Topics to be covered

- Introduction to Highways
- Rights of way/footpaths
- Traffic Regulation Orders
- Advance Payments Code
- Highways agreements
- Prosecutions and advocacy
- Illegal scaffold/strips
Highways Law - Background

• Statute
  – Highways Act 1980 ("HA 1980") – starting point
  – New Roads and Street Works Act 1991
  – Countryside and Rights of Way Act 2000 ("CROWA 2000")
  – Traffic Management Act 2004
  – Growth and Infrastructure Act 2013
  – Infrastructure Act 2015

• Common law
  – Principles developed over centuries
What is a ‘highway’?

- No definition in statute or common law
- s328 HA 1980 assists with interpretation
- Characteristics
  - open to the public at large;
  - public have a right to use the way;
  - used by public for passage; and
  - follows a defined route
Open to the public at large

- **Austins Case (1671) 1 Vent. 183**
  - right of usage ‘common to all the King’s people’
- If not open to the public then a private right of way
- Private right of way can become a public highway
- **Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1976**
Public right to use the way

• Creation by dedication
  – Express – eg under highways agreement
  – Implied – 20 years use
• Must be permanent surrender by landowner of land that the highway lies upon
• Once created, public rights cannot be lost other than by operation of law

“Once a highway, always a highway”

*R. (Smith) v Land Registry (Peterborough) [2011]*
QB 413
Public right of passage

_DPP v Jones_ [1999] 2 WLR 625 – Lord Irvine para 257

“…the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and re-pass…”

See also – _City of London Corporation v Samede_ [2012] EWCA Civ 160
Along a defined route

- Public right of passage to follow a known, defined line
  - CROWA 2000 – ‘right to roam’
- Distinguish from public open space, commons and village greens
  - Different nature of user
  - Defined section of public
  - For purposes other than passage
Who is responsible?

• Highways Authorities
  – The Minister (trunk roads and motorways)
  – Local Highway Authorities
    • County Council;
    • Unitary Authorities;
    • Metropolitan District Councils
Who is responsible? (2)

- Maintenance – adopted?
- Local authorities to maintain register of dedicated highway land – Definitive Map
- Ownership
  - Estate roads/CPO/highway surface
  - Subsoil
  - ‘ad medium filum’
Creation of highways

Requires:
1. Dedication by a landowner; and
2. Acceptance by the public

- Express dedication v Presumed dedication
- Creation by statute
Express dedication

Express dedication

– no prescribed formalities
– landowner written statement and plan confirming intention and route of right of passage sufficient
– taken as accepted by public when used by public
Presumed dedication

Presumed dedication either at common law or by statute

- Common law
  - used by public as of right and without interruption
  - time period for continuous use not prescribed

Presumption can be rebutted by landowner if it

- can prove stopped people using highway
- restricted use of the highway to section of public
- lacked capacity to dedicate the land
Presumed dedication (2)

- Under section 31 of the HA 1980 highway presumed dedicated if
  - highway enjoyed by public as of right, without interruption, for 20 years

AND

- highway is not of such a character that public use cannot give rise to a common law presumption of dedication
Presumed dedication (3)

Public right of way for “mechanically propelled vehicles” cannot be created by presumed dedication – s66 of the Natural Environment and Rural Communities Act 2006
Creation by Statute

Part III HA 1980

- Highway Authority power to construct (s24)
- Public path creation agreement (s25)
- Public path creation order (s26)
- Parish Council’s voluntary agreement (s30)
- Landowner’s voluntary dedication by notice (s37)
- Agreement between Highway Authority and landowner (s38) – most common
Extinguishment of Highway

2 main methods:

   - If necessary to enable development to be carried out either in accordance with planning permission or by government department
   - Made by Secretary of State
   - Since coming into force of Growth and Infrastructure Act 2013, can be made in advance of grant of planning permission
   - Cannot be made retrospectively
Extinguishment of Highway (2)

2. Order from Magistrates’ Court under s116 HA 1980
   • Need to show highway “unnecessary”
     – Question of fact
   • Current public use and existence of alternative route material considerations
   • Can be made retrospectively
Rights of Way

Similar legal principles of creation and maintenance

Definitive Map
• Requirement of WCA 1981 and CROWA 2000
• Recording location and status of different types of highway

CROWA 2000
• Created general right of access to some areas of open countryside
  – Mountain, moor, heath and down
Rights of Way (2)

s13 Growth and Infrastructure Act 2013

- Landowner may deposit map of their land with appropriate council together with a statement indicating what ways over that land are dedicated as highways
- Prescribed form
- Landowner statement to be repeated at 20 year intervals – no additional rights of way dedicated or, if there are new rights of way, statement should identify them
Rights of Way (3)

