RIGHTS OF LIGHT and

SECTION 203 of the HOUSING AND PLANNING ACT 2016

Neil Cameron QC

1. Following the judgment in ***HKRUK II (CHC) Limited v. Heaney [2010] EWHC 2245 (Ch)*** ("Heaney") developers and funders have become increasingly aware of the risk that the threat of an injunction poses when a proposed development infringes rights to light. Developers who wish to avoid the threat of an injunction began to regard section 237 of the Town and Country Planning Act 1990 ("TCPA 1990") as the solution to their problems.
2. Although section 237 authorises infringements of rights in relation to land which is or has been held by a local authority, it is often those who wish to develop land, and those who fund such development, who are most interested in the authorisation which it can confer.
3. In July 2016 section 237 of the TCPA 1990 was replaced by section 203 of the Housing and Planning Act 2016 ("HPA 2016"). The intention behind the legislation was to extend the powers to bodies other than local planning authorities and regeneration agencies.
4. In this paper I will consider how use can be made of section 203 to facilitate development.
5. Section 203 authorises interference with rights or interests other than rights of light. For the purposes of this paper I shall concentrate on rights of light.

Section 203

6. In order to understand the purpose of section 203, I will first consider its predecessor, section 237 of the TCPA 1990.
7. The purpose underlying s. 237 of the 1990 Act was described by Dyson J (as he then was) in ***R v City of London Corporation ex parte Mystery of the Barbers of London (1997) 73 P&CR 59***[1] in the following terms:

[1] At paragraph 64

"The statutory objective which underlies section 237 of the 1990 Act is that, provided that work is done in accordance with planning permission, and subject to payment of compensation, a local authority should be permitted to develop its land in the manner in which it, acting bona fide, considers will best serve the public interest. To that end, it is recognised that a local authority should be permitted to interfere with third party rights. A balance has to be struck between giving local authorities freedom to develop land held for planning purposes, and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237(1) is the result of the balancing exercise. Parliament has decided to give local authorities the right to develop their land and to interfere with third party rights, but on the basis that work is done in accordance with planning permission (with the protection inherent in the planning process), and that third parties affected are entitled to compensation under section 237(4)."

8. As to the extent to which those deriving title under a local authority are protected, Dyson J added (66):

"I do not have to consider in this case whether, as a matter of construction, there are any, and if so what, limits to the application of section 237(1) to those who derive title under the acquiring or appropriating local authority. My provisional view is that, in order to attract the immunity conferred by the subsection, the work done (whether by the local authority or the person deriving title under it) must be related in some way to the planning purposes for which the land was acquired. That would explain why, even in cases where the work is done by a person deriving title under a local authority, Parliament has decided that the local authority should have a contingent liability to pay compensation."

9. Dyson J's provisional view was expressly upheld by Peter Smith J in ***Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch)*** [2]. The restriction imposed by the courts has now been given statutory force by the provisions of section 203(2)(d), 203(3)(d), 203(5)(d), and 203(6)(d) of the HPA 2016.

10. S. 237 was not limited to development by local authorities, but also applied to persons deriving title under local authorities. As a general proposition, a person derives title from another if s/he acquires some inferior estate or interest in the relevant land which is carved out of the other's own estate or interest.

[2] At paragraph 46

11. Peter Smith J observed in ***Midtown*** that s. 237(1) was available to successors in title (para 34): thus the purchaser of a freehold estate or the assignee of a leasehold estate formerly held by the authority was a person 'deriving title under' the authority, and was capable of being within the scope of s. 237(1).

12. Section 237 provided that the statutory override applied whether the works were carried out by the local authority or by a person deriving title under them. Similar words (deriving title under it) appeared in in paragraph 7 of Schedule 20 to the Local Government Planning and Land Act 1980[3]. The provisions in the 1980 Act were considered in ***Ford Camber v. Deanminster***[4]. The Court held that when A sold land to B (the public authority) and B then sold it back to A, A derived title under B, as there was a chain of title.

13. Paragraph 1(1) of Schedule 3 to the Housing and Regeneration Act 2008 ("the 2008 Act") used the words "The HCA or any other person…". S.203 adopts a similar approach to that taken in the 2008 Act. Unlike in s.237 of the 1990 Act, there is no reference to those deriving title from an authority being able to use the powers. The powers can be exercised by "a person". Paragraph 571 of the Explanatory Notes to the HPA 2016 states:

    Section 203 enables a person to interfere with easements and other rights when undertaking building or maintenance works on, or using, land which has been vested in or acquired by a "specified authority". The reference to "a person" would include a successor in title to the "specified authority".

