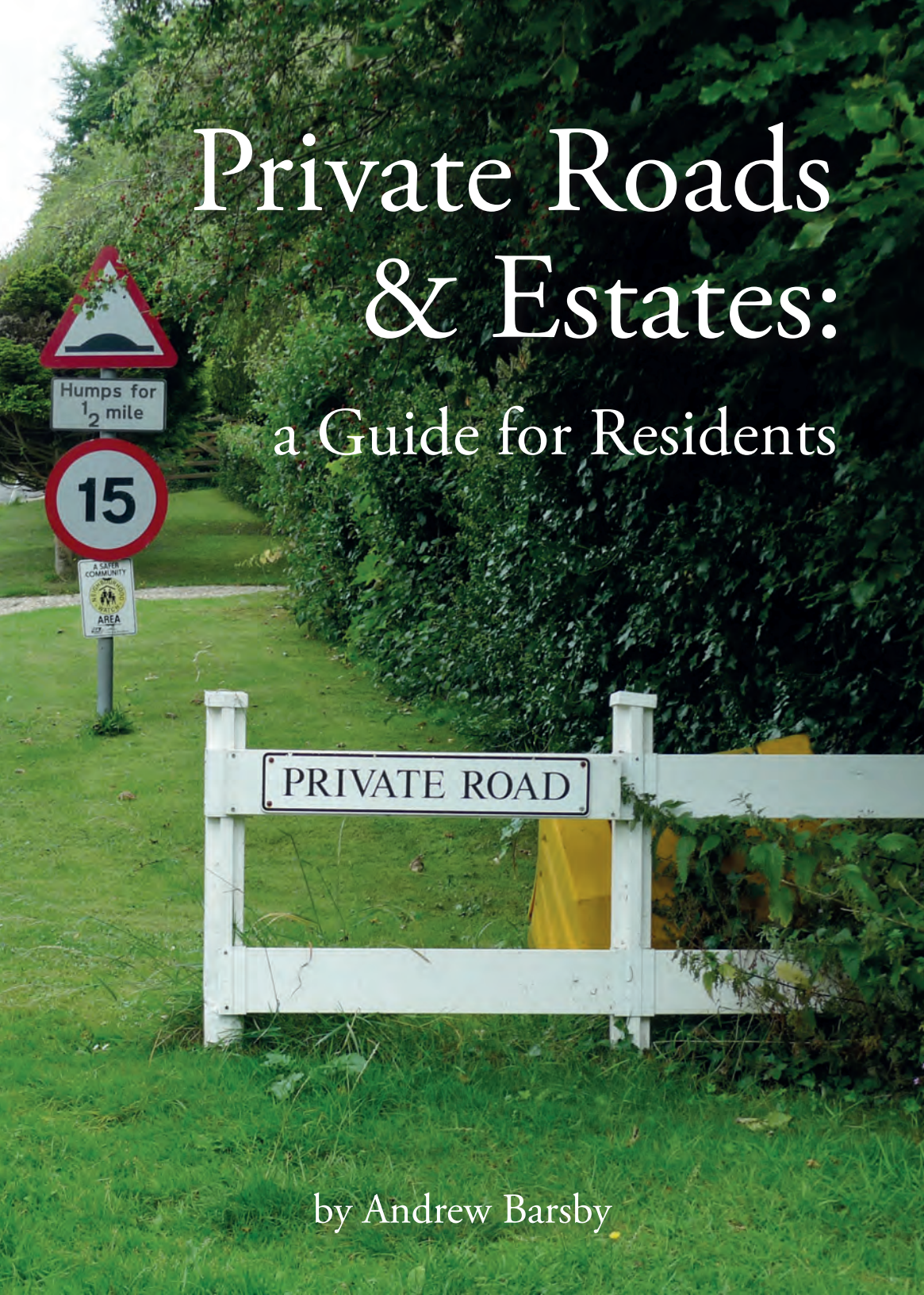
Private Roads & Estates:

a Guide for Residents



by Andrew Barsby

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Introduction

Private roads are different from the generality of public roads. On the whole, the private status of a road is an advantage for residents. But it's important for residents and would-be residents to appreciate the difference — and its consequences.

Responsibility for public roads lies with government (usually local government) but government has only a limited degree of responsibility for private roads. For most purposes, responsibility lies with residents.

Some form of collective management is therefore needed, which will usually involve a company or an unincorporated association. (See further, chapter 8. In this guide we use "residents' association" as a general term, to cover both.) The process of management should not be burdensome or expensive, provided residents understand what needs to be done and support their residents' association.