• Sufficient to negative the presumption of dedication of any ways not included within the statement and map
  – Burden of proof on individual claiming a way to demonstrate landowner’s intention to dedicate that was as highway
• Local authorities placed under a duty to keep a register of maps, statements and declarations (s31(6) HA 1980)
• Local authority also under a duty to publicise deposit of map and statements (Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013)
• Relationship with landowner statement pursuant to s15A Commons Act 2006 protecting land from registration as a town or village green
Footpaths

- Highway which carries only a public right of way on foot
- Subject to similar rules re creation, maintenance etc as other highways
- Stopping Up Order under s257 TCPA 1990 – mirrors power in s247 TCPA 1990
- Order normally made by local planning authority
- Power also exists under s 118 for council to make an order that a footpath be stopped up on basis that it is not needed for public use
  - “public path extinguishment order”
Footpaths (2)

s119 HA 1980 contains a power allowing a council to make a diversion order for a footpath for either or both

• Securing the more efficient use of land; or/and
• Providing a shorter or more commodious path or way
  – “public path diversion order”

Recent legislative changes
  – s12(2) Growth and Infrastructure Act 2013 - s257 Order can be sought in advance of grant of planning permission
Ali v Secretary of State for Environment, Food and Rural Affairs and others [2015] EWHC 893

- Application to quash an order under section 53 (2) WCA 1981 modifying Definitive Map
- High Court held locking alleyway door over Christmas period insufficient to inform public of landowner’s lack of intention to dedicate alleyway as highway
- Intention not to dedicate land must be communicated to public through overt acts
- Acts required to rebut statutory presumption of dedication differ on case by case basis
Traffic regulation orders
Introduction

• Traffic Regulation Orders (TROs) are created by councils and traffic authorities to:
  – apply traffic management controls to roads and car parks
  – specify parking restrictions
  – create bus lanes
• Restrictions can be temporary, experimental or permanent
• Examples include restriction of HGV movements and parking restrictions on single streets.
Purpose

- Road Traffic Regulation Act 1984 (the 1984 Act)
- S.1(1) - permanent orders for the following purposes:
  - Avoiding danger to persons or traffic using the road
  - Preventing damage to the road or any nearby building
  - Facilitating passage of any traffic incl. pedestrians
  - Preventing use of unsuitable vehicles on the road
  - Preserving road character where used on foot or by horse
  - Preserving or improving local amenities
  - Purposes specified in Environment Act 1995 re air quality.
Purpose

- S.9 – experimental orders can be made for purpose of carrying out an experimental scheme of traffic control
- Maximum duration of 18 months
- May empower a specified person to modify or suspend the order if considered essential for:
  - expeditious, convenient and safe movement of traffic
  - providing suitable and adequate on-street parking
  - preserving or improving amenities in affected area
Must consult chief police officer and give public notice.
Experimental TROs

*Trail Riders Fellowship v Peak District NPA [2012] EWHC 3359*

An experimental TRO made by a national park authority (NPA) prohibited the use by ‘mechanically propelled vehicles’ of a byway for 18 months.

*Held: the experiment as described in the NPA’s statement had no rational basis and the TRO was therefore quashed.*
Purpose

• S.14(1) – temporary orders for the following purposes:
  – Works to be executed on or near the road
  – Likelihood of danger to the public or serious damage to the road, not attributable to works
  – Litter clearing and cleaning under EPA 1990
• Maximum duration of 18 months except where works cannot be executed within that time.
Duty when exercising functions

• S.122 of 1984 Act imposes a duty on strategic highways companies and LAs to exercise their functions to secure:
  – expeditious, convenient and safe movement of traffic
  – provision of suitable/adequate parking facilities
• whilst having regard to:
  – securing/maintaining reasonable access to premises
  – preserving/improving amenities of affected areas
  – securing passage of public service vehicles
  – any other matter which appears to be relevant.
Challenge to duty

Trail Riders Fellowship v Devon CC [2013] EWHC 2104 (Admin)

- Claim that the LA had failed to discharge its duties under s.122 for expeditious, convenient and safe movement of traffic
- Court held the duty was not absolute
- In this case it was subject to the safe movement of traffic, which was the LA’s primary concern.
‘Expeditious movement’

- DfT guidance on Traffic Management Act 2004:
  - overall aim of “expeditious movement of traffic” is an efficient road network without unnecessary delay
  - however, this duty does not take precedence over other things the authority has to consider
  - e.g. securing expeditious movement of vehicles should not be at the expense of authority’s road safety objectives.
Procedure – permanent orders

- Procedure set out in Local Authorities’ Traffic Orders (Procedure) (England and Wales) Regs 1996
- LA to consult with the bodies specified in Reg 6, depending on the order
- Such bodies include other authorities, tram service operators, NHS trusts and fire and rescue authorities
- LA must also publish a notice in a local newspaper and provide ‘adequate publicity’ to those who may be affected – Reg 7
- Notice must specify deadline for objections.
Procedure – permanent orders

- Anyone may make written objections before the deadline or within 21 days of the notice being given/adequate publicity.
- Public inquiries to be held where order affects loading/unloading at certain times or bus services.
  
