

Number: WG23294



Llywodraeth Cymru
Welsh Government

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Consultation Document

Proposed amendments to legislation on the power to override easements and other rights

Date of issue: **6 October 2014**

Action required: Responses by **16 January 2015**

Overview

This consultation seeks views on the proposal to amend, by order, the following provisions which provide powers enabling relevant organisations to override easements and other rights over land in their ownership:

- (i) Paragraph 6 of Schedule 28 of the Local Government, Planning and Land Act 1980;
- (ii) Section 19 of the New Towns Act 1981;
- (iii) Paragraph 5 of Schedule 10 of the Housing Act 1988; and
- (iv) Section 237 of the Town and Country Planning Act 1990.

How to respond

The closing date for responses is **16 January 2015**. You can respond in any of the following ways:

Email:

Please complete the consultation response form (at Annex 1) and send it to:

planconsultations-h@wales.gsi.gov.uk

(Please include 'Consultation on Overriding Easements and Other Rights - WG23294' in the subject line)

Post:

Please complete the consultation response form (at Annex 1) and send it to the address provided under the 'Contact Details' section

Further information and related documents

Large print, Braille and alternative language versions of this document are available on request.

The proposed amendments to the legislation are set out at section 5 of this document.

Contact details

For further information:

Consultation WG23294
Decisions Branch
Planning Division
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

email: planconsultations-h@wales.gsi.gov.uk

(Please include 'Consultation on Overriding Easements and Other Rights - WG23294' in the subject line).

If you have any queries regarding this consultation, please use the e-mail address above, or phone 029 2082 5181

Data protection

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of

the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government.

This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

1. The Foreword

- 1.1 We are considering amending, by order, the provisions contained in the following Acts which provide powers to relevant organisations¹ enabling them to override easements and other rights over land in their ownership to improve the implementation of regeneration projects by removing an impediment to the use of the land:
- (i) Paragraph 6 of Schedule 28 to the Local Government, Planning and Land Act 1980;
 - (ii) Section 19 of the New Towns Act 1981;
 - iii) Paragraph 5 of Schedule 10 to the Housing Act 1988: and
 - iv) Section 237 of the Town and Country Planning Act 1990.
- 1.2 The Welsh Ministers are given the authority to amend these Acts by order through the provision set out in section 203 of the Planning Act 2008 which would apply an 'England only' provision in relation to Wales.

2. Background to the Statutory Provision

- 2.1 On some land there are restrictive covenants and easements or other rights which affect land owned by other people. When development on land held for planning purposes takes place (often following compulsory purchase) it is often necessary to override these rights and allow appropriate compensation for the owners of the rights.
- 2.2 The provisions of the Acts listed at paragraph 1.1 above confer an immunity to carry out building operations on land acquired for planning purposes. It empowers the relevant organisation to interfere with easements and other rights where land has been acquired or appropriated for planning purposes provided that development is in accordance with planning permission and compensation is paid. The easement might, for example, permit access over a site that is to be developed from neighbouring land or the land to be developed could be subject to a restrictive covenant that prevents the land from being used for a certain purpose.

¹ Urban development corporation/ local highway authority/ development corporation/ housing action trust/ local authority

3. Main Issues

- 3.1 Under the provisions of the Acts listed above at paragraph 1.1, which are currently in force in Wales, where the relevant organisation has acquired or appropriated land “for planning purposes”, easements and other rights can be overridden to enable building or other works to be erected, constructed, carried out or maintained on that land i.e. during the construction phase of development and not permanently for the new use of the site. The relevant organisation is expressly (as distinct from impliedly) authorised to infringe these rights
- 3.2 This was confirmed following the decision in *Thames Water Utilities v. Oxford City Council*, [1999] 1 E.G.L.R. 167 where it was held that the express words in section 237 of the Town and Country Planning Act 1990 (“the 1990 Act”) did not justify impliedly overriding such rights by a material change of use as distinct from the carrying out of works etc. as stated in section 237; yet planning permission is needed in either case.
- 3.3 As the provisions of the 1990 Act are those which were the subject of the *Thames Water Utilities v. Oxford City Council* decision, it is therefore considered that easements and other rights would only be overridden during the erection, construction or carrying out or maintenance of any building or works and not permanently for the new use of the land acquired through the grant of planning permission. The existing choice of words given expressly in section 237 of the Act has the unfortunate result of preventing what might have been thought to be the presumed purpose. This causes doubt, uncertainty and inevitable delay as well as considerable scope for expensive litigation in this area if the matter is not resolved.
- 3.4 The *Thames Water Utilities v Oxford City Council* decision highlighted a limitation on the statutory powers contained in section 237 of the 1990 Act which appear to be unsatisfactory and section 237 of the 1990 Act in Wales is currently limited in its effect. As the provisions in the Acts listed above in points (i) – (iii) at paragraph 1.1, which are currently in force in Wales, are similar to the provisions of section 237 of the 1990 Act, the subject of *Thames Water Utilities v. Oxford City Council*, it is considered the decision may equally apply to them.
- 3.5 Compulsory purchase powers can lend themselves to the timely delivery of regeneration projects, and can be used to improve blight in communities and assist with the re-commencement of stalled regeneration projects. The fact that easements and other rights may only be overridden during the erection, construction or carrying out or maintenance of any building or works phase, and not permanently for the new use of the land, is a threat to the ongoing effectiveness and consistency of the use of compulsory purchase powers in the bringing forward of sites for development.