The purpose of this guide is to explain briefly how private roads are different, and what issues may need to be addressed by a residents' association.

Private roads can be found in the countryside and in town-centres, though most are in the suburbs. They may be recent or ancient, long or short, through-roads or culs-de-sac, with or without a hard surface. Some issues, such as the need to be properly organised, and to think about maintenance and risk, will be common to all. Others will be more specific. Depending on the circumstances, there may be problems with rights of way, or parking, or the ownership of the road, or pressure from developers.

It is right to say that this guide is only an outline, and is selective in its treatment: very little is said, for example, about the criminal law, or the process known as "making up and adoption". Nonetheless, we hope it will provide a useful introduction to the business of looking after a private road.

Our book, *Private Roads*: The Legal Framework (5th ed, 2013) provides a detailed account of the law and this is available to the public at large from the shop on our

website. Please see www.privateroads.co.uk. For those who wish to understand the issues in more detail, references to *Private Roads* are given in square brackets, thus: [1-23]. Detailed guidance for residents' associations, including our online guide, *Managing Private Roads and Estates*, is available on our website for a modest annual payment.

This guide applies to private roads and estates in England and Wales (Scotland has its own legal system). References to the law are to the law as it stands in the spring of 2015.

CHAPTER 1:

Background

Most roads are public. They are "adopted", meaning that they are a public responsibility. Some roads are private, in the sense that they are "unadopted", hence not a public responsibility [1-3 on].

There are thought to be about 40,000 private roads in England and Wales. This is an estimate, prepared by the House of Commons library some time ago, and seems to embrace every type of private road, including roads within hospitals, colleges and other institutions, private drives, slip-roads leading to filling stations, and so forth [1-13 on].

This guide is concerned with a smaller class, namely private roads which are wholly or mainly in residential use, providing access to a number of properties in separate ownership. There are no official figures for the number of roads of this sort, but it seems clear that the number is increasing, as new private roads continue to be created.

Most private roads are comparatively recent, having been laid out from the end of the nineteenth century onwards, though some are much older. They must in most cases be the result of private initiatives by a landowner or developer: if central or local government had been responsible, one would expect the road to have been adopted after building work was finished.

There are private roads and estates in all parts of England and Wales, but they are not evenly distributed. Many are to be found in the suburbs around major cities. Among the home counties, Surrey seems to have the most, with more than 2,000 private roads. Some counties, such as Cornwall, have relatively few. This uneven distribution may be the result of various factors, including:

- Demand: the expansion of cities naturally created a need for more housing in the suburbs

- Policy: different local authorities may have taken different views about whether private roads should be laid out
- Geography: land which is less suitable for agriculture may be easier to acquire cheaply for development.

In some cases, special factors may apply. In parts of Wales and the north east of England companies engaged in coal-mining created private roads to house miners. While the mining has ceased, the private roads remain. Some are in poor condition. In recent years a group based in Sunderland, known as TRAC ("The Road Adoption Campaign") was pressing for the wholesale adoption of private roads; but the organisation now seems to be in abeyance.

* * *

The Highways Act 1980 — a key piece of legislation — contains, in Part XI, detailed provisions dealing with the adoption of private roads [12-0 on]. In theory, many if not all of the existing private roads could be adopted under these provisions, and so cease to be private. In practice, adoption under Part XI by local authorities is now a rare event.

This is partly because the provisions are cumbersome and complex to the point of uncertainty. Operating them imposes a formidable administrative burden on the local authority. The process is likely to be unpopular with residents, most of whom (there are various exceptions and qualifications [12-36 on]) have to share the cost of bringing the road up to a standard laid down by the local authority before the road is adopted. If the work required involves such things as widening, pavements, lighting, re-surfacing, drainage, or attention to difficult corners and junctions [12-8 on] it may simply be beyond the ability of residents to finance.

In any event, the provisions of Part XI are out of date: they derive from nineteenth century legislation, passed at a time when the standards expected of roads were much more modest, and private roads were regarded more as a liability than an asset. Times have changed: standards of construction are much higher, and private roads are more asset than liability. Private roads suit developers and residents, and they suit local authorities in that the latter usually do not want to acquire any more roads to maintain.

For the foreseeable future, then, existing private roads are likely to remain private and more private roads will continue to be built.

