

**CITY OF LONDON LAW SOCIETY  
PLANNING AND ENVIRONMENTAL LAW COMMITTEE**

**Response to consultation by Communities and Local Government on  
Overriding Easements and Other Rights: Possible Amendment to  
Section 237 Town and Country Planning Act 1990**

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The Planning and Environmental Law Committee of the City of London Law Society welcomes the opportunity to respond to CLG's consultation on this issue, which has caused problems for certain development and regeneration projects since the decision in *Thames Water Utilities v Oxford City Council*.<sup>1</sup>

Our comments on the two specific questions raised in the consultation paper, together with some further general comments, are set out below.

**1. Do you agree that section 237 of the Town and Country Planning Act 1990 should be amended such that the overriding of easements etc will apply to the use of the land after construction?**

1.1 We agree that section 237 of the Town and Country Planning Act 1990 ("TCPA") should be amended to cover the lacuna in the current wording, which was highlighted in *Thames Water*. We also agree that an express provision should be inserted allowing persons whose third party rights are affected by the use of a development to which section 237 applies to claim compensation for the depreciation in the value of their land.

1.2 We set out below our reasons for agreeing with CLG's suggestion, and some additional comments on the implications of the proposed amendment, in the context of our general understanding of the law in this area.

1.3 Interests that may be "acquired" by compulsory purchase

1.3.1 It has long been established that third party rights which burden a site acquired by compulsion are themselves incapable of being "acquired" by an authority separately from the land that they benefit. In other words, such rights cannot be listed in the schedule to a compulsory purchase order and acquired in their own right, as a freehold or leasehold interest may be.

1.3.2 Therefore, where land is compulsorily purchased (or appropriated) under any enactment, it will be conveyed to the acquiring authority (or appropriated to its new purpose) with the burden of all third party rights in existence on the date of such transfer.<sup>2</sup>

1.4 Effect of statutory authorisation

1.4.1 Case law (in particular the *Brand* case<sup>3</sup>) established that an acquiring authority is able to override these residual third party rights to the extent that interference

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<sup>1</sup> [1999] 1 EGLR 167

<sup>2</sup> The only exception to this rule is where a certain class of right is expressly "extinguished" by a relevant statutory provision and will therefore be automatically removed from the title on transfer. An example of this would be the express extinguishment of private rights of way under s236 TCPA.

<sup>3</sup> *Hammersmith and City Railway Co v Brand* (1869-70) LR 4 HL 171

with them is unavoidable in carrying out purposes for which they have express statutory authority.

- 1.4.2 Section 10 of the Compulsory Purchase Act 1965 ("CPA") (and its precursor, section 68 of the Land Clauses Consolidation Act 1845) recognised that statutory compensation (in lieu of damages or an injunction) should be payable to persons who are "injuriously affected" in this way by the "execution of the works" authorised by statute on land compulsorily acquired.<sup>4</sup> *Metropolitan Board of Works v McCarthy*<sup>5</sup> established that the basis of compensation should be the diminution in the value of the claimant's leasehold or freehold interest by virtue of the execution of the works, but no compensation may be claimed for the "use" of those works. A claimant must also be able to establish that, but for the statutory authority under which the works are carried out, they would have had a claim in nuisance.

## 1.5 The need for section 237 of the Town and Country Planning Act 1990

- 1.5.1 We disagree with the statement in the "Background" section of the consultation that an authority would "impliedly" be authorised to infringe third party rights even without the existence of section 237. Although local authorities have the right to acquire land (compulsorily or by agreement) under sections 226 and 227 TCPA "for planning purposes", these sections do not specify the nature of the works themselves which may be carried out for these purposes. Section 237 is, in our view, essential to give statutory status (and the corresponding protection from injunction) to the construction of the works carried out within the scope of the section. Equally, section 237(4) is essential in giving persons affected by such works a right to claim compensation under section 10 CPA, which they would not otherwise have.
- 1.5.2 The reason for this is that planning permission has not been deemed by the courts to constitute "statutory authority" to carry out the works permitted. This was most recently confirmed in the case of *Wheeler v JJ Saunders Ltd*.<sup>6</sup> Brand's case could not, therefore, be relied upon by developers or local authorities to override third party rights when implementing a planning permission without section 237. For the same reason, section 10 CPA would not give those with third party rights affected by the "execution of work" on land compulsorily acquired any right to compensation without section 237. The definition of "execution of works" in the Compulsory Purchase Act 1965 refers to works authorised by statute, not by planning permission.
- 1.5.3 We believe that it would have been for these reasons that Parliament originally felt it necessary to enact section 237(1). This section provides expressly that the "the erection, construction or carrying out or maintenance" of works "in accordance with planning permission" is "authorised by [section 237]" where it is carried out on land held for planning purposes.

