The path less travelled

Huseyin Huseyin delves into the issues to be considered when developing out unusual sites

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Any competent developer should be capable of acquiring a greenfield site which is not subject to restrictions or covenants on title and successfully redeveloping for a decent profit.

Skilled developers, however, will often look for sites where technical challenges must be overcome to realise their full redevelopment value. The type of developers who are willing to invest the requisite time, money and energy, and have the skillset to deliver on such projects, will be limited. This also means that the number of suitors for such sites will be limited, which also suppresses the land value of such sites.

The types of site that may fall into this category include sites near a railway, over underground tunnels or pipes and abutting rivers or canals and sites in need of extensive remediation. Each of these has the potential to be an immoveable obstacle standing between a developer and its new scheme.

Before exchanging contracts to acquire a development site, clients will want to be well-informed about any matters that may impact upon value or their development proposals. Alongside a physical site investigation and appropriate surveys, full due diligence should be undertaken, and we set out below guidance on how to obtain as much information as possible so that your client can make a fully informed decision as to whether to proceed.

Railways

In recent times there has been an expansion in development above railway stations or adjacent to railway lines; examples include the extensive redevelopment of the area surrounding King's Cross station. Owning a home near a railway station is becoming increasingly desirable with commuters who want to work in a city but live in the suburbs.

There are however many challenges when acquiring a site neighbouring or adjoining railway land. Title to the railway land and to your proposed development site will frequently alert you to covenants restricting development within the vicinity of the railway.

It will be sensible to approach the statutory bodies that operate the railway services in the area, although be aware that you may not get an answer to any general pre-contract enquiries raised as there is no formal search which can be carried out of the railway operators. Usually the owner of railway land will be Network Rail, Rail for London or other regional operators and, more often than not, you will need their consent for your proposed development. There will undoubtedly also be a protected zone within which no construction can take place.

An index map search of your proposed site and the surrounding area will assist in establishing the ownership of any railway land. New railway lines or proposals to bring a disused line back into use may be revealed on your local authority search results. Any reference to the Crossrail or HS2 schemes can be followed up with a specific search for these projects.

Network Rail also has some general information on buying a property next to a railway on their website (www.networkrail.co.uk).

A proposed development must take into consideration the practicalities of access to railway services and the need of railway operators to cross the development site in order to undertake works to the railway. In addition to any express matters set out on the title register, the railway operators will

also have the benefit of statutory rights to enter onto neighbouring land in order to carry out repair or prevent an accident.

It is critical that a full risk assessment is carried out to identify and mitigate any risks to the railway associated with the construction and future use of the development. Any redevelopment to the adjoining land must neither interfere with the railway operations nor increase the costs of maintenance or operation of the railway service.

We all know that railway services have the possibility to generate noise and vibration. Appointing acoustic specialists at a pre-planning stage will help determine how the proposed development can be constructed to minimise unwanted noise and vibration and maximise values on the scheme.

Tunnels

If you are developing in cities with underground services, such as London's tube service, it is imperative that you raise enquiries with London Underground Ltd or Transport for London and the relevant local planning authority. It is likely that there will be operational tunnels and services adjacent to or beneath your proposed development site. Any developer intending to construct within the vicinity of an underground tunnel will need to consult with the relevant statutory authority in relation to any works as the integrity of these structures and the safety of the commuters using them are paramount.

As part of a developer's pre-exchange and pre-planning investigations, it is important to establish the existence of any tunnels or subways which either cross or otherwise affect the development site. The developer will then need to liaise with the relevant statutory bodies as necessary with a view to ensuring that the proposed development can be implemented so as not to cause interference. Enquiries of the relevant bodies should assist in determining the location and ownership of underground track, tunnels and associated infrastructure. Their records may also provide you with further information regarding relevant existing access rights, leases and licences.

The operational tunnels and services neighbouring or beneath the development site may be at a shallow depth which could materially affect the design or viability of your client's proposed scheme. Many of the underground services that remain in use today were constructed in the nineteenth century and care must therefore be taken when relying on the plans supplied by statutory bodies. It is recommended that a developer physically confirms the locations of the tunnels on site to ensure that they can be accommodated in any development.

Similar to the obligations when constructing on land neighbouring railways, there will undoubtedly be a requirement for consent from the relevant authorities to any works under, adjacent to or over these tunnels. The statutory bodies will also expect unencumbered access to the tunnels and subways.

Early dialogue with the relevant authorities is advisable in order to discuss the location of development foundations and where possible, to agree the relocation of pre-existing services where they may otherwise interfere with the proposed development.

Riverbeds

Sites neighbouring the river are considered prime real estate and desirable places to live, however they are not without their complications. First and foremost, the risk of flooding will need to be carefully analysed by experts in this field (see 'What is a solicitor's role?' by Hannah Kramer, *PLJ*320, April 2014, p13-17).