* * *

Responsibility for private roads which are not adopted will almost inevitably come to rest with residents. Since no-one else will do so, they must look after the road and any land associated with it, such as parking spaces, amenity areas, and land within loops or circles of road and land at junctions, and they must think about maintaining the road, the risks associated with it, and the rights which may exist over it [0-3].

CHAPTER 2:

Status

At this point it will be useful to say more about the status of private roads, dealing in particular with:

- The way in which private roads differ from public ones
- The extent to which private roads are actually private
- Legal differences between private roads

As explained in chapter 1, most roads are public in the sense that they are a public responsibility. They are also "highways", meaning that they are subject to public rights of way [3-7]. The local authority is responsible for maintaining them. (Typically, responsibility is divided between the relevant county and district councils. This guide uses "local authority" as a general term [1-6].)

Local authorities are required by the Highways Act 1980 to keep a list of such roads (and other highways for which they are responsible, such as footpaths), these being known in the Act as "highways maintainable at the public expense". Private, or "unadopted", roads are outside this category and will therefore not appear on the list [1-27].

In relation to private roads, the term "road" is self-explanatory. There is no difference in law between roads and streets, though people sometimes, for the sake of convenience, attach different meanings to them — for example, "street" if there are houses, "road" if there are none. Similarly, "avenue", "crescent" and other such descriptions don't have any particular legal significance [1-16 on].

The meaning of "private" is more difficult. This is not a black-and-white issue: private roads are not the sole concern of the people who live in the road. In the first place, roads are land, and no land is an entirely private matter. Its use is controlled by the planning system, and by much other legislation. (Chapter 6 deals with regulation.) In almost all private roads the utility companies will be responsible for pipes, cables

and other equipment associated with power, water and other services, which will run under or over the road. These companies have the power to enter land, and to install and maintain their equipment.

Furthermore, a private road is a shared resource, being used by residents and their visitors, and in that sense is not entirely private [1-30 on].

Residents will need rights of way over a private road. These may be private rights of way, but they may also be public rights of way. A private road may, in other words, be a highway; but it is nonetheless private in the sense that it has not been adopted, and is not a public responsibility [1-10, 3-13 on].

Both public and private rights of way are legally complex subjects. Chapters 4 and 5 explain briefly:

- How public and private rights of way can be created over a private road
- What their scope may be — that is, who may use the road, and what amount of use is allowed.

The distinction between private roads which are subject to public rights of way, and those which are not, is important in itself; but it is also important because it gives rise to other legal consequences. For example, the local authority has power to make orders regulating traffic in highways maintainable at the public expense and in private roads which are highways [10-16 on].

A further distinction needs to be mentioned at this point. Some legislation applies to roads which are actually used by the public, such use being tolerated by whomever is responsible for the road. The local authority's power to make traffic regulation orders (to take that example) applies not just to private roads which are highways, but also to private roads where public use takes place in the way just described [1-26].

To summarise, private roads do not all have the same legal status. They may be:

- Highways
- Not highways, but subject to public use
- Neither highways nor subject to public use

The last sort is more private than the second, and the second more private than the first.

* * *

Just how private a private road is will thus vary from case to case, depending upon its physical nature, and also it status. This is really a question of degree [1-30 on]. Nonetheless, the fact that a road is private rather than adopted will mean that those responsible will usually be able to exercise a worthwhile amount of control over the road. This will include control over amenity and security, and in some cases the ability to control development by granting or refusing additional rights of way.

CHAPTER 3:

Ownership

In modern times, new residential roads are often laid out with the intention that they will be adopted. This takes place in accordance with the Highways Act 1980[1]. The road has to be constructed in accordance with the requirements of the local authority. It then has to be maintained in good order for a period — typically two years — after which it is adopted (i.e. becomes a highway maintainable at the public expense). The consequences are that:

- A public right of way arises
- Ownership passes to the local authority, and
- The local authority becomes responsible for maintaining the road [1-7].

In other cases, the intention is that the road will remain unadopted. Once the new houses have been sold off, the usual course is for the developer to form a company to own and maintain the road itself. Residents then become the members and directors of the company, and the developer's involvement ceases.

At earlier dates, the pattern of events was often different. Suppose that in the 1920s a small suburban road — call it Acacia Avenue — is laid out by Smith & Jones Ltd, a firm of builders. The assumption is that the road will be adopted by the local authority once the development is complete. But adoption never takes place. This is mainly due to inertia on the part of all concerned, and also to the feeling that the road itself (which has been given a basic gravel surface, nothing more being needed) is unimportant, and that little or nothing needs to be done to it or with it. By default, ownership remains with Smith & Jones Ltd.

