

Mind the Gap

Early Autumn 2016

The pitfalls of having a Gap between the adopted highway and development site

It is becoming increasingly common on development sites to find that there is a gap between the extent of the adopted highway (as shown on the highways authorities' records) and the land being purchased by the developer (as shown on the deed plans) (the Gap).

It is an essential part of the due diligence process that you ascertain the reason for the Gap. It may be as simple as a small mapping error that can be rectified, or it could be indicative of a much larger issue with the property you intend to purchase (the Site) - that the Gap is in third party ownership.

The outcome will have an impact on the viability of your Site and we have set out below a few key considerations in relation to any Gap:

Mapping inconsistencies

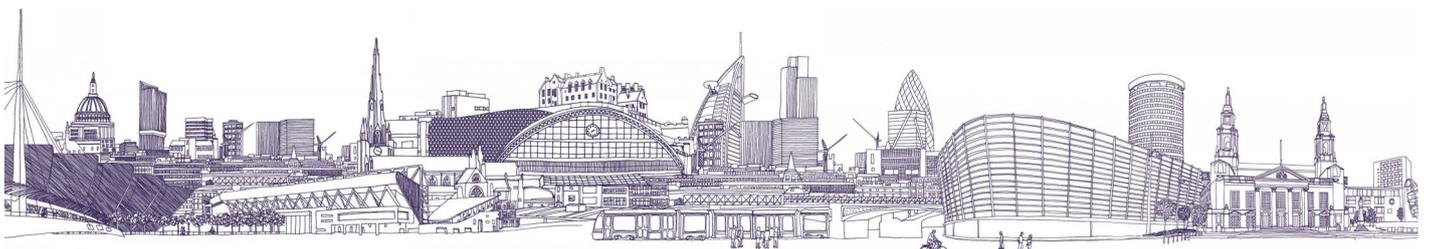
- i It is possible that the Gap is a result of mapping inconsistencies because the Land Registry applies the 'general boundaries rule' to the title plan of the Site.
- i The general boundaries rule is the principle that the Land Registry only shows the 'general' extent of the boundary on the title, rather than the exact legal boundary. Common law presumptions of boundary position such as the 'hedge and ditch' rule and the *ad medium filum* presumption (whereby it is presumed that an owner abutting the road owns to the mid-point of the road) give rise to situations where there may be a Gap, and the Land Registry has applied the general boundaries rule without reference to physical features on the ground, or to title plans.
- i If an application to amend the red line on a title plan is made under the *ad medium filum* presumption, the

Land Registry is still unlikely to amend the red line on the title plan as it relies upon the general boundaries rule, which is enshrined in the Land Registration Act 2002.

- i However, having an unregistered Gap can cause difficulties with road adoption, in spite of the *ad medium filum* presumption. In addition, it is possible for service providers and statutory undertakers to raise queries with the title on this basis as well.
- i If there are mapping inconsistencies as a result of the application of the general boundaries rule by the Land Registry, it may be possible to use a procedure known as an 'application for a determined boundary'. This is intended to provide a definite title boundary based on an analysis of previous title records, historic evidence and OS mapping to determine the exact title boundary.

Third party ownership

- i If the Gap is in third party ownership, then unless equitable rights already benefit the Site (which is very unlikely), there is a ransom situation in favour of the third party owner. The Site is land-locked with no means of access to the adopted highway.
- i This becomes more complicated if title to the Gap is not registered at the Land Registry, as it may be difficult to ascertain the owner of the Gap.
- i The Gap could also pose additional issues when selling plots e.g.:
 1. reservations may be lost as a result of the lack of rights over the Gap as plot purchasers do not feel comfortable with the access issue;
 2. you would need to consider your obligations from a consumer rights perspective in disclosing such information;
 3. there may be a (sometimes significant) delay in installing services on the Site. Whilst rights can be



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granted up to the boundary of the Site, service providers will be expecting you to show title up to the boundary of the adopted highway. In the event that this is not possible due to a Gap, different service providers have different approaches as to what they will accept in relation to the Gap. Furthermore, service providers may have to comply with statutory notice periods over the Gap before they can commence works.

Possible solutions?

It may be that a letter to the Highway Authority pointing out mapping inconsistencies between their plan and up to date OS material results in them amending their plans or updating them.

Additionally, a carefully crafted letter to the Highway Authority pointing out the legal reasons why their own interpretation of the extent of the highways is not correct could result in them correcting their records and plans.

You may want to consider making contact with the Highways Authority (or other statutory undertaker/utilities providers) as part of the due diligence process to ascertain their requirements, and particularly their attitude to the Gap in respect of entering into adoption agreements. However, you must bear in mind that this could cause issues in obtaining indemnity insurance.

Failing that, another option is to obtain title to the Gap (e.g. by a possessory title application by the Seller or by

purchasing the Gap from the third party owner), or obtain an access and services indemnity policy.

It may also be possible to rely on statutory procedures e.g. S228 Highways Act 1980, where a developer would carry out street works to an adoptable standard and then, using the statutory procedure, require the relevant Highways Authority to adopt the roads.

Alternatively, negotiations with the council may result in the council using a compulsory purchaser order to acquire the necessary land for access, although you can expect to pay their costs and to have to give a full indemnity, even if the council can be persuaded to do this.

In short, it is, always wise to 'mind the Gap'!

If you would like to discuss any of the issues raised in this update, please contact:



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