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<sup>4</sup> Note that in the recent case of *Moto Hospitality Ltd v Secretary of State for Transport* [2007] EWCA Civ 764, the judge interpreted s10 CPA as providing that the works need not in fact be carried out on land compulsorily acquired, but that s10 CPA will also apply where land is used for works authorised by the same "special Act" under which a compulsory purchase order is promoted for the same scheme.

<sup>5</sup> (1874) LR 7 HL 243

<sup>6</sup> [1995] Env LR 286

## 1.6 Omission of "use" from section 237

- 1.6.1 We note that Judge Rich in *Thames Water* did not consider that, on a strict construction of its wording, section 237(1) could be interpreted as giving statutory authority to the "use" of a development after its construction.
- 1.6.2 **Recommendation:** We therefore agree with CLG that section 237 should be amended to give statutory authority to such "use" in order to empower local authorities and those deriving title from them to override third party rights affected by the "use" of the development. Given Judge Rich's view that section 10 CPA does not authorise the provision of compensation for third party rights affected by the use of development, we also agree that an express provision would need to be added to section 237 to allow the beneficiaries of third party rights breached or interfered with by the use of such development works to claim compensation. It would seem sensible to provide that the basis of compensation should be the diminution in the value of the land with the benefit of the right. This would in effect put such claimants in the same position as claimants under section 10 CPA.
- 1.6.3 We also consider that it would be useful for these amendments to take effect from the commencement date in relation to all acquisitions or appropriations falling within section 237 whether made before or after commencement.

## 1.7 A side effect of the statutory authorisation of "use" under section 237

- 1.7.1 Section 1 of the Land Compensation Act 1973 ("LCA") gives persons the right to claim compensation for the depreciation in the value of their land if such depreciation is created by certain physical factors caused by the use of "public works". These "public works" include "any works or land ... provided or used in the exercise of statutory powers." The physical factors referred to are defined as "noise, vibration, smell, fumes, smoke ... artificial lighting and the discharge of ... any solid or liquid substance." Section 1(6) provides the important caveat that "Compensation shall not be payable ... unless immunity from actions for nuisance in respect of that use is conferred (whether expressly or by implication) by an enactment relating to those works."
- 1.7.2 If section 237 is amended to include the "use" of works constructed thereunder, then the section should also make clear that such use is deemed to give immunity from action for nuisance based on the sort of physical factors listed in the LCA ("annoyance-based nuisance"), as well as the nuisances of interference with rights in land ("right-based nuisance") currently expressly referred to in subsections (a) and (b) of section 237(1), and section 237(2).
- 1.7.3 If the word "use" is simply added to section 237(1) without further amendment it will be unclear whether use is or is not authorised, notwithstanding the creation of any annoyance-based nuisances. It will therefore also be unclear whether a person affected by, for example, the nuisance of artificial lighting from a development constructed on land held for planning purposes will be able to claim statutory compensation under Part I LCA or apply for an injunction or damages for the nuisance. The latter will usually be a far greater ("ransom") figure than the statutory compensation available for depreciation under Part I LCA.