The years go by. Smith & Jones Ltd ceases trading and is wound up. The residents of Acacia Avenue begin to see that the road is more asset than liability, and that it needs

1. Not Part XI, but section 38 [3-53 on].

to be properly managed. A hard surface needs to be laid down and kept in good order. Risk and safety need to be considered, and something needs to be done about the use of the road as a free car park by workers who commute from the nearby station. The Acacia Avenue Residents Association ("AARA") is formed, to deal with these matters. However, it does not own the road [2-4 on].

* * *

In many older roads the residents' association is in the same position as the AARA. The lack of ownership is not ideal. But once residents have assumed control the law helps them, because they can take action against trespassers: the law protects not just the owners of land but also those who are in control of it. So they can deal with the commuters' cars and other forms of encroachment [1-44 on].

Can ownership be obtained? For roads like Acacia Avenue, the title will not be registered on the Land Register, because registration is required only when a "trigger" event, such as a sale, occurs, and nothing of that sort has ever happened [2-21 on]. It may be that the assets of Smith & Jones Ltd were transferred to relatives or colleagues of the directors (who may or may not be aware that the own Acacia Avenue). Perhaps they can be traced, and persuaded to sell the road to the residents' association.

Or it may be that Acacia Avenue still belonged to the company when it was wound up, in which case it would have passed to the Crown — the Crown usually being for these purposes represented by the government's main body of lawyers, the Treasury Solicitor's Department [2-51 on].

However, the Treasury Solicitor will not be able to sell the road in this way unless it can be shown that the road definitely belonged to Smith & Jones Ltd when the company was wound up. (Otherwise, there might an owner somewhere whose rights would be prejudiced by a sale of the road and subsequent registration of the residents' association's title on the Land Register.) This may be difficult if there are no surviving records.

An alternative approach may be to rely on the presumption of ownership by frontagers [2-8 on]. The law applies presumptions in various situations, in order to reach a conclusion when there is no evidence on a particular point. (The presumption would not apply to Acacia Avenue if there was evidence that the road belonged to Smith & Jones Ltd.)

Where it does apply, the presumption is that each frontager owns half the width of the road [2-9]. The titles to individual houses in a private road are almost certain to

be registered, a "trigger" event having occurred at some time in the past. The Land Registry plan may show that half the width of the road is included, if the developer specifically included that part of the road in the sale of the house in question. But the fact that a section of road is not shown on the Land Registry plan does not mean that the presumption cannot apply: the Land Registry has a "general boundaries" rule, meaning that the boundaries they show are not absolutely precise, and this rule applies to sections of unadopted road adjoining registered land [2-11].

If ownership can be obtained by residents, it is certainly desirable. Uncertainty is thus removed, and residents are in a stronger position to resist encroachment.

* * *

Sometimes residents in a private road may come together to acquire nearby land, typically in the form of a field or woodland, in order to prevent unwanted development and so protect the amenity of their road. Land thus acquired will have to be registered, if it is not registered already [2-21 on]. The question of ownership by residents collectively is considered in chapter 8.

CHAPTER 4:

Public rights of way

The public have a right to use highways. They are entitled to "pass and repass", for whatever purpose they please; and this includes the right to stop temporarily, to load and unload passengers and goods (though not the right to treat the highway as a car park) [3-7 on].

In legal terminology, highways may be "footpaths", with a right of way for pedestrians; "bridleways" (pedestrians and equestrians); or "carriageways" (all classes of traffic, including vehicles) [3-3].

Central and local government have statutory powers which enable them to construct new roads which will be highways — the "highways maintainable at the public expense" mentioned in earlier chapters. But highways may also arise through a process known as "dedication and acceptance", a creation of the common law[1] [3-13 on]. If the owner of land "dedicates" land to public use as a highway, and if the public use the land for a sufficient period, thus accepting the dedication, then the land becomes a public right of way; but, as explained in chapter 2, that does not mean that it is then automatically adopted by the local authority.

In practice, landowners rarely take a deliberate decision to dedicate land as a highway. But the law regards public use as evidence of an intention to dedicate on the part of the owner, and a highway may thus eventually be created. This is an odd sort of backwards logic, but it is how many highways come into existence. The public use must be "as of right"; that is, as though the public had the right to pass and repass [3-19 on]. Use by permission of the landowner is not use "as of right". Generally, 20 years' use of this sort is required. And if the landowner makes clear that she does not intend to dedicate her land then no highway can be created [3-37 on].