14. S. 237 of the 1990 Act[5] and Schedule 3 to the 2008 Act[6] were repealed by Schedule 19 to the HPA 2016, and replaced by s. 203.

15. S. 203 of the HPA 2016 provides as follows:

[3] Paragraph 7(1) provided: "(1) The erection, construction or carrying out, or maintenance, of any building or work on land which has been acquired by the Authority under section 104 above, whether done by the Authority or by a person deriving title under it, is authorised by virtue of this paragraph if it is done in accordance with planning permission notwithstanding that it involves interference with an interest or right to which this paragraph applies, or involves a breach of a restriction as to the user of land arising by virtue of a contract."

[4] [2006] EWHC 1961 (Ch) at paragraph 57, upheld on appeal [2007] EWCA Civ 458

[5] Paragraph 9 of Schedule 19 to the HPA 2016

[6] Paragraph 16 of Schedule 19 to the HPA 2016

203 Power to override easements and other rights

(1) A person may carry out building or maintenance work to which this subsection applies even if it involves—
(a) interfering with a relevant right or interest, or
(b) breaching a restriction as to the user of land arising by virtue of a contract.
(2) Subsection (1) applies to building or maintenance work where—
(a) there is planning consent for the building or maintenance work,
(b) the work is carried out on land that has at any time on or after [the relevant day] [1] —
(i) become vested in or acquired by a specified authority [or a specified company acting on behalf of a specified authority] [2] , or
(ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990,
(c) the authority could acquire the land compulsorily for the purposes of the building or maintenance work, and
(d) the building or maintenance work is for purposes related to the purposes for which the land was vested, acquired or appropriated as mentioned in paragraph (b).
(3) Subsection (1) also applies to building or maintenance work where—
(a) there is planning consent for the building or maintenance work,
(b) the work is carried out on other qualifying land,
(c) the qualifying authority in relation to the land could acquire the land compulsorily for the purposes of the building or maintenance work, and
(d) the building or maintenance work is for purposes related to the purposes for which the land was vested in, or acquired or appropriated by, the qualifying authority in relation to the land.
(4) A person may use land in a case to which this subsection applies even if the use involves—
(a) interfering with a relevant right or interest, or
(b) breaching a restriction as to the user of land arising by virtue of a contract.
(5) Subsection (4) applies to the use of land in a case where—
(a) there is planning consent for that use of the land,
(b) the land has at any time on or after [the relevant day] [3] —
(i) become vested in or acquired by a specified authority [or a specified company acting on behalf of a specified authority] [4] , or
(ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990,
(c) the authority could acquire the land compulsorily for the purposes of erecting or constructing any building, or carrying out any works, for that use, and
(d) the use is for purposes related to the purposes for which the land was vested, acquired or appropriated as mentioned in paragraph (b).
(6) Subsection (4) also applies to the use of land in a case where—
(a) there is planning consent for that use of the land,
(b) the land is other qualifying land, and
(c) the qualifying authority in relation to the land could acquire the land compulsorily for the purposes of erecting or constructing any building, or carrying out any works, for that use, and
(d) the use is for purposes related to the purposes for which the land was vested in, or acquired or appropriated by, the qualifying authority in relation to the land.
(7) Land currently owned by a specified authority is to be treated for the purposes of subsection (2)(c) or (5)(c) as if it were not currently owned by the authority.
(8) Land currently owned by a qualifying authority is to be treated for the purposes of subsection (3)(c) or (6)(c) as if it were not currently owned by the authority.
(9) Nothing in this section authorises an interference with—
(a) a right of way on, under or over land that is a protected right, or
(b) a right of laying down, erecting, continuing or maintaining apparatus on, under or over land if it is a protected right.
(10) Nothing in this section authorises—

(a) an interference with a relevant right or interest annexed to land belonging to the National Trust which is held by the National Trust inalienably, or
(b) a breach of a restriction as to the user of land which does not belong to the National Trust—
(i) arising by virtue of a contract to which the National Trust is a party, or
(ii) benefiting land which does belong to the National Trust.
(11) For the purposes of subsection (10)—
(a) "National Trust" means the National Trust for Places of Historic Interest or Natural Beauty incorporated by the National Trust Act 1907, and
(b) land is held by the National Trust "inalienably" if it is inalienable under section 21 of the National Trust Act 1907 or section 8 of the National Trust Act 1939.