- 1.7.4 Admittedly, since one of the aims of the planning system is to avoid annoyance-based nuisances occurring, the circumstances in which a neighbour might be in a position to make a claim for this type of nuisance either in damages or under Part I LCA are likely to be limited. This type of compensation is obviously more likely to be an issue for infrastructure developments than for the types of developments carried out under section 237 powers. However, we believe that this is an opportunity to clarify the situation and avoid future uncertainty.
- 1.7.5 **Recommendation:** In addition to adding the word "use" to the list of activities in section 237(1), sub-section (1) should also be widened so that the right to statutory immunity in carrying out and using a development is not limited to right-based nuisance, but also annoyance-based nuisance. The right to claim compensation under Part I LCA for annoyance-based nuisance arising through use should be referred to in section 237(4). This will ensure that section 237(5) (liability of the local authority in the event of developer's failure to pay compensation) applies to such compensation.
- 1.8 Application to the Regional Development Agencies Act 1998 etc
- 1.8.1 We agree with CLG that the wording of paragraph 2 of Schedule 6 to the Regional Development Agencies Act 1998 and the wording of any other Acts which contain similar wording to section 237 will suffer from the same problems associated with the *Thames Water* interpretation of section 237. We therefore agree that any amendments to section 237 should also be made to the corresponding provisions of such Acts.
- 2. Do you have any comments or information about the potential costs and benefits of this proposal which would be relevant to the Impact Assessment?**
- 2.1 Statutory compensation in lieu of damages or injunction for right-based nuisance arising from use
- 2.1.1 We agree with the assessment of the benefit to developers and the broader public of the proposed change to section 237 as set out in the cost/benefit analysis in the consultation. However, we do not believe that the consultation's analysis of the benefit to owners and the costs to developers and owners correctly captures the effect of the proposed change.
- 2.1.2 Following the *Thames Water* interpretation of the scope of section 237, persons with the benefit of user covenants (or other rights affected solely by the use of a development constructed on land held for planning purposes) are in a position to hold developers to ransom over any infringement of these rights. This is the case because, following *Thames Water*, such interference would be deemed to be carried out without statutory authority. It would therefore constitute a tort of nuisance – what we have referred to above as "right-based nuisance". The beneficiary of such a right could expect to obtain either an injunction from the courts to prevent the use which infringes the right, or damages.<sup>7</sup>
- 2.1.3 Significantly, the proposed change will prevent affected parties from asking the courts to award damages on the "ransom" basis which might otherwise be

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<sup>7</sup> See *Regan v Paul* [2007] Ch 135 (Court of Appeal).

allowed following the case of *Tamares v Fairpoint* earlier this year.<sup>8</sup> This case involved an "ordinary" development project outside the scope of section 237. It was held in *Tamares* that the beneficiary of a right infringed by a development was entitled to compensation which recognised the bargaining position which he would be in as the holder of the affected right had the developer entered into "fair" negotiations with him for the removal of that right. It was held that in such circumstances he would normally be expected to receive some part of the likely profit from the development.

2.1.4 In contrast, if "use" is given statutory status under section 237, the consultation proposes that an affected party will only be able to claim compensation for the depreciation in the value of his land arising from the infringement (i.e. mirroring compensation available under section 10 CPA). It has been recognised by the courts in several cases relating to section 10 CPA that a claimant may be able to prove little or no depreciation in the value of his own land caused by the breach of a user covenant on adjacent land. Therefore, there is potentially a difference between the damages that an owner might expect to receive following *Thames Water* for the breach of a user covenant on land held for planning purposes and the statutory compensation he is proposed to receive under the amendment to section 237. However, we believe that this is justified by the wider public benefit of overriding such rights at an affordable cost where a development is carried out for "planning purposes". There would seem to be, after all, no reason why beneficiaries of rights affected by "use" should be in a position to claim higher sums than those affected by the execution of the works under the current drafting of section 237.

## 2.2 Statutory compensation in lieu of damages or injunction for annoyance-based nuisance arising from use

2.2.1 For the reasons set out in paragraph 1.7 above, we believe that section 237 should be amended so that it is clear that the use of the works is authorised notwithstanding that it gives rise to annoyance-based nuisances (e.g. smoke, dust, noise etc). As discussed in paragraph 1.7, if section 237 is amended to cover uses giving rise to such nuisances, then affected persons will obtain only statutory compensation for depreciation in the value of their land under Part I LCA. Section 237 should be amended so as to authorise the use giving rise to such nuisances so that affected persons will not be in a position to apply to court for an injunction or damages. The financial implications of this proposal are discussed in paragraph 2.1 above.

## 3. **Further general comments on section 237**

3.1 The following comments go beyond the scope of the consultation, but are mentioned as other important issues relating to section 237 and the implications of the *Thames Water* judgment generally.