1. That is, the law laid down by judges, over the years, in deciding particular cases.

There are statutory procedures by which highways can be diverted or ended (the process known legally as "stopping up"). Otherwise, the rule is "once a highway, always a highway": the owner of the land in question cannot by himself divert or end the public right of way [4-28 on].

The creation of highways by dedication and acceptance is a complicated area of the law: many pages would be required for a full explanation. It has another dimension in that legislation protects highways which are paths and tracks, and which might either be lost or obliterated, by causing local government to record them on the "definitive map and statement[1]" for their area [4-4 on].

Furthermore, the legislation does not merely deal with recording these vulnerable highways, but makes substantive changes as well. This is true of the Countryside and Rights of Way Act 2000 ("CROW") and the Natural Environment and Rural Communities Act 2006 ("NERC") [3-1, 4-2, 4-13 on].

Private roads may, as a result of public use, have footpaths or bridleways running along or across them; and these highways may or may not be recorded on the definitive map and statement (highways can always be added, as and when they are found to exist) [4-7].

Of particular significance in private roads is Part 6 of NERC. The main aim of Part 6 was to protect "green lanes" [4-13 on]. This is not a legal term, but is often used to signify grassy tracks, running across the countryside, technically carriageways and subject to a public right of way for vehicles, therefore popular with four-wheel drive enthusiasts and off-road motorcyclists. Part 6 sought to extinguish existing public rights of way in relation to motor vehicles, and to prevent new ones being created by use over time (dedication and acceptance) [4-15 on].

However, constructing a clear legal definition of "green lanes" proved difficult, and the result is that Part 6 applies with some exceptions to all private roads which are carriageways, i.e. subject to public vehicular rights of way. The exceptions include cases in which a public right of way for vehicles was established at some time before 2001 — perhaps long ago — and public use has continued for five years since then, being use mainly by people in motor vehicles [4-18].

1. The map shows the route; the statement adds additional details, such as the width of the highway. This is different from the local authority's list of highways maintainable at the public expense.

* * *

As explained above, a highway can arise through "dedication and acceptance"— in effect, public use over time. Many private roads are culs-de-sac, so unlikely to have attracted sufficient public use. Private through-roads may have been used by the public, at some time in the past if not currently; but an appropriate notice[1] can make clear that there is no intention to dedicate. It is likely that only a minority of private roads are carriageways [3-34].

In such cases, subject to the exceptions, Part 6 of NERC has extinguished public rights of way for motor vehicles[2]. This is helpful for residents. Less helpful is the fact that the public right of way for other vehicles, such as horses and carts, remains. Residents cannot, therefore, erect barriers or gates to keep out motor vehicles, since this would obstruct the public right of way for non-motorised vehicles, and obstructing a highway is an offence [4-25].

1. A notice which merely says "Private" is not necessarily sufficient for this purpose.
2. NERC preserves a right of way for residents who need access to their properties [4-19].

CHAPTER 5:

Private rights of way

Unless there is a full public right of way (i.e. one which includes motor vehicles) properties in a private road will need a private right of way [5-10].

Public rights of way (see chapter 4) can be enjoyed by all, but they do not belong to anyone in particular. In contrast, a private right of way is a piece of legal property and does belong to someone. It cannot exist on its own, but is regarded as being attached to one piece of land, giving the right to cross another piece of land to reach the first piece. In a private road, a private right of way over the road will be attached to a house in the road and the road will be subject to the right [5-1].

A right of way can be created by deed, executed by the owners of the two pieces of land in question. The right of way will be recorded on the Land Register entry for the house and — if the road is registered — the entry for the road. Rights of way are among the class of rights known as "easements", which provide, for the benefit of one piece of land, some limited use of another piece of land [5-0].

Typically, a private right of way will be granted by the developer in selling off the houses in the road he has laid out. The right of way will then be permanent: it will not cease if the house (or the road) changes hands. In this respect the right of way is different from mere permission, which is personal to the recipient [5-14, 5-11].

A right of way may be granted in unlimited terms, or it may be limited. Such limitations may relate either to the land subject to the right of way, for example by saying that it may not be used by vehicles weighing more than 10 tonnes, or to the land which has the benefit of the right of way. Examples of the latter sort of limitation might be that the land must not be used for more than one dwelling, or put to any commercial use [5-29 on].

It does not follow that every house in a private road will have a private right of way granted in the same terms: different purchasers, at different times, may have negotiated more or less restrictive rights.