Where a developer is proposing to develop on land adjacent to the River Thames, it is likely that a licence, consent or permission will be required from the Port of London Authority (PLA). Enquiries of the PLA should also yield further information as to the ownership of the riverbed and foreshore and whether the PLA exercises rights over the proposed development site. A pro forma search can be found on their website (http://www.pla.co.uk/About-Us/Property-Related-Search).

It is often the case that the licences from the PLA are personal to the owner of a site and do not benefit successors in title. If you are acquiring land adjacent to the river it is important that you apply and agree terms for a separate licence and do not assume that you can rely on a previous owner's licence.

Where the PLA grants a licence for an object (for example a river wharf, moorings or other river works) to be in the River Thames it comprises both:

- a licence from them which will require the developer to keep any object in the River Thames in good repair; and
- the required payment of a licence fee equivalent to an open market rent for the relevant items.

The level of licence fee in part will depend upon the uses to which the items are put. Such costs must be accounted for in a developer's financial appraisal of its scheme.

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Canals

In July 2012, the government transferred the property, assets, rights and liabilities relating to inland waterways in England and Wales (formerly maintained by the British Waterways Board) into a new charitable body, the Canal & River Trust (the CRT).

Where land abuts a canal, as part of your pre-contract enquiries you should seek to establish whether the landowner has maintained the banks of the canal itself, whether it has made any contribution towards the repair and maintenance and whether it has had any previous correspondence with the CRT, for example in relation to consents to discharge into a canal. It is important that a purchaser carries out a CRT search. Guidance as to the enquiries to raise can be found on the CRT website (https://canalrivertrust.org.uk/media/library/1174.pdf).

Search results are likely to confirm that the CRT does not generally hold

the owner of land abutting a canal liable in respect of maintenance, repair or rebuilding of the canal, its banks or towing paths except when:

- the canal banks are included within the title to the site;
- any work undertaken on the site for building, maintenance or any other purposes results in damage to any canal-side property, in which case the CRT will take steps to recover the cost of such damage and any other costs, loss or expenses from any persons responsible for such damage; or
- there is an agreement or other form of contractual arrangement conferring obligations on the landowner or a third party.

Riparian rights

Developers whose land is situated above or adjacent to a watercourse, or who have a watercourse running through it, are called 'riparian owners'. Riparian owners have certain rights and responsibilities in relation to such a watercourse.

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If the land boundary is next to or marks the boundary with a watercourse, it is assumed that the riparian owner owns the land up to the centre of the watercourse, unless it is proven to be owned by someone else. Where the watercourse is the responsibility of a third party, it should be noted on the title deeds.

Riparian owners have the right to protect their land from flooding and erosion. They must accept flood flows through their land, and should keep the banks clear of anything that could cause an obstruction or increase flood risk.

The Environment Agency highlights the following three issues:

- A riparian owner is responsible for maintaining the bed and banks of the watercourse and the trees and shrubs growing on the banks.
- There should always be a development-free edge on the banks next to a watercourse to allow for ease of access for maintenance or inspection of the watercourse.
- Owners are responsible for protecting their property from water that seeps through natural or artificial banks. Where a flood defence is damaged, the riparian owner of the flood defence may be required to pay for the repairs by the local risk management authority.

While the Environment Agency has a statutory power to carry out maintenance or repairs, it is not obliged to do so and, unless there is an express agreement to the contrary, responsibility for the maintenance and repair of the watercourse and any structure affecting the channel of the watercourse rests with the riparian owner or the owner of the land adjoining the watercourse. Further guidance is available on the Environment Agency website: www.legalease.co.uk/riverside.

If a developer is looking at a site neighbouring a watercourse then the cost of constructing suitable flood defences and subsequent maintenance must be borne in mind. It is likely that any works will require planning consent as well as a flood defence or ordinary watercourse consent. The Environmental Agency is a statutory consultee on planning applications that relate to environmental matters and will be approached by the local planning authority to determine whether any proposed development will adversely impact floodplains or the water environment.

Mines and minerals

The usual position is that all mines and minerals pass with the title to a property unless there is an exception on the title retaining the mines and minerals in favour of a third party. The wording of the exception is important to determine the nature of any legal and commercial risk in developing the site and in deciding whether or not to effect appropriate mining indemnity insurance.

It is rare for minerals to be specified by name and therefore where an exception is registered against the title to the site it will usually include the ability to mine any minerals. There is no clear legal definition of what amounts to a mineral. In general, a developer should think in wide terms that potentially it could include any substance below the surface or at least such substances as are dug out of the earth by means of a mine, but this will depend on the context.

It is unlikely that an exception on title will provide details of:

- at what levels the minerals can be extracted;
- the permitted methods of extraction; or
- any acknowledgement of paying compensation to the landowner for any damage caused.