### 3.2 Government guidance needed on use of appropriation

3.2.1 Currently there is a Government Circular on the use of compulsory purchase powers (ODPM Circular 06/2004) but, to our knowledge, no guidance on the use

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<sup>8</sup> [2007] EWHC 212 (Ch)

of powers of appropriation for planning purposes. Under sections 122 and 126 Local Government Act 1972 ("LGA"), a local authority may appropriate land held for one statutory purpose, which is no longer required for that purpose, to some other statutory purpose. However, there are no provisions under the LGA or the TCPA which set out the grounds on which land may be appropriated for planning purposes. It is generally assumed that the grounds for appropriation will be the same as those for acquisition under section 226 TCPA, i.e. the appropriation must facilitate the carrying out of development/redevelopment OR be required for a purpose which it is necessary to achieve in the interest of the proper planning of an area; and in addition it must contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the local authority's area. It would be useful to have this set out in Government policy. In practice, the main way in which appropriation facilitates development within the meaning of section 226 is by allowing the operation of section 237 to apply.

- 3.2.2 **Recommendation:** Government guidance should be published on the proper use of powers of appropriation and the procedures which should be followed to appropriate land.

### 3.3 Human rights and appropriation under section 237

- 3.3.1 We also have some concerns that the effect of appropriation under section 237 may in future give rise to challenges under the Human Rights Act 1998. Where a local authority proposes to promote a compulsory purchase order under section 226 TCPA, they must notify persons with third party rights who might have a future claim under section 10 CPA.<sup>9</sup> This gives the persons notified an opportunity to make representations as statutory objectors at the CPO inquiry. However, persons similarly affected due to "appropriation" are not given any notice of the appropriation, or any forum to object. The inequity of this position is highlighted by the fact that frequently compulsory purchase and appropriation are used in parallel by local authorities to "cleanse" the title to both land which they already own and land which they are acquiring for the same scheme. In such circumstances it seems unfair that persons with third party rights over land to be compulsorily acquired are in a better position to object than those with rights over appropriated land.

- 3.3.2 **Recommendation:** We believe that Government guidance on appropriation (as suggested in paragraph 3.2.2 above) should specify the duty of local authorities to notify and consult in advance with those persons whose rights would be affected by the appropriation to the extent that they might be eligible to make a claim for compensation under section 10 CPA. This notification procedure should be modelled on the procedure currently in place for persons with third party rights which would be affected by a proposed compulsory purchase. We also believe that the Government should require registration as a Local Land Charge of notice that land has been appropriated for planning purposes and may therefore benefit from section 237, in order that third parties can discover the status of such land.

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<sup>9</sup> Section 12(2A)(b) Acquisition of Land Act 1981

### 3.4 Duration of protection given by section 237

- 3.4.1 We believe it would be useful to clarify, either in Government guidance or in section 237 itself, the duration of the protection afforded by acquisition or appropriation of land for planning purposes. If possible, we feel the distinction made between the circumstances of *R v City of London Corporation. ex parte Mystery of the Barbers of London*<sup>10</sup> and *Midtown Ltd v City of London Real Property Company*<sup>11</sup> should be codified. In essence, the former case established that a local planning authority which had already carried out development in accordance with planning permission on land that it had acquired for planning purposes, was authorised to interfere with third party rights when the site was subsequently redeveloped in accordance with a new planning permission. In the latter case, the *Barbers* decision was distinguished on the basis that, in *Midtown*, the local authority had long ceased to have an interest in the land or any control over the land in question when it came forward for redevelopment. We feel it would be useful if the parameters of this distinction were set out in more detail, albeit that in practice the safe course of action is clearly for local authorities to minute a fresh "appropriation" every time they wish to implement a new planning permission on the relevant land.
- 3.4.2 **Recommendation:** We suggest that, in light of the *Midtown* decision, Government guidance is issued stating that appropriation is necessary each and every time land is redeveloped by a local planning authority, should it wish to rely upon section 237 to overcome private rights and easements affecting that land.