Rights of way can be amended or cancelled by the current owners of the two pieces of land concerned; though if ownership of the road can no longer be traced (see chapter 4) this will not be possible [5-50].

Besides being granted by deed, a private right of way may be acquired by use over a period of time. This process is known to the law as "prescription", the principle being that after a certain length of time an unlawful use (a trespass) becomes lawful, a permanent right having arisen [5-16 on]. Here the law resembles the law of dedication and acceptance (see chapter 4). The concept of use "as of right" is common to both [5-18].

Confusingly, the law has created rules about prescription several times over; but for practical purposes it can be said that 20 years' use as of right is in general required [5-17].

The scope of a prescriptive right of way will depend upon the use which has taken place. But there is a certain elasticity in this principle: a right of way established by prescription, which gives access to land with one house on it, may still be sufficient if another house is built on the land [5-29 on]. (Contrast a right of way granted by deed which limited the use of the land to one dwelling: this right of way would not be sufficient if another house were built on the land.)

A prescriptive right of way may add to a right granted by deed. A given property might thus enjoy a right of way granted by deed which confines the use to residential use; but also a prescriptive right of way for commercial use. Like rights granted by deed, prescriptive rights should be shown on the Land Register, but are not necessarily invalid if they are not shown [5-55 on].

* * *

In public roads it can generally be assumed that access to houses and other properties is not a problem, given the public right of way. But in private roads, the existence of rights of way is a live and important issue. Even if a public right of way for vehicles has been created (see chapter 4) that right will in many cases have been cut back by "NERC" so that it no longer applies to motor vehicles and is therefore not sufficient for residents, who will almost invariably wish to have access for motor vehicles [4-25].

The issue of rights of way is particularly important in relation to new development in older private roads. Development can be controlled by granting rights of way in limited terms, and this is often done. A resident's association can grant further rights of way if it owns the road; otherwise it can only veto use which goes beyond existing rights of way, and is therefore a trespass.

Whether an existing right of way is sufficient to permit further development of a given plot of land may be unclear. Has a public right of way been created? If so, has it been cut back by NERC, or does an exception apply? Has a private right of way been created by prescription, and if so what is its scope? Ultimately, a decision by a court may be required in order to establish the position.

In relation to private rights of way, however, legal indemnity insurance[1] will usually be available, at relatively modest cost, provided there have been 20 years' unchallenged use.

1. Legal indemnity polices can also be used to deal with other issues such as possible failures to comply with the building regulations.

CHAPTER 6:

Regulation

Private roads are land, and are therefore subject to regulation; some general (such as the controls on planning, waste and littering) some more specific in that they relate to roads [9-14 on].

Planning law imposes the requirement for planning consent for "development", meaning building and other operations, and material changes of use; and these concepts are elaborated in many different ways [9-3 on]. The building of new houses in private roads will require planning consent. The fact that a road is private is relevant to the extent that the development impacts on public rights of way. But the absence of any necessary private right of way is irrelevant for the purposes of a planning application[1] [9-55 on]. The application can still be made and granted, even if it is known that the development cannot be carried out because it requires new rights of way which will not be obtainable.

Legislation, in the form of the General Permitted Development Order (which is frequently amended and updated) grants permission automatically for many forms of minor development, including work required for the maintenance and improvement of a private road [9-15 on]. However, other work, such as the installation of electronically-controlled gates, would usually require express planning consent.

It should be added that these automatic grants of planning consent may be disapplied in conservation areas [9-51 on]. Tree preservation orders can be made in relation to any trees or groups of trees, and in a conservation area notice must be given to the local authority before a tree is felled or lopped, so that they have the opportunity to make a tree preservation order if they wish [9-32 on].

1. As is the existence of a restrictive covenant which would be breached if the development took place.

* * *

The Highways Act 1980 gives powers to local authorities to take action in relation to roads. Most such powers are for highways maintainable at the public expense, so not for use in private roads. (These include the power to install roads humps, or "sleeping policemen": local authorities thus do not have the power to install road humps or other traffic-calming features in private roads.) [10-4]

For private roads, the powers vary according to the status of the road, as explained in chapter 2 [10-5 on].

In private roads which are highways, the local authority can, for example, carry out work to widen or drain the highway, install lighting, and remove obstructions.

In roads which are subject to public access (which include highways), they may deal with trees and shrubs which overhang a road and cause danger or an obstruction; they can also deal with trees and shrubs which are dead, diseased or damaged, and which might fall into the road; and they can deal with obstructions to the view at junctions with highways maintainable at the public expense [10-7 on].

