Case Name: *Swindon Borough Council v Secretary of State for Housing Communities and Local Government & Anor* [2019] EWHC 1677 (Admin) (01 July 2019)

Full case: Click Here

Commentary: A Certificate of Lawfulness (CLOPUD) had been granted in respect of a large employment development which certified the lawfulness of the formation and use of private access roads as private access roads. The CLOPUD was granted on appeal and the local planning authority applied for a statutory review on the basis that the outline planning permission required that the public had rights of way over the access roads. The CLOPUD was overturned.

The case turned on the construction of the planning permission and in particular Condition 39 which read:
"The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.
Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

The Inspector had granted the CLOPUD on the basis that the condition referred to the manner of construction of the access roads and did not require the access roads to be made available for the use of the general public. This was supported by the distinct use of the term "public highway" in the reasons. The Council argued that the Inspector erred in not giving "highway" its normal meaning of a road over which there is a public right of way.

The High Court reviewed the case law on the lawfulness of planning conditions imposing obligations on the landowner (including Hall v Shoreham) and the authorities on the meaning of the word "highway". There was no authority where the word "highway" had been interpreted as meaning a private road. Therefore, the Inspector's interpretation meant that the word "highway" was not given its usual meaning. The High Court held that the meaning of the condition was clear and the word "highway" was being used in its ordinary sense, and not as a synonym for road. The Planning Inspector had fallen into error because she did not appreciate that this planning permission, read as a whole, plainly envisages that the access roads are to be highways, in the normal sense in which that word is used.

The Court also held that the condition "does not introduce the requirement to grant a public right of way over the access roads by surreptitious means; the fact that the access roads are intended to be public roads is plain on the face of the permission read as a whole. Even if there was no express discussion of that topic with the Council, that much should have been obvious to the landowners and the developer from the outset. The s.106 agreement, which includes an obligation on the owners to construct the access roads to the site boundaries in accordance with condition 39, is entirely consistent with this interpretation."

Case summary prepared by Susannah Herbert