  *Williams v Devon CC [2015] EWHC 568 (Admin)*

- Public inquiries must start within 42 days of LA giving notice.
- Orders must be made within 2 years of initial notice.
- Within 14 days of making the order, LA must give adequate publicity and write to objectors with reasons for decision to proceed.
Procedure – permanent orders

**Williams v Devon CC [2015] EWHC 568 (Admin)**

- LA made an experimental traffic order banning long vehicles from main shopping street. ETO then made permanent.
- W claimed TRO breached Road Traffic Regulation Act 1984 as LA did not hold public enquiry or seek consent of SoS.
- Court held public enquiry should have been held as TRO affected bus services; order was quashed.
Procedure – experimental orders

• Reg 22 – provisions for publication and objections do not apply to experimental orders
• Schedule 2 specifies documents that must be deposited and made available for viewing at LA offices
• Experimental orders shall not come into force less than 7 days from the date the order is published
• Can be used as a precursor to a permanent order.
Procedure – experimental orders

- Reg 23 – a permanent order can be made to give indefinite effect to an experimental order
- Requirements for consultation (Reg 6), notice (Reg 7) and objections (Reg 8) do not apply, as long as:
  - The notice of making of the order contained the statements specified in Sch 5
  - Deposited documents were made available for inspection, including LA’s reasons for making the experimental order
  - No variation/modification more than 12 months after the order was made.
Procedure – temporary orders

- Procedure set out in Road Traffic (Temporary Restrictions) Procedure Regulations 1992
- LA to give min. 7 days notice of intention to make an order by publishing in local newspaper and in vicinity of affected area and by informing police
- Within 14 days of making the order, the LA must publish a notice in local newspaper and vicinity of affected area that the order has been made.
TRO uses

• S.2 of the 1984 Act sets out uses for TROs, including:
  – Prohibiting, restricting or regulating use of road by vehicles and/or pedestrians
  – Provisions relating to:
    • requiring traffic to move in a specified direction
    • prohibiting/restricting waiting, loading and unloading
    • prohibiting use of roads by through traffic
    • prohibiting or restricting overtaking
  – Prohibiting or restricting use of or specifying through routes for heavy commercial vehicles.
TRO uses

• Note that TROs can only be used for specific roads and not to impose general parking prohibitions.
• Special parking bays for disabled persons may be made under a TRO – enforceable by law.
• TROs are relatively complicated and costly – LAs will sometimes mark out spaces without an order, so no legal sanctions would be available.
Challenging TROs

• Any person may challenge the validity of or any provision contained in a TRO, on the following grounds:
  – that it is not within relevant powers
  – that any of the relevant requirements have not been complied with
• An application to the High Court must be made within 6 weeks of the order being made
• The court may suspend or quash the order.
TRO challenges

Hamnett v Essex County Council [2014] EWHC 246 (Admin)

- Discrimination claim due to removal of blue badge parking spaces from town centre
- Claimed authority had breached public sector equality duty and that decision to make E-TRO was irrational
- Held: decision was not irrational – equality impact assessments, review by consultants, consultation with affected groups.
TRO challenges

*Trail Riders Fellowship v Powys CC [2013] EWHC 3144 (Admin)*

- Court quashed TROs made in respect of two byways
- LA committee “could have been influenced” by possibility that TROs would benefit LA’s position in pending Crown Court appeal
Advance Payments Code ("APC")

APC defined in section 329 HA 1980
- Rules set out in ss219-225 HA 1980
- Require landowner/developer make payment/provide security to the Highway Authority for the making up of the new roads onto which a new development fronts
- Alternative to s38 agreement

Applies in:
- Outer London Boroughs
- Counties in which APC was in force pre 1974 – most areas
- Parish/Community where APC adopted by County Council resolution
APC (2)

• Security intended to give Highway Authority comfort they can complete new road to satisfactory standard if Developer fails to do so
• Also protect any purchaser of a building in a new development from the cost of constructing the road fronting that building to adoption standard
• s219 HA 1980 – Highways Authority assesses cost of road works fronting new buildings on private roads
APC (3)