In all private roads (including the above) the local authority has, for example, powers relating to the installation of refuse and storage bins; the removal of projections on buildings which obstruct the road; and doors which open outwards on to the road [10-8].

* * *

"Traffic regulation orders" are also important, since they may be made in relation to private roads which are highways or to which the public has access (but not other private roads - see chapter 2). These are wide powers: the local authority can for example:

- Impose speed limits
- Make the road "one-way"
- Restrict parking and waiting
- Restrict the classes of traffic entitled to use the road (for example, no heavy goods vehicles) [10-16 on].

Local authorities also have powers relating to amenity, high hedges (whether of *ley-landii* or not) and the licensing of entertainments [10-27 on].

CHAPTER 7:

Civil liability and risk

Civil liability — the liability to compensate those who are injured, or suffer loss — attaches to the owners of land, if they are at fault. It also attaches to those who are "occupiers" of land—that is, in control of it — even though they are not the owners of it. (In legal terms, this is known as "occupiers' liability[1]".) In many older roads, residents are in control but are not owners (see chapter 3) so the issue is one which affects all private roads [7-18 on].

Here "fault" means breach of a legal duty of care. Such breaches are not limited to acts or omissions which are reckless or foolish, or blameworthy in a moral sense.

The duty of care owed by occupiers of land to a person depends upon that person's status on the land in question. A limited duty of care applies to trespassers and people exercising a private right of way, the duty being merely to take reasonable care to protect people who come on to the land from injury as a result of serious dangers. An unfenced trench in an unlit road might constitute a danger of this sort [7-29 on].

A wider duty applies to people who are legitimate visitors on the land (those with express or implied permission to be there) and those on land in pursuance of a legal right (local government staff, for example, have rights of this sort, as do the staff of the utility companies). Here the person who owns or controls the land must take reasonable care to see that the person in question is reasonably safe, bearing in mind the purposes for which they are allowed to be on the land [7-20 on].

Many accidents are caused by falling branches and trees, and uneven surfaces on pavements and roads. A failure to deal with such things, if it represented a failure to take reasonable care, would be a breach of the wider duty.

1. Defined in the Occupiers' Liability Acts 1957 and 1984.

The duty of care owed to legitimate visitors is modified by the law in several ways [7-25]. In particular:

- An occupier must be prepared for children to be less careful than adults. If children are allowed to use a private road as a playground, the resident's association must take reasonable care to see that they are reasonably safe in playing, taking into account that the children may be less careful than adults. (In the circumstances, it will generally be unwise to allow a private road to be used as a playground.)

- An occupier is entitled to expect specialists, such as tree surgeons or contractors resurfacing a road, to understand the risks ordinarily involved in the work, and to take any necessary precautions. (If there are any hazards which would not normally be apparent to such workers, the residents' association should draw attention to them.)

The law of negligence also imposes a duty of care — a wide duty, owed to all those who are affected by what a person does. In some cases, the duty is the same as the duty of an occupier of land. But if a tree in a private road fell and caused injury and damage on neighbouring land, that would be a matter for the law of negligence rather than occupier's liability [7-34 on].

The law restricts the ability of a residents' association to exclude liability for accidents by means of a notice. Liability cannot be excluded if an accident results in injury or death; but it can be excluded in relation to property damage in so far as that is reasonable [7-38 on].

That said, a notice may be effective if it gives a warning which allows people to avoid a danger — for example a notice, in winter, which alerts motorists to the fact that a private road has been gritted by residents, but is still slippery.

* * *

Private roads are not particularly risky places. But they often lack the features of public roads, such as pavements and lighting. Accidents can and do happen.

The risk of being held liable for accidents is important for all residents' associations, both because this is a litigious age — people who have accidents expect to be compensated by someone — and because all claims for compensation need to be dealt with. Even if it appears that an accident was entirely the fault of the person concerned, a demand for compensation cannot simply be ignored, since in that event it may eventually lead to a judgment by a court.

The solution lies in part with public liability insurance, i.e. insurance which will cover claims for injury and damage relating to accidents (and usually a range of other claims). A claim can then simply be referred to the insurers, who will deal with it as they think best, offering compensation if appropriate, and meeting any legal or other costs such as medical reports.

It is important to remember, however, that every insurance contract involves an obligation on the part of the insured person to make an effort to minimise risk. If a large tree branch is obviously dangerous and liable to fall, action should be taken by the residents' association, perhaps by putting up a warning notice and calling in a tree surgeon.

