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Boundary of the Highway Ownership

About this document ...

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1 *Introduction*

Before installing, maintaining, altering, adjusting or repairing any apparatus, it is necessary for BT to establish under what statutory rights it can carry out these operations. BT has a statutory right (Part 8 of the Electronics Communications Code) to install, keep, upgrade, maintain apparatus in public maintainable highways in England, Wales, Northern Ireland or public roads in Scotland. In order to gain a right to install apparatus in private land, which includes private roads and unadopted roads, BT must obtain the agreement in writing of at least the occupier of the land - see EPT/OAM/F027.

Because the rights and procedures to be followed differ between private land and the highway, it is important for Openreach acting on behalf of BT to establish the status of the land in which it wishes to install its apparatus. This may not be straightforward because an indisputable red line rarely marks the edge of a highway and the beginning of private land. There will often be doubt about the location of the boundary of a highway beyond which BT's street rights are not exercisable and a wayleave agreement has to be obtained.

This document is, for internal use of only, and gives practical guidance on determining the boundary of the highway. It also sets out who owns the soil in a highway, for cases of non-maintainable highway, where BT is looking for the agreement of the landowner before installing apparatus. This is further explained in paragraph 3.

2 *Boundary of the Highway*

The definition of public highway is:

A way over which all members of the public have a right to pass and repass.

The most common are footpaths, bridleways and full vehicular use highways.

The public highway usually extends over the whole width of a road, footway, verge and other land up to the boundaries of adjoining properties and fields.

Where a highway has been recently constructed, the land upon which it has been built will have been acquired from the previous owners in order to construct the highway. In these circumstances, the local highway authority should have definitive records of the extent of the land which comprises the highway.

However, most highways will not have been created in this way, and there will be no definitive plans as to their extent. Here, the location of the boundary between the highway and the surrounding private land is a matter to be determined by the evidence in each case.

The following types of evidence may be relevant:

2.1 Evidence of the Local Highway Authority

The local highway authority is obliged by law to keep a publicly accessible list of all maintainable highways for which it is responsible. This record may also include information about the extent of the highway. The local highway authority may be willing to say what they regard as the boundary of a particular highway, or to state, in respect of a particular highway, the area they have been maintaining.

Some local highway authorities make reference to a so-called “two metre rule”. This will probably be no more than a statement that their normal practice is to maintain an area two metres each side of a metalled road. This may not be applied in all situations, however, and may be overridden by other evidence e.g. where the highway is bounded by a fence, wall or hedge, less than two metres away from the road.

The question that the local highway authority should be asked is whether, in respect of the particular area of highway on which apparatus is proposed to be installed, it regards that area as part of the highway. The street works gazetteer will give evidence if a road has been designated as public highway and will tell you who the Local Authority is responsible for maintaining it.

2.2 Evidence On The Ground

The land itself may provide evidence of the extent of the highway. This may include:

- Evidence that the area is actually used as a highway.
- Evidence that the area has been maintained by the highway authority
- The position of the apparatus of undertakers (gas, electricity, water, telecoms) with the right to install in the highway. The presence of such apparatus installed some time ago may be evidence that the area where it is installed is part of the highway.
- Where there are signs that the area in question has been or is being cultivated or otherwise used for private (or other non-highway) use, it is not safe to install apparatus there without further checks.

2.3 Physical features And Physical Boundaries

The presence of fences and other physical features will constitute evidence of the boundary of the highway. In some cases, courts have treated such physical features as founding a “presumption” that land is or is not part of the highway. A presumption means that a court, in making a decision of fact will treat certain evidence as establishing the position of the highway boundary unless there is evidence sufficient to rebut the assumption.

In general (in the absence of other evidence) the highway is the highway between its more or less defined limits; for example fences, ditches, walls, and the legal presumptions support this common sense position.

The following physical features may provide evidence to help determine the boundary of the highway:

2.3.1 Where there is a Metalled Track/Road

Where a metalled road crosses unenclosed land, there being no ditch or physical feature to indicate other limits to the highway it is the metalled track alone which is the highway unless it can be proved that the adjoining land is used as a highway.