16. The condition created by s. 203(2)(d), 203(3)(d), 203(5)(d), and 203(6)(d) has no analogue in the language of s. 237 of the 1990 Act. It reflects, however, a limitation on the s. 237 power which was imposed by the court in *Midtown* (at para 47). In that sense s. 203(2)(d) does not amount to a change in the law, but a codification of it.

17. S. 204 of the HPA 2016 sets out the provisions governing the payment of compensation where rights are overridden in reliance on s. 203:

204 Compensation for overridden easements etc

(1) A person is liable to pay compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by section 203.

(2) The compensation is to be calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965.

(3) Where a person other than a specified or qualifying authority is liable to pay compensation under this section but has not paid—

(a) the liability is enforceable against the authority, but

(b) the authority may recover from that person any amount it pays out.

(4) The authority against which a liability is enforceable by virtue of subsection (3)(a) is—

(a) where the land to which the compensation relates was vested in or acquired by a company through which the Greater London Authority exercises or has exercised functions in relation to housing or regeneration, the Greater London Authority,

(b) where the land was vested in or acquired by a company through which Transport for London exercises or has exercised any of its functions, Transport for London, or

(c) in all other cases, the specified or qualifying authority in which the land was vested, or by which the land was acquired or appropriated.

(5) Any dispute about compensation payable under this section may be referred to and determined by the Upper Tribunal.

18. The phrase "a person", as it appears in s. 204(1), is not defined. In my view, however, it is clear that this is a reference to the person carrying out the building and maintenance works for which the s. 203 override was required in the first place (c.f. s. 203(1)).

19. S. 205 contains a number of definitions for terms contained in s. 203. "Building and maintenance work" means the erection, construction, carrying out or maintenance of any building or work. "Planning consent" encompasses both planning permissions granted under the 1990 Act and development consents granted under the Planning Act 2008. "Specified authority" has a broad definition[7]. This definition is wider than that contained in the legislative predecessors to s. 203, and indeed it was the widening of this definition which appears to have been the primary policy objective of s. 203 (see below). A 'body established by or under an Act' covers a wide class of bodies, and includes such organisations as the Homes and Communities Agency[8].

20. The definition of "other qualifying land" in s.205 includes land acquired by a variety of public sector bodies:

> *"other qualifying land" means land in England and Wales that has at any time before [13 July 2016] 1 been—*
> *(a) acquired by the National Assembly for Wales or the Welsh Ministers under section 21A of the Welsh Development Agency Act 1975;*
> *(b) vested in or acquired by an urban development corporation or a local highway authority for the purposes of Part 16 of the Local Government, Planning and Land Act 1980;*
> *(c) acquired by a development corporation or a local highway authority for the purposes of the New Towns Act 1981;*
> *(d) vested in or acquired by a housing action trust for the purposes of Part 3 of the Housing Act 1988;*
> *(e) acquired or appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990;*
> *(f) vested in or acquired by the Homes and Communities Agency, apart from land the freehold interest in which was disposed of by the Agency before 12 April 2015;*
> *(g) vested in or acquired by the Greater London Authority for the purposes of housing or regeneration, [or vested in or acquired by a company or body through which the Greater London Authority exercises functions in relation to housing or regeneration,] 2 apart from land the freehold interest in which was disposed of before 12 April 2015—*
> *(i) by the Authority, other than to a company or body through which it exercises functions in relation to housing or regeneration, or*
> *(ii) by such a company or body;*

[7] "specified authority" means—
(a) a Minister of the Crown or the Welsh Ministers or a government department,
(b) a local authority as defined by section 7 of the Acquisition of Land Act 1981,
(c) a body established by or under an Act,
(d) a body established by or under an Act or Measure of the National Assembly for Wales, or
(e) a statutory undertaker;

[8] The HCA was established by section 1 of the Housing and Regeneration Act 2008

(h) vested in or acquired by a Mayoral development corporation (established under section 198(2) of the Localism Act 2011), apart from land the freehold interest in which was disposed of by the corporation before 12 April 2015;

21. The HPA 2016 does not contain a definition of "land". S. 5 of the Interpretation Act 1978 ("the Interpretation Act"), however, provides that unless the contrary intention appears, any Act is to be construed in accordance with Schedule 1 thereto. Schedule 1 defines land as follows:

""Land" includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land."