In order to trigger payment a Highways Authority must
• Serve notice within 6 weeks of building regulations approval of a building
• Notice must be served on person who deposited building regulations plans
• Sum required is amount Highway Authority consider recoverable under Private Street Works Code to bring road up to adoptable standard
APC (4)

APC Notice will set out costs of works for whole street
• ‘street’ does not include part of a street unless street works authority happy to treat as such

APC Notice can be challenged by way of appeal
• Appeal to be made within one month of service of Notice
• Highway Authority estimate must be significantly flawed if appeal to be successful
• Existence of s38 agreement negates need for service of APC Notice (s205 HA 1980)
  – Highway Authority can refund whole/part of sum paid in advance of completion of s38 agreement (s221(3) HA 1980)

Criminal offence to begin construction prior to making payment due under APC Notice
  – landowner and builder liable (s219(2) HA 1980)
Section 38 agreement

Mechanics of s38 agreement

• Landowner/developer agrees to construct a road to a particular standard and, once constructed, to dedicate the road as highway

• Highway Authority agrees to adopt the road as highway maintainable at public expense provided the highway is constructed to the required standard

• s38 agreement can also deal with adoption of existing highway

• Often combined with a section 278 agreement re works to existing highway
Drafting considerations

• Agreement usually required to discharge planning condition

• Provide step-in rights so that Highway Authority can carry out the work and recover costs if landowner/developer defaults

• Require a bond given by a bank/insurance company that Highway Authority can rely upon to recover costs incurred in event of landowner/developer default
Section 38 agreement (3)

- Confirm landowner has the necessary capacity to dedicate land as highway – evidence of title
- Length of maintenance period and party responsible for upkeep during maintenance period
- Extensions of time for completion of highways works
- Indemnity from developer/landowner to Council
- Easements required for drainage access
- Clarity as to timing of adoption
- Road Safety Audits – four stages
Section 38 agreement (4)

- Private Street Works Code
- Local Land Charge
- Commuted sum – *R (oao Redrow Homes Limited) v Knowsley MBC [2014] EWCA Civ 1433*
  - Highway Authority in principle able to recover future maintenance costs from developers
Section 38 agreement - Process

Developer undertakes Part 1 Works (base course, drainage etc)
- Highways Authority inspects and issues Part 1 Certificate if satisfied
- Developer completes Part 2 Works
- Highways Authority inspects and issues Part 2 Certificate
- Maintenance period (usually 12 months) running from date of Part 2 Certificate expires
- Highways Authority inspects again and if satisfied adopts the highway

If new highways being constructed, not unusual for Part 1 Works to be built out before s38 agreement negotiated
Section 37 HA 1980

- Developer/landowner construct roads at own risk
- Serve notice on Highway Authority requiring adoption
  - developer/landowner must prove to Highway Authority (or Magistrates Court on appeal) highway is of “sufficient utility to the public”

*Redrow* case – potential increase in s 37 applications/challenges
Section 278 Agreement

No-one entitled to carry out works in or on a highway, except:

• Highway Authority responsible for the road; or
• Statutory Undertaker

Section 278 HA 1980

• Relevant where providing for works of improvement and/or alteration to the existing highway
Section 278 Agreement (2)

- Length of maintenance period (12 months from issue of certificate of practical completion?)
  - Relationship with construction contract
- Specification of works
  - DfT Specification of Highway Works; and
  - Local standards/specifications
- Pre commencement conditions
  - Submission and agreement of information/specification
- Local Land Charge
Section 278 Agreement (3)

- Restrict occupation
  - Relationship with planning permission ie Development cannot be occupied until...
- Indemnity from developer/landowner to Council
- Timing of adoption
  - Final Certificate – consideration as to liability as Highways Authority will become responsible for ensuring highways works safe and fit for traffic
- Extensions of time
- Compensation for land damaged during execution of highway works
  - Depreciation in value of neighbouring land
- Developer’s Public Liability Insurance
Prosecutions and advocacy
HA powers of prosecution

Highway authority can prosecute for:

- Obstruction or damage to surface of highway (s131/131A)
- Wilful obstruction of highway (s137 HA 1980)
- Failure to comply with notice to remove tree/shrub planted in carriageway (s141)
- Use of verge in contravention of conditions imposed (s184)
- Failure to provide information as to ownership of land (s297)
- Unlawful display of advertisements on highway
Excavation of highway without permission (s131)

**Greenwich LBC v Millcroft Construction [1986] 150 JP 645**

- M’s premises were linked to a road by three crossings. *Without permission M began excavating the highway to repair one of the crossings*
- M claimed it did not know HA permission was required
- **On appeal, the court held that ignorance of the law was not ‘lawful excuse’ within s131(1) HA 1980.**
Case law - prosecutions