2.3.2 Where there are Ditches

- Where there is a ditch alongside a highway, with no other features, the highway is presumed to extend to the edge of the ditch nearest the road.
- Where there is a ditch which runs between a highway and fence, hedge or wall but is close to the fence, hedge or wall, the highway is again presumed to extend to the edge of the ditch nearest the road.
- Where the ditch is some distance from the fence, hedge, or wall, the fence, hedge, or wall may form the boundary of the highway rather than the ditch, the local highway authority should be consulted for their view of where the boundary lies.
- Against the above, there is nothing to prevent a ditch being dedicated as part of a highway. Therefore where a wide drain, which is proved to be necessary for the existence of the highway, runs between a metalled road and a fence, it may be shown that the site of the drain has been dedicated as part of the road ward side of the fence. In cases of this kind, consult the appropriate local highway authority. In addition refer to [Planning Policy Briefing 729](#) which gives further guidance on the Internal Drainage Boards who must also be consulted prior to installing any apparatus in the vicinity of a drainage ditch which they manage and maintain.

2.3.3 Where there are Fences Walls or Hedges

- Where there is a fence wall or hedge adjacent to a highway, this is evidence that the highway extends as far as the fence, wall or hedge. This is because it is normally assumed that such a boundary was erected by a neighbour “fencing against the highway”. However, such evidence may be defeated by evidence that the fence, wall or hedge was erected for some other purpose.
- For this reason, where a fence, wall or hedge is some distance from the metalled road, it is **not safe** to assume that all the area between the road and the fence, wall, or ditch is part of the highway. In such cases consult the local

highway authority. Where there is a ditch between the metalled road and a fence, wall, or hedge, see 2.3.2 above.

- Where there is a fence which has been erected by a local highway authority, this is good evidence that the maintainable highway extends as far as the fence, particularly where such a fence is of some age.
- Apparatus should not be attached to a fence or a wall and not installed within a hedge (except in circumstances described below) but only on the highway side of these.
- Where there is no room to install apparatus in the highway verge because a hedge is overgrown or is encroaching onto the highway the landowner should be asked for written consent for BT to trim the hedge. Hedges should not be cut/trimmed without consulting the owner. If it is not possible to obtain verbal consent, a letter should be sent to the landowner requesting him to trim the hedge so that the apparatus can be installed, and notifying him that if no counter notice is received within 28 days BT will trim the hedge. A copy of the OFCOM notice to be used is attached as an Appendix to this ISIS. If no reply is received within this time the hedge may be trimmed. If the landowner refuses permission the highway authority may be approached to use its powers to trim the hedge.
- In cases where BT is challenged about a pole or other apparatus already installed which is now within a hedge, and on the highway side of the root, BT's position should be that it is deemed to be in the public highway.

2.3.4 Where a Hedge or Tree is determined to be “interfering” with or “obstructing” Apparatus

As above, there may be occasions where vegetation or trees have grown over or around our apparatus and in order to install, maintain or test our network we require cutting back or lopping the vegetation / tree. Prior to doing this we must issue an OFCOM notice to the occupier requesting permission to carry out the works. See appendix for a copy of the notice. The Code (paragraph 82(4)) states the occupier has 28 days to issue a counter notice to BT objecting to the lopping and clearly state why they object. We can discuss the works with the occupier to reach an agreement but if no consensus can be reached we cannot proceed without a court order. If an agreement is reached with the occupier for the works to be completed within the 28 days, we can proceed to lop or cut back the tree / vegetation.

If we complete the tree lopping / vegetation cut back, we must do so as to cause minimum damage to the tree / vegetation. The alternative is to agree with the occupier for them to complete the works within an agreed timescale.

2.3.5 Where adjacent ground is not suitable for highway use

Where the area adjacent to a highway is not suitable for highway use, e.g. because it is too steep for passage, or there are other features which make passage difficult or impossible, this is good evidence that such land is not part of the highway.

It is also worth considering if the land is at risk of erosion or landslides and look to avoid the area to future proof the network.

- There is a useful slide pack attached as an appendix to this ISIS that shows examples of ditches and other features detailed above that can help.

2.4 Procedure To Follow In Determining Boundary Of Highway

Because the boundary of the highway is a matter of evidence in each case, it is not possible through setting out general rules to guarantee certainty when installing apparatus.