4. Planning Act 2008 and the Independent Advisory Group (IAG) Report

Planning Act 2008

- 4.1 In 2004 the Law Commission² recommended that the UK Government amend the legislation relating to the statutory objective underlying section 237 of the 1990 Act. This recommendation was based on the uncertainty created by the *Thames Water Utilities v. Oxford City Council* decision, where it was held that an express power to *erect* buildings in breach of a private right (under the 1990 Act, section 237) did not necessarily confer power to *use* the building once erected. The court held that although section 237 of the 1990 Act permitted temporary non-compliance with the covenant for the duration of the works of construction, it did not authorise the subsequent use of the land in breach of covenant. There was a strong view among respondents to the Law Commission's consultation paper '*Towards a Compulsory Purchase Code: (2) Procedure*'³ that amending the legislation was urgently required.
- 4.2 In 2007 the UK Government's Department for Communities and Local Government consulted upon this issue and proposed an amendment to section 237 of the 1990 Act⁴ which was to be included in a Planning Bill. In its response to the consultation⁵, the UK Government confirmed a provision would be included in the Planning Bill to amend section 237 of the 1990 Act so that the use of any land in England, which had been acquired or appropriated by a local authority for planning purposes, would be authorised if in accordance with planning permission. The UK Government also confirmed in its response to the consultation that it intended to bring forward amendments to enable the Welsh Government to apply the relevant provisions in Wales in a similar way.
- 4.3 The Planning Act 2008 received Royal Assent on 26 November 2008 and the provisions of section 194(1) and Schedule 9 to that Act came into force in England on 6 April 2009 which clarified the scope of the powers to override covenants restricting the use of land in England that had arisen due to the *Thames Water Utilities v. Oxford City Council* decision.

² The Law Commission (December 2003) *Towards A Compulsory Purchase Code: (2) Procedure (Final Report)*

³ The Law Commission (November 2002) *Towards A Compulsory Purchase Code: (2) Procedure – A Consultative Report* (Consultation Paper No 169)

⁴ Department for Communities and Local Government (August 2007) *Consultation - Overriding Easements and Other Rights: Possible Amendment to Section 237 Town and Country Planning Act 1990*

⁵ Department for Communities and Local Government (June 2008) *Overriding easements and other rights: Possible amendment to Section 237 Town and Country Planning Act 1990 – Response to Consultation*

- 4.4 Schedule 9 to the Planning Act 2008 introduced powers that the use of land in England which has been acquired or appropriated by a relevant organisation for planning purposes is authorised if it is in accordance with planning permission.

Independent Advisory Group (IAG) Report

- 4.5 In taking forward the Welsh Government's commitment to the planning reform agenda in Wales, and to inform the introduction of the Planning (Wales) Bill, an Independent Advisory Group (IAG) was established by the then Minister for Environment and Sustainable Development to review the delivery of the planning system in Wales as part of the evidence base for the draft Planning (Wales) Bill and Consultation Paper. This work led to the publication of a report by the IAG ("The IAG Report") in 2012⁶ which contained detailed recommendations to the Welsh Government.
- 4.6 In relation to planning and compulsory purchase, the IAG reported that the law of compulsory purchase and compensation is closely linked to the wider system of land law, which is not a devolved function, and that there is a strong argument that the law in Wales on compulsory purchase should remain the same as in England. Schedule 9 to the Planning Act 2008, which clarifies the scope of the powers to override covenants restricting the use of land in England that had arisen due to the *Thames Water Utilities v. Oxford City Council* decision, amends the provisions of the Acts listed at paragraph 1.1 above on England only basis. This change in legislation has yet to be made in Wales and the IAG Report states that, in relation to section 237 of the 1990 Act, this has resulted in gaps opening up between the law in Wales and England, with potentially unpredictable consequences. Furthermore, that there is a technical but significant difference affecting disposals of development sites in Wales that have been acquired by compulsory purchase.
- 4.7 In the interests of maintaining the coherence of the system of compulsory acquisition and compensation, IAG Recommendation 97 states that, with specific reference to section 237 of the 1990 Act, the power to override easements and other rights should be brought in line with England through applying the powers under section 203(1) of the Planning Act 2008 as soon as practicable.

⁶ Independent Advisory Group (IAG) (2012) *Towards a Welsh Planning Act: Ensuring the Planning System Delivers – Report to the Welsh Government by the Independent Advisory Group*

5. The Proposed Solution

- 5.1 We propose to make an order under section 203 of the Planning Act 2008 which will have an effect which corresponds to section 194(1) of, and Schedule 9, to that Act.
- 5.2 This will introduce provisions in Wales, equivalent to those introduced under section 194(1) and schedule 9 of the Planning Act 2008 which:
 - **Introduces sub-paragraph 1A of paragraph 6 of Schedule 28 to the Local Government, Planning and Land Act 1980;**
 - **Introduces sub-paragraph 1A of Section 19 of the New Towns Act 1981;**
 - **Introduces sub-paragraph 1A of paragraph 5 of Schedule 10 to the Housing Act 1988; and**
 - **Introduces sub-paragraph 1A of section 237 of the Town and Country Planning Act 1990.**
- 5.3 These will apply 'England-only' provisions in Wales which will amend the provisions of the Acts listed above to make it clear that they apply to any permitted use of land as well as the erection, construction or carrying out or maintenance of any building or work on land. This would allow the subsequent use of the land to benefit from the overriding of the easements and other rights on a permanent basis. Compensation for overriding rights restricting the use of land will be based on the depreciation in the value of the land which has the benefit of the restrictive covenants.