Wilful obstruction of highway (s137)

*Kaba v DPP [2014] QBD (Admin)*

- K was at traffic lights in the lane turning left when he realised he wanted to turn right. He stopped, indicated and waited to move into the right hand lane.
- A police officer told him to move as he was causing an obstruction. K refused. The exchange lasted 30-60 secs.
- Court found him guilty of wilfully obstructing a highway.
Use of verge/footway (s184)

* R v Kensington & Chelsea RLBC ex p Eminian *

- Council refused E’s application to construct vehicle crossing over footpath outside his house, due to adverse effect on the controlled parking zone (CPZ) in that area
- E applied for judicial review, claiming council should limit consideration to matters in s.185(5), not CPZ
- Court held LA was entitled to consider CPZ, not just factors in s185(5).
Failure to provide information as to land ownership

*Rushmoor BC v Reynolds [1991] 23 HLR 495*

- A notice from the council was pushed through the letterbox of a house in multiple occupation. R, the intended recipient, did not receive the notice.
- R had previously had difficulty with delivery of mail and couldn’t read or write.
- Court held there was an irrebuttable presumption that the notice had been effected and R could not deny he had received it.
Case law - prosecutions

Illegally advertising on highway – Town and Country Planning (Control of Advertisements) (England) Regs 2007
Unreported case, Nuneaton and Bedworth BC:

• A venue operator was prosecuted for affixing placards to highway structures such as lampposts and railings, advertising his music events

• Despite warning, the fly-posting continued and the council pursued enforcement action in magistrates court.
Defence of prosecutions

_Balfour Beatty Infrastructure Services Ltd & Enterprise (AOL) Ltd v HSE [2014] EWCA Crim 2684_

- Road managing agent and subcontractor failed to undertake sufficient risk assessment when designing traffic management system
- Judge found system posed “material” risk to users and that serious injury was foreseeable
- Both parties incurred a fine of £225,000.
Defence of prosecutions

McCable v Cheshire West and Chester Council [2014] WL 3387826

- LA failed to maintain streetlamp on flight of steps on public footpath.
- Court held LA owed no duty of care to a member of the public who fell down the steps.
- Liability established only if LA did some positive act which created a danger – failure to maintain the lamp was not a positive act.
Defence of prosecutions

Crown Censure for Highways Agency, January 2015

- Equivalent of criminal prosecution for safety failings
- Traffic Officer killed by out of control car on M25
- HSE found failures in HA’s quarterly supervision checks necessary to ensure health and safety of its employees
- Crown Censure is maximum sanction for government body – official record of failing to meet standards in law.
Illegal scaffold / strips
Illegal scaffold

- Highways Act 1980 s169
- Scaffold which obstructs the highway is illegal if erected without a licence from highway authority
- Authority is under duty to issue licence unless:
  - the structure may cause unreasonable obstruction of highway, or
  - an alternative design of structure could be used which would cause less obstruction
Scaffold licence

• Applicant can appeal to magistrates’ court if licence not granted.
• Person issued with licence must:
  – ensure structure is adequately lit
  – comply with HA’s directions re traffic signs
  – comply with statutory undertaker requests to protect or give access to their apparatus
• Failure to comply with these provisions, or with terms of licence, is an offence
• A licence complied with is a defence to a charge of obstructing the highway.
Scaffold licence

- LA may set an initial period and fee for the scaffold licence
- After this licence renewals may attract further charges
- Licence fee should be a reasonable amount for the period of the licence
Scaffold licence

- Survey undertaken in 2010 by the National Access & Scaffolding Confederation (NASC) of LA licence criteria
- Considerable variation in LA requirements – from evidence of adequate insurance to evidence of competence
- NASC in consultation with HSE developed detailed criteria for LAs to demand consistent standard for scaffolding companies
Examples

- Brighton scaffolding firm fined in April 2015 for dangerous scaffold
- Company failed to respond to requests to make safe
- Fine of £400 plus £800 costs

- Cambridge scaffolding firm fined £5000 in December 2014 plus £1000 costs for scaffolding without a licence
Hoardings – s172 Highways Act 1980

- Where a building is taken down or altered externally, a close boarded hoarding or fence must be erected first.
- LA can consent to not using a hoarding or fence.
- LA may require covered platform and handrail as pedestrian footway outside hoarding.
- Hoarding must be maintained and LA can require lighting at night.
- Hoardings must be securely fixed.
- Failure to comply with these provisions is an offence.
Questions?
Check out the website …