The following procedure is suggested in determining the location of the highway boundary:

- Check the physical boundaries for evidence of the extent of the highway, as set out in 2.3 above and there is a PowerPoint in the appendix that gives examples of what to look for. In the absence of any other evidence to the contrary, these physical boundaries should be taken as evidence of the boundary.
- Check for any visible signs of non-highway use, such as cultivation or penning of animals. Apparatus should normally not be installed on land where there is evidence of this sort unless a separate written agreement is in place with the land owner.
- The local highway authority can be consulted as to where it believes the boundary lies, or the extent of the land which it has been maintaining. Some Local Authorities have produced maps showing their boundaries on their website so it is always worth a look. If the information is undetermined, consider if the construction of the land has been installed / maintained by the Highways Dept. For example the footway is tarmacked up to the wall / fence line or the slabs are laid to the hedge / fence line. We would view this as having been maintained with public money and therefore we would have a right to install. It is not guaranteed and a court may take a different view if we are challenged.
- Where, despite the above checks, there is still reasonable cause for doubt about the status of the land on which it is proposed to install apparatus, and there is no alternative location, then, where practicable, the adjacent

landowner may be asked for evidence of the location of the boundary. For example, there may be evidence in the title documentation to the land.

In cases of doubt or dispute, title deeds and plans should be obtained and advice may be sought from the paralegal team who's manager is Carl Pinnock but he has an escalation team via wayleave.escalations@openreach.co.uk or regs.advice@openreach.co.uk

Our default position should always be to site our apparatus in the public maintained highway (roads in Scotland) and only install apparatus on private land where there is no suitable alternative.

3 ***Ownership of Soil/Occupation of Land***

It is sometimes contended by owners of property adjoining a public maintainable highway that since they own an interest in the soil of that highway, their permission is needed in order for BT to install etc. apparatus. This claim occurs most often where BT is installing underground apparatus. However, BT's powers to install, keep, upgrade and maintain apparatus in a public maintainable highway are in the nature of statutory powers which cannot be overridden by claims of soil-ownership. As far as non-publicly maintainable or prospectively maintainable highways are concerned, it is important to establish the ownership of the soil. Although BT's minimum legal requirements in order to install apparatus on private land (and all unadopted highways are considered as private land for the purposes of the code) is obtaining the agreement of the occupier, it is BT policy also to obtain agreement of the owner. (The occupier in relation to a non-publicly maintainable highway will be the street manager or developer.)

It is a general rule of law that the owner of land is presumed to own also the soil of an adjacent highway up to the centre line. The owner of the leasehold interest will have a leasehold interest in the soil up to the centre line. Where the same person owns the land on either side, that person will own the soil in the whole highway.

There are, however, exceptions to this. A person may own the exclusive freehold of a non-publicly maintainable highway or individual leases may specifically exclude any ownership rights over the soil of the highway. Individual cases should be researched if it proves important for BT to establish the ownership of soil.

In these cases it is important to view the Land registry documents as within the "burdens" there may be easements for "utility services and telecoms" which can give BT rights to remain on the land.

In the case of a highway which has been constructed recently using purchase powers, the local highway authority will also be the freehold owner of the land on which the highway is constructed.

4 ***Land Registry***

The land registry site holds details of registered parties of land, be they freeholders, leaseholders or other interested parties, and the registered titles are shown on the FREE map search facility in pink. A good number of existing users are using this as a way to determine if an area is either private or public highway. Unfortunately you cannot use this tool for that purpose.

Areas that are marked in pink are simply registered but they can still form part of the public maintainable highway. Therefore when you are dealing with a customer complaint, a new install, a repair or project, you cannot assume that all areas that are pink are private or all areas that are white are public maintainable highway.

The only way you can determine if an area is public maintainable highway is by speaking to the local highways authority who maintain these areas. They have a record of everything they maintain at public expense, and it is these areas where BT has statutory rights to install and maintain network without the need for a wayleave.

Please also bear in mind that not all areas of land are registered. It only became law to register any property sold or transferred in the early 80s, so if someone has owned the land or property prior to this, there is no legal obligation on them to register their land and this is why you see pockets of land or properties, that while they appear to be someone's house or field, still show as white on the land registry. These will eventually turn pink when they next change ownership.