22. The language of s. 203 differs, in a number of respects, from section 237 of the TCPA 1990 (and from other preceding provisions such as Part 1 of Schedule 3 to the Housing and Regeneration Act 2008). It is unclear from the wording of the statute, however, to what extent Parliament intended to alter the substantive law as contained in s. 237 and its associated jurisprudence.

23. The following principles govern the interpretation of statutes in such a situation:

    a. The general approach to statutory interpretation is described in the latest (sixth) edition of "Bennion on Statutory Interpretation" in the following terms (Section 208):

    "*In the construction of an enactment, due attention should be paid to relevant aspects of the state of the law before the Act was passed, the history of its passing, and the events subsequent to its passing.*"

    b. In determining the mischief which a statutory provision is intended to remedy, it is necessary to consider the previous state of the law, the defects said to exist in that law, and the factual context which caused those defects to be remedied by legislation: Bennion s. 209.

c. Where a particular term is used in a statute, Parliament will (subject to the circumstances) generally be taken to have intended that word to carry the meaning which it possessed under the preceding legislation: see for example ***Lowsley v Forbes***[9].

d. Where an enactment is either a consolidation or a codification of the previous law (with or without amendments), the meaning of those parts of the enactment which do not amend the law are to be interpreted by reference to the jurisprudence on the preceding statutory provisions: Bennion ss. 211 and 212.

e. These principles apply to provisions in principal Acts which seek to bring a new approach to a topic whilst retaining aspects of the old law: in such a case the parts of the principal Act which reproduce the old statutory wording are to be treated as if they were contained in a consolidating statute (Bennion p. 557).

f. Where Parliament has taken the opportunity to seek to improve the drafting of the previous provisions in the course of enactment, or to import into the statute itself aspects of the previous law which emerged from judicial decisions (as is clearly the case for s. 203(2)(d) of the HPA 2016, for instance), then the statute should be construed as it stands, albeit that the legislative history is relevant to determining the mischief which Parliament sought to cure. See for example ***Bishopsgate Investments Ltd (in Provisional Liquidation) v Maxwell***[10], in which Dillon LJ said of the insolvency legislation (21):

"It is common knowledge that the Insolvency Acts 1985 and 1986 were passed in the light of the Report of the Review Committee on Insolvency Law and Practice … but Parliament did not accept all the recommendations of that report. In these circumstances, there can be no doubt that the primary task of the court is to construe the Insolvency Act 1986 as it stands, without regard to the legislative histories of its various components: see Farrell v. Alexander [1977] A.C. 59 . Even so, I have found it essential in the present case to consider the legislative antecedents of the Act of 1986, and the cases decided under them, partly to see how certain provisions of the Act of 1986 can, in the light of previous decisions under the earlier statutes,

[9] [1999] AC 329 per Lord Lloyd of Berwick at 340
[10] [1993] Ch 1

be expected to fit together, but even more to see what the mischief was in the old law which the Act of 1986 was intended to cure."

g. Where the words actually used by Parliament in a statute give rise to an absurdity, the courts may proceed on the basis that there is an error in the drafting of the statute, and "correct" that error through the process of interpretation: see for example ***Camden LBC v Post Office***[11].

h. Where a statutory provision is ambiguous, and where in the course of its parliamentary passage there was a clear statement made by a minister or by a parliamentarian on a minister's behalf which discloses the mischief at which the statute is aimed or the legislative intention underlying the words used, that ministerial statement is admissible as evidence of the proper interpretation of the statute: Bennion s. 217, expressing the *ratio* of the well-known rule in ***Pepper v Hart***[12].

i. Where a statute is preceded by a report of a committee set up to investigate the relevant mischief and to propose a remedy, that report is admissible as evidence of the parliamentary intention underlying the statute: Bennion s. 216.

j. Where a statute is ambiguous, the court will not usually prefer an interpretation which would give rise to administrative inconvenience or uncertainty: ***Shannon Realties Ltd v Ville de St Michel***[13].