### 3.5 Protection against public nuisance privately actionable

- 3.5.1 We note that currently section 237 does not provide protection against public nuisance which is privately actionable, i.e. it does not protect the local authority or developer against the interference with a person's right as a member of the public where that interference causes him particular damage. An example would be where statutorily authorised works cause a temporary or permanent obstruction to a highway giving access to a person's land.
- 3.5.2 This is at odds with the general position where land is compulsorily acquired and used for works authorised by other enactments (such as the Highways Act 1980, or a Transport and Works Act Order). In such cases, protection from injunction or damages is generally afforded to the party carrying out the works, and compensation is payable under section 10 CPA and the *McCarthy* rules. However, the drafting of the subsections (a) and (b) of section 237(1) and section 237(2) makes clear that section 237 only applies to nuisances caused by interference with private rights in land.
- 3.5.3 **Recommendation:** We believe that the Government should widen section 237 to give statutory immunity from public nuisance privately actionable caused in connection with development carried out under section 237. This could be effected by deleting the restriction in section 237(2) and expanding the ambit of limbs (a) and (b) in section 237(1) to include nuisance. This would bring the

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<sup>10</sup> [1996] 2 EGLR 128

<sup>11</sup> [2005] EWHC 33

statutory protection under section 237 into line with the general position at law where land is compulsorily acquired and used for works under other enactments.

3.6 Clarification that "retention" is covered by section 237

3.6.1 While the omission of "use" from the ambit of section 237(1) is the subject of this consultation, we would like to suggest that "retention" of the building or work is also added to the list of protected activities in the section.

3.6.2 Currently, it is unclear whether "maintenance" should be interpreted to mean the indefinite "retention" of the development once constructed, or to mean "repairs" thereto after construction, or both. We believe that case law has correctly interpreted "maintenance" as having the former meaning. However, we feel that the inclusion of the word "retention" would make clear that where, for example, rights of light are breached during the construction phase but also (of course) continue to be breached by the buildings continued existence after practical completion, an injunctive remedy would be prohibited.

3.6.3 **Recommendation:** We suggest that "retention" of the building or work is added to the list of protected activities in section 237(1).

3.7 Remedy unavailable for breach of user covenants etc on land acquired and used under other enactments

3.7.1 Though not directly relevant to this consultation, we would like to draw CLG's attention to the fact that Judge Rich's narrow interpretation of section 10 CPA in *Thames Water* will (if followed) potentially prejudice the right to compensation of owners of user covenants breached by the use of land compulsorily acquired under enactments other than the TCPA.

3.7.2 Section 10 CPA gives a right to compensation to persons whose third party rights are affected by statutory works on land compulsorily acquired under any enactment (for example, land compulsorily acquired under the Highway Act 1980 or Electricity Act 1989). Judge Rich held in *Thames Water*, on a strict construction of section 10 CPA, that compensation is not payable for the diminution in value of land arising from breach of user covenants, since these covenants do not relate to the "execution of works" to which section 10 CPA is expressed to apply.

3.7.3 Potentially, persons with user covenants breached by the use of statutory works on land compulsorily acquired under other Acts will therefore now be denied the right to either (i) any compensation under section 10, or (ii) the right to an injunction (or damages). Fortunately for the promoters of such statutory works, most empowering Acts (unlike section 237) authorise the "use" of the statutory works as well as their construction. This statutory authorisation of use denies the affected party the right to obtain an injunction or damages. However, if Judge Rich's interpretation of section 10 CPA is followed, affected parties will not be able to obtain compensation under section 10 CPA because the interference does not stem from the "execution of the works."

3.7.4 This may be a position which CLG considers to be inequitable. It is also possible that in the absence of the existence of statutory compensation, judges may deem that damages should be awarded. This could be expensive for the authorities



using such works. It may therefore be that an express provision should be inserted into the CPA specifying the basis on which compensation is payable for interference with rights in land arising from use authorised by statute.

3.7.5 **Recommendation:** We believe that the Government should also amend section 10 CPA to provide for compensation to be payable for interference with rights in land arising from the use of works, not merely from their execution.

3.8 Suggested revised drafting for section 237

Should CLG wish us to provide suggested drafting to address some or all of the matters set out in this response, we would be pleased to do so.

**City of London Law Society**  
**Planning and Environmental Law Committee**

22 October 2007