If you need access to the land Registry site then follow the instructions on the [Fixit article 27002](#) and if you need help using sites [Fixit Article 26997](#) has guides to help you navigate both HM Land Registry (England & Wales) and the ScotLIS land registry and Sasine Registers.

5 ***Street Managers***

The Street Manager is the person to whom advance notice and notice of starting dates must be given. The Street Manager and/or the HA may give directions and co-ordinate the execution of street works in a private street. Reinstatement of a private street must be carried out to the reasonable satisfaction of the Street Manager.

5.1 Identifying a private, or 'unadopted' road

This information will be available on the Additional Street Data in the National Street Gazetteer (NSG). The National Street Gazetteer is intended to identify Unique Street Reference Numbers (USRNs) and track proposed street works. You will need an account and password to access this system.

A private street is usually identified where the Street Status does not say 'publicly maintainable or prospectively maintainable'.

5.2 Identifying a Street Manager

The Street Manager of a private street may not be immediately obvious, the following steps are recommended to identify the street manager.

1. **Make enquiries with Highway Authority.** The authority must maintain a list of all streets in their area but are not legally obliged to record the details of all private Street Managers. They may know the Street Managers of some private streets so this is a good place to start.
2. **If practical, talk to residents on the road in question.** The residents may know who the Street Manager is or may themselves be responsible for the street.
3. **Enquire with the Land Registry.** If there are no residents or frontages on the street this avenue could be used for enquiries and may provide the detail of a landowner who could be contacted.
4. **If the Street Manager cannot be determined** from the avenues listed above then we should assume that the street is the responsibility of the frontages.

6 *Unregistered Land*

What is unregistered land and why is it an issue?

When we need to put our network or equipment on private land we need permission. We do this by agreeing a wayleave with the land-owner. There are very rare occasions where we simply cannot identify the owner of the land via our normal searches (via Land Registry and the relevant Local Authority).

Not all land is registered but we still have to try to find the owner before we can proceed with any works.

The Electronic Communications Code (The Code) enables telecoms licenced operators (both mobile phone operators and fixed line operators) to provide electronic communications networks by installing and maintaining apparatus in, over and under land. In order to do so we need permission.

If we cannot find the correct person to get permission then, after reasonable inquiries, a notice (simply address to the “occupier” or “owner” of the land, as appropriate) can be given by presenting it to someone on the land or by attaching it to a “conspicuous object on the land” such as an existing pole.

The specific unregistered land notice that must be used is in the Appendix below and there is further help on the Network Regulations unregistered land page on [SharePoint](#).

If you have done all the relevant checks with the Land Registry and the relevant Local Authority but are still unable to locate an owner of the land, then you need to:

- Advertise - put a notice in the local press asking for information
- Spread the word - stick notices in local shops, pubs, Post Office etc. asking if anyone knows (or is) the owner
- Ask around - often local residents will know who owns the land or would be able to point you in the right direction
- Site Specific Notices - Put up notices on the site requesting the owner contacts us. It is important that the correct notice is used (see appendix 5 below) The areas highlighted in yellow on the form need to be completed prior to the notices being posted on the site. They should remain in place for a minimum of 28 days. Notices need to be clearly visible (such as, not too high or too low to read) and provide all the relevant information to enable the owner to contact us. The template notice is in Appendix below. Photographs should be taken of the notices in position on the site as evidence should the case need to go to a Land Tribunal.

Once the 28 days has elapsed and you have been unable to identify the land owner using all the above strategies / methods, you should contact Netregs (regs.advice@openreach.co.uk) to review and consider the need for a compulsory permission to be sought from the Land Tribunal. Send the Netregs team a summary of the apparatus to be installed, details of the job and copies of the photo's and notices applied with the relevant dates.

7 *Appendix*



Tree Lopping
Request 82(3).docx

2.3.4 – OFCOM Notice for permisison to lop or cut back trees
/ vegetation



Verges -
explained.pptx

2.3.5 – Examples of Verges, hedges and ditches



unregistered land
notice.docx

6 – site notice for unregistered land

8 ***Enquiries***

Enquiries about this document should be sent to:-

The Network Regulatory Helpline on regs.advice@openreach.co.uk

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