CHAPTER 8:

Organisation

Residents in a private road need to be organised in order to look after the road effectively.

There are many forms of organisation, most of which exist for particular purposes. In the case of private roads, there are essentially two possibilities:

- An unincorporated association
- A company[1] [13-8 on].

Unincorporated associations are not subject to a specific regulatory framework, as companies are, so they do not have to comply with the same sort of requirements: they do not have to be registered, as companies do, nor do they have to comply with ongoing requirements in the same way [13-9 on].

A company is an artificial legal person, which can do things in its own name. An unincorporated association is not an artificial person in its own right, though in some circumstances it is treated as if it was a single entity[2] [13-22 on].

A company can be limited by shares, or limited by guarantee. In the first case, the members are shareholders, and pay an amount, usually nominal, for their share. In the second case members are guarantors, and guarantee that they will pay a given amount, again usually nominal, to satisfy the company's creditors if it is wound up.

If ownership of the road is involved, a company is the better choice, since a company can own property in its own right [13-35]. (Land owned by an unincorporated

1. If appropriate, a company can use the word "association" as part of its name.
2. For tax purposes, unincorporated associations are treated as though they were companies.

association has to be held on its behalf by trustees, who will be shown on the Land Register as the owners, and this is a cumbersome and unsatisfactory arrangement.)

The formal requirements with which a company has to comply include the submission of an annual return and accounts to Companies House, which is a burden; but the discipline of complying is helpful, since it means that the company is kept going in good order, and may enjoy more credibility with third parties. By contrast, the absence of such requirements means that an unincorporated association may be at risk of disintegrating and may enjoy less credibility.

If a company is the chosen form of organisation, limitation by guarantee is more appropriate than limitation by shares, given that the company will not be trading in order to make and distribute a profit [13-22].

It is possible for residents to have both a company, to own the road, and an unincorporated association to manage it. This arrangement can work well. The company can then be "dormant", meaning that it has no accounting transactions, and this minimises the administrative burden; meanwhile, the unincorporated association is the active body, which raises funds and carries out maintenance etc [13-43 on].

Whatever form of organisation is chosen, it is important that the rules are devised with care, so it is clear what the scope of its activities will be, and how decisions will be taken. It may be best for important decisions, such as decisions about rights of way or development, or about starting legal proceedings, to be taken by the whole membership, at a general meeting.

The tasks which the residents' organisation undertakes fall under several different headings:

- *Maintenance* Minor repairs may be needed to the road surface, and in the longer term funds will need to be accumulated for re-surfacing; trees, shrubs and grass will need attention; surface water drains should be checked.

- *Encroachment* Non-residents may, for example, seek to use the road for parking, or (if the road is a through-road rather than a cul-de-sac) as a cut-through. An eye needs to be kept on such abuses, since the law is creative, and use over a period of time may give rise to legal rights (see chapters 4 and 5).

- *Risk and safety* In today's "compensation culture", anyone who suffers injury or damage in a private road is likely to demand compensation (see chapter 7). A residents' association needs to think about possible causes of accidents and take preventive action. Public liability insurance is not a legal requirement, but it is certainly wise.

In all these areas, prevention is much simpler and less expensive than cure. Indeed, if public or private rights of way are allowed to arise, through inaction on the part of the residents' association, it will not be possible for the association to remove them.

A certain amount of administrative work will also be required. The requirements of the Data Protection Act 1998 must be understood and obeyed; and regulation now extends to cctv, which is increasingly used for security purposes. And a notice should be put up at the entrance to the road to make clear that it is private, and to indicate how the public's rights are restricted, with appropriate wording such as "no public access", or "no public motor vehicles".

* * *

What emerges from the preceding pages is not merely that residents in a private road need to form an association of some kind, but that the association needs to be actively addressing the issues outlined above, rather than waiting to react when problems occur.

Residents' associations are voluntary bodies. It is common to find that although most residents understand the need for such a body, and are prepared to support it by paying an annual subscription and participating in the association, one or two won't do so. This is unfortunate, but it should not prevent the majority from proceeding. If a residents' association is properly set up and run, the cost will be modest, and will be amply repaid by the benefits it confers on residents.

1. Directors' and Officers' insurance (sometimes known as "D & O" or Trustees' Indemnity cover) provides protection for the managers of a residents' association against personal claims, and thus encourages residents to volunteer as committee members and company directors.

NOTES

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