24. In the case of the HPA 2016, there are a number of statements in the legislative history which indicate the intention underlying s. 203:

a. The HPA 2016 was preceded by the Government's "Technical Consultation on Improvements to Compulsory Purchase Processes" (March 2015). The consultation paper indicated that the Government wished to modify the existing law to extend override powers to a wider range of acquiring authorities (such as statutory undertakers) which did not already possess them (para 114). The consultation paper

[11] [1977] 1 WLR 892 per Lord Denning MR at 897
[12] [1993] AC 593
[13] [1924] AC 185

noted that existing override powers "*generally pass to any purchasers of that land and are only exercisable where there is planning permission for the proposed development or use of the land*" (para 111). There is no suggestion of an intention to modify this rule. There was also a proposal to alter the basis on which compensation is calculated.

b. The Government response to the technical consultation (October 2015) indicated that the Government would proceed with the proposed extension to the scope of override powers (para 92):

"The government will take forward the proposal to extend the existing statutory power to override easements and restrictive covenants to all acquiring authorities. The existing power, which is only available to local planning authorities and regeneration bodies, already includes protection for statutory undertakers and requires the development to have planning permission. This will be widened to encompass equivalents to planning permission, such as development consent orders and Transport and Works Act Orders."

The response indicated that the compensation provisions would not be changed.

c. During the public bill committee stage in the House of Commons, the minister, Mr Marcus Jones, introduced a number of amendments to cl. 137 (which became s. 203 on enactment). Those amendments are immaterial for present purposes; the minster's introductory statement, however, is of considerable assistance (Hansard 8 December 2015, col 635, emphases added):

"This group of amendments contains mainly transitional provisions and drafting improvements. With your permission, Mr Gray, before I explain what they all do I will set out the purpose of clauses 137 to 139 to put them into context.

Regeneration and redevelopment projects will, almost by definition, take place on previously developed land. To ensure that there are no impediments to the proposed regeneration, it may be necessary to deal with restrictive covenants and easements that affect the land acquired. The Law Commission has found that there are easements over at least 65% of registered freehold titles. Those third-party interests are typically rights to allow the

underground services—for example, water, gas, electricity and telecommunications—of one property to pass beneath the land of neighbouring properties. There are also rights of light, rights of way and covenants restricting development to certain uses or density.

The statutory power to override such easements and covenants for both the construction and use of development is currently restricted to local planning authorities and regeneration agencies such as the Homes and Communities Agency and urban development corporations. New town development corporations and housing action trusts also have that power, but there are none in existence at present. One important aspect of the power is that it devolves to subsequent purchasers of the land without the local authority or agency having to do the development itself. It is therefore an important feature of town centre redevelopment schemes where local planning authorities acquire land and sell it on to their developer partner.

Not all development schemes are undertaken on land held for planning purposes or acquired by regeneration agencies. The Government have therefore decided to extend the power to override the easements and other rights to all bodies with compulsory purchase powers. Clause 137 contains that power, which will be available in respect of land acquired by or vested in a specified authority, as defined by subsection (7), when the provision comes into force."

d. Later in the same debate, in response to a question about the compensatory basis of the override power, the minister stated that the relevant provisions "*are designed to extend the existing powers to other bodies with compulsory purchase powers, not to amend them*" (col 366).

25. In my view, it is reasonably clear, therefore, that whilst the drafting of s. 203 of the HPA 2016 differs from that of s. 237 of the 1990 Act and Part 1 of Schedule 3 to the 2008 Act, Parliament intended to make only a limited change to the substantive law, namely the extension of statutory override powers to a wider range of acquiring authorities. There appears to have been no intention to alter the basis on which those powers could be utilised by acquiring authorities, nor to how those powers could be utilised by private developers of land.

How can Section 203 be used?

26. There are two main issues to consider, namely the steps required to be taken to engage section 203, and the effect of section 203 once those steps have been taken.

The steps required to be taken to engage s.203

27. Section 203 operates to override property rights, whilst providing for compensation to be paid. The effect of acquisition of land by a specified authority or appropriation by a local authority for planning purposes (and fulfilment of the other conditions) will be to override rights. In some cases the sole or dominant purpose of acquisition or appropriation will be to override rights. The effect may be said to be similar to that of compulsory acquisition.