While the nature of the mineral will, primarily, be a solid substance, that does not necessarily preclude other substances such as oil or gas. The most common mineral which is extracted from land is coal. Where a site is in an area known for mining activity a search with the Coal Authority should be undertaken to establish details of past, present and future mining activity at a site. The search will also identify if there are mine shafts on the site and whether any mining activities may cause subsidence. If your client is considering building over or within the influencing distance of a mine entry, this can have the potential for significant risks both to the development and to any occupiers. Appropriate engineering precautions will be required along with the Coal Authority Permissions Service Approval which will also monitor the implementation of the works. Further information can be found on the Coal Authority website: https://www.gov.uk/government/organisations/the-coal-authority.

It may be appropriate to undertake a desktop flood search as part of your initial due diligence. Where such results indicate that a site is susceptible to flooding, it will recommend that a detailed flood risk assessment be undertaken prior to any development on the site. It is common for such a report to be carried out prior to a planning application submission and a sophisticated developer will discuss this issue with their planning consultant during the pre-application process. Where a site has a potential flood risk, it is likely that any planning consent for the site will include conditions with regard to flood defence works and/or safeguarding the development.

Contaminated land

Skilled developers will often look to acquire sites commonly known as 'brownfield' with a view to remediating and regenerating the site. The risks and rewards on such schemes are high. A buyer's solicitor will generally advise their client to undertake an environmental search. A desktop search comprises only a review of information compiled by a search agency from selected public and private databases and will not include a site visit or any testing of soil or ground water samples. The scope of this type of search is, therefore, limited and should be used as a starting point only for risk assessment purposes. A more intrusive environmental investigation should be undertaken for potentially contaminated sites and steps taken to ensure that your client can rely upon such a report, either by it being directly addressed to them or by procuring a letter of reliance from the provider.

If a developer is aware that a site is contaminated then it may be possible to negotiate contractual protection from the seller against environmental liability. This may take the form of an indemnity, a reduction in the purchase price or an obligation on the part of the seller to undertake remediation works to clear the site of contaminative material before completion.

However, where there are existing buildings on the site which a developer intends to demolish, it may be difficult to identify the full extent of contamination prior to legal completion, and even after detailed site inspections and extensive due diligence significant problems may still arise.

Part IIA of the Environmental Protection Act 1990 creates a regulatory regime for the identification and remediation of contaminated land. Local authorities, as the enforcing authorities (although the Environment Agency also has enforcement powers), are now required to inspect and identify seriously contaminated sites with a view to issuing remediation notices requiring action to be taken to remove the contamination in the absence of a voluntary agreement to do so. Compliance can be costly and, in extreme cases, could result in expenditure exceeding the value of the contaminated site.

The statutory definition of 'contamination' (contained in Part 2A of the Environmental Protection Act 1990) broadly means that any land which appears to the relevant local authority to be in such condition by reason of substances, in, on or under that land, that significant harm is being caused; or there is a significant possibility of such harm being caused; or pollution of controlled waters is being or is likely to be caused, will require cleaning up to standards acceptable to such local authority. Clean up, therefore, will only be required if contamination is present and found to pose an unacceptable risk to human health or the environment.

If there is a pollutant linkage, then liability for the contaminated land attaches to the 'appropriate person', who will be responsible for remediation of the contaminated land. There are two groups of appropriate persons: Class A and Class B. A Class A person is one who 'caused or knowingly permitted' a contaminant to be in, on or under the contaminated source land. If after reasonable enquiry, no person can be found who would qualify as a Class A person, then the next in line will be a Class B person, who is the current owner or occupier of the contaminated land.

The relevant local authority will generally be the enforcing authority and will be responsible for attributing liability between the groups. Non-compliance with a remediation notice (without reasonable excuse) is a criminal offence and lack of funds to carry out the remediation will not usually be considered a reasonable excuse, with significant fines payable.

Where your client is purchasing potentially contaminated land the following key questions (among others) should be considered to assist in determining the possible existence of a pollutant linkage:

- Are you aware of the existence of any contaminants either originating or migrating to the site?
- If so, is there a risk of such contaminants migrating either onto or from the site from or onto receptor land, which could result in the site or that receptor land potentially being designated as contaminated land?
- Are you aware of any person bringing onto, collecting or storing something on the site or other land that is likely to cause damage either to other land or to the site if it escapes?
- Is there a risk of third-party action, whether under the contaminated land regime or at common law in relation to contamination, which exists or could exist on or passes through the site onto someone else's land?

Compliance can be costly and, in extreme cases, could result in expenditure exceeding the value of the contaminated site.

Conclusion

We have given some examples of the pitfalls that must be overcome if a developer is to profitably redevelop a challenging site. In all cases the consequences can be mitigated or eliminated if given due consideration. Where such issues are not properly considered, a developer may see the potential costs of a once viable scheme increase exponentially, wiping out any profit it hoped to make. Appropriate reports and surveys should be undertaken and searches and enquiries made with professional and technical teams appointed at an early stage, so that obstacles can be identified and solutions found. ■