Appropriation

28. A local authority which owns land can use its power (under section 122 of the Local Government Act 1972 ("LGA 1972")[14]) to appropriate land for planning purposes. It is for the local authority to determine whether the land is no longer required for the purpose for which it is held.
29. The meaning of the words "not required"[15], which appeared in the predecessor to section 122 LGA 1972, were considered by Russell LJ in ***Dowty Boulton Paul v. Wolverhampton Corporation [1976] 1 Ch 13*** who stated at page 26:

> *"I would construe "not required" in the section as meaning "not needed in the public interest of the locality" for the original purpose: and it appears that Maugham J. so construed them. Now that question, it is plain to me, involves matters both of degree and of comparative needs, as to which there can be no question but that the local authority is better qualified than the court to judge, assuming it to acting bona fide and not upon a view that no reasonable local authority could possibly take."*

[14] Section 122(1) provides: "(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned."
[15] These words appeared in section 163(1) of the Local Government Act 1933

30. In ***R v. Leeds City Council ex parte Leeds Industrial Co-operative Society Limited (1997) 73 P & CR 70*** McCullough J considered the approach to be taken by a local authority when considering whether to appropriate land in order to engage section 237. At page 77 he stated:

> *"I do not find the concept of "appropriation" easy to grasp, since land which is "appropriated" is already in the council's ownership. More must surely be involved than a mere decision that land held for one purpose will henceforth be held for another. Otherwise, for example, if an authority decided to build houses on a small part of land it was holding for future light industrial development, the change of purpose would involve, indeed require, an "appropriation", and, as a consequence of section 237, could materially effect the rights of any interested third parties. It seems to me that, at least in a case where third parties are known to have rights, an authority cannot properly embark on such a course unless it has good reason to believe that interference with such rights is necessary. I regard it as significant that a single provision in the 1990 Act, section 226, empowers an authority both to acquire land compulsorily and to "appropriate" its own land. I see "appropriation", therefore, as the equivalent of compulsory purchase of a council's own land, and the same degree of "requirement" or "necessity" should apply in each case."*

31. McCullough J suggested that appropriation is the equivalent of compulsory purchase. If the same degree of "requirement" or "necessity" is to apply, the approach taken when confirming compulsory purchase orders will have to be considered.
32. The Human Rights Act 1998 has been enacted since McCullough J's decision in the ***Leeds*** case. Article 1 Protocol 1 rights will be engaged, and if interference with rights of light affects a person's home, Article 8 rights may also be engaged.

Acquisition

33. In my view similar considerations also apply when a specified authority decides to acquire land in order to engage the provisions of section 203.

The Criteria to be considered

34. In **Appendix 1** to this paper I have identified the main issues to be considered by a specified authority when it is considering whether to acquire or appropriate land. **Appendix 1** relates to acquisition or appropriation by a local planning authority. If the land is to be acquired by any other specified authority the criteria would have to be adjusted to reflect the statutory provision which empowered that authority to acquire land.

35. In order to given consideration to the question of whether agreement could be reached for the release of rights of light, and whether extinguishment of those rights is necessary in order to allow the development to proceed it would be advisable to establish whether those entitled to the benefit of the rights of light are prepared to relinquish those rights. I suggest that the approach to be taken should similar to that followed when considering whether to promote and to confirm a compulsory purchase order[16].
36. In the case of rights of light, before considering appropriation a local authority should identify all those with rights which would be infringed if the development contemplated was carried out, and seek to secure release of those rights by negotiation.

The effect of s.203

37. All the following conditions must be fulfilled in order for s.203 to be engaged:
    a. The land has become vested in or acquired by a specified authority on or after 13th July 2016 (or appropriated by a local authority for planning purposes) or the land is 'other qualifying land' as defined in s.205;
    b. There is planning consent for the building or maintenance work or use;
    c. The specified authority could acquire the land compulsorily for the purposes of building or maintenance work or for the purposes of erecting or constructing a building or carrying out any works, or for the use.
    d. The building or maintenance work or use is for purposes related to the purposes for which the land was vested in or acquired by the specified authority.
38. Condition (a)
    a. At any time on or after 13th July 2016, land is vested in or acquired by the specified authority or been appropriated by a local authority for planning purposes.
    b. At any time before 13th July 2016 the land was vested in or acquired by the qualifying authority.
    c. Whether this condition is satisfied is a matter of fact to be determined in each case.
    d. The land must have been vested in or acquired by the specified or qualifying authority, but there is no requirement that it is still owned by the specified or qualifying authority.
39. Condition (b)

[16] See the DCLG Guidance on the Compulsory Purchase Process (October 2015) – in particular, paragraph 2

a. Planning consent includes a planning permission granted under Part 3 of the 1990 Act, or section 293A, or a development consent under the Planning Act 2008[17].
b. The meaning and effect of the planning permission must be ascertained and a judgement made as to whether the building or maintenance work or use is permitted by the planning permission.
c. The principles to be applied in interpreting a planning permission are well established.
d. Those principles, as they apply in the case of an outline planning permission, were summarised by Keene J in ***R v. Ashford BC ex parte Shepway DC***[18]

> *(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see Slough Borough Council v. Secretary of State for the Environment (1995) J.P.L. 1128 , and Miller-Mead v. Minister of Housing and Local Government [1963] 2 Q.B. 196 .*
> *(2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see Slough Borough Council v. Secretary of State (ante); Wilson v. West Sussex County Council [1963] 2 Q.B. 764 ; and Slough Estates Limited v. Slough Borough Council [1971] A.C. 958 .*
> *(3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "… in accordance with the plans and application …" or "… on the terms of the application …," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see Wilson (ante); Slough Borough Council v. Secretary of State for the Environment (ante). ***20***
> *(4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see Staffordshire Moorlands District Council v. Cartwright (1992) J.P.L. 138 at 139; Slough Estates Limited v.*

[17] S. 205(1) of the HPA 2016, definition of 'planning consent'
[18] [1999] PLCR 12 at pages 19 to 20

Slough Borough Council (ante); Creighton Estates Limited v. London County Council , The Times, March 20, 1958.

(5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see Slough Borough Council v. Secretary of State (ante); Co-operative Retail Services v. Taff-Ely Borough Council (1979) 39 P. & C.R. 223 affirmed (1981) 42 P. & C.R. 1.

e. In the case of a detailed planning permission regard is to be had to the approved drawings; they are as much part of the description of what has been permitted as the decision notice itself[19].

40. Condition (c)

a. In order to satisfy condition (c), at the time the building or maintenance work is carried out, or the use instituted, the specified or qualifying authority must be able to acquire the land compulsorily, in the sense that it could exercise its powers of compulsory acquisition in relation to the land.

b. If, at the time of the carrying out of the works/instituting the use, the authority owned the land, in determining whether the authority could exercise those powers, the land is to be treated as if it were not currently owned by the authority[20].

c. The meaning of "could acquire the land compulsorily" is not clear. It could be interpreted narrowly, limiting the requirement to the need to demonstrate that the authority has compulsory powers which would enable acquisition for the purpose required. Alternatively, those words could be interpreted more broadly, as meaning that not only must the existence of the compulsory powers be demonstrated but it must also be shown that such powers could be exercised having regard to the general requirements for compulsory purchase orders (compelling case in the public interest etc..).

d. I favour the narrower interpretation. There was no indication from those promoting the Housing and Planning Bill that they intended to change the basis upon which the powers could be exercised or to add another layer of complexity. The use of the word 'could' indicates that there is an ability or legal power, not that it must be demonstrated that a compulsory purchase order would necessarily be confirmed.

[19] *Barnett v. SSCLG [2009] EWCA Civ 476* at paragraphs 20 and 21

[20] S.203(7) and (8) of the HPA 2016

Indeed, if the land can be acquired without such an order, an order would be unnecessary and therefore unlikely to be confirmed.

e. I note that the editors of the Planning Encyclopedia take a similar view:

It seems unlikely that the intention of introducing the requirement was to impose such a high degree of complexity on the decision to exercise these powers—especially given the requirement is a new one and is intended to operate without the need for compulsory purchase. Indeed, if the more onerous interpretation were applied, this would detract from the utility of the provision. The requirement appears to have been imposed as a means of constraining which of the wide categories of "specified authorities" are able to use the powers in s.203 which, if correct, is another example of clumsy drafting.
Paragraph 573 of the Explanatory Notes states:
"The 'specified authority' must be able (i.e. have the necessary 'enabling powers' in legislation) to acquire the land compulsorily for the purpose of the building or maintenance work / the purpose of erecting or constructing any building, or carrying out any works, for the use."

The reference to "enabling powers" suggests that the narrower meaning of this requirement was intended.[21]

f. In my view, condition (c) would be satisfied if the authority had the power to acquire the land compulsorily. In the case of a local authority acquiring for planning purposes the relevant power is conferred by section 226(1) of the Town and Country Planning Act 1990. In my view it is not necessary to form a view as to whether or not the Secretary of State would authorise the acquisition; it is sufficient that the authority would have power to make an order.

41. Condition (d)

a. As noted above, condition (d) is a statutory codification of the previous position established by the case law.

b. The building or maintenance work or use does not have to be for the same purpose as that for which the land was vested or acquired, but for a related purpose, and as a result there is a degree of flexibility.

[21] Planning Encyclopedia paragraph 2-7060.5

Compensation

42. Section 204(2) of the HPA 2016 provides that compensation is to be calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965.
43. The obligation to pay compensation lies with a person who has derived title from a local authority who acquired or appropriated the land. However if that person fails to discharge that liability the liability becomes enforceable against the local authority (section 204(3)). As a result any authority which is prepared to acquire or appropriate land to engage section 203 to facilitate the carrying out of development should be careful to ensure that it does not result in the authority incurring liability to pay compensation for any infringement with rights of light.
44. The normal measure of compensation is the diminution in the value of the land held by the person entitled to the right which is interfered with.
45. In ***Ward v. Wychavon DC [1986] 2 EGLR 205*** the Lands Tribunal considered a claim for compensation under the provisions of section 127 of the Town and Country Planning Act 1971 (the predecessor to section 237 TCPA 1990). The right interfered with was a right of way along a farm track. The local authority provided an alternative right of way. The Lands Tribunal held that the value of the Claimant's interests in land had not been lowered by the new arrangements and as a result the claim for compensation failed.
46. In ***Holliday v. Breckland [2012] UKUT 193 (LC)***[22] the Lands Chamber rejected an argument that interference with an easement authorised by section 237 TCPA 1990 should be compensated based on ransom value:

> *16. Compensation, therefore, falls to be assessed, as it would be assessed under sections 63 (or 7) or 68 (or 10) in respect of injurious affection. It is not to be assessed as though the land had been taken. Where section 63 or section 7 applies the basis of compensation for injurious affection is the diminution in the value of the retained land of the claimant: see Hoveringham Gravels Ltd v Chiltern District Council (1978) 35 P & CR 295. Where section 68 or section 10 applies, again the basis of compensation for injurious affection is the diminution in the value of the retained land: see Argyle Motors Ltd v Birkenhead Corpn [1975] AC 99. Compensation for injurious affection under section 237(4) is to be assessed on the same basis. It cannot include ransom value.*

[22] At paragraph 16

47. In a rights of light case it is possible that betterment attributable to the new development could outweigh any diminution in value attributable to the interference with the right of light.

Issues

48. I have sought to consider a number of issues which might arise when considering the use of section 237 to authorise infringement of rights.

Challenge to a decision to acquire or appropriate

49. The decision to appropriate land for planning purposes is susceptible to judicial review, as is a decision to acquire land by agreement.
50. Such a decision can be challenged on normal public law principles.
51. If land is acquired compulsorily the order will be subject to objection and an inquiry will be held if statutory objections are maintained.
52. It will be necessary to consider whether a particular restriction to the local authority's power to appropriate land applies. For example, section 19(2) of the Housing Act 1985 provides that where a local authority have acquired or appropriated land for housing purposes they shall not, without the consent of the Secretary of State, appropriate any part of the land consisting of a house or any part of a house for any other purpose.
53. As there is no equivalent to an inquiry to consider objections to a compulsory purchase order a court is likely to subject any decision to appropriate or acquire land, in order to engage section 203, to particular scrutiny.

Is the purpose now contemplated related to the purposes for which the land was acquired or appropriated?

54. It will be necessary to consider whether the scheme to be developed pursuant to a planning permission can be said to be related to the purposes for which the land was acquired or appropriated by the authority.
55. In cases where there is doubt as to whether the development now contemplated can be said to be for the planning purposes for which a local authority originally acquired or appropriated the land, the following steps should be considered:
    a. If the land is held by the local authority they should be asked to consider appropriating the land to the specific planning purpose now contemplated.

b. If the land is no longer held by the local authority the position is more complex. Consideration might be given to disposing of the land to the local authority and re-acquiring it.

Acquisition by a Local Authority and disposal to developer

56. It is open to a local authority to acquire the land for planning purposes and to then dispose of it to a developer.
57. The disposal to the developer can be made pursuant to section 233 TCPA 1990. Consent of the Secretary of State will be required where the disposal is to be for a consideration less than the best that can reasonably be obtained and is not for a short lease (section 233(3)).
58. If the existence of rights of light is likely to frustrate beneficial development a local authority may be prepared to acquire the land from the developer and then sell it back to the developer.
59. Such a transaction is likely to be subject to particularly careful scrutiny. As noted by McCullough J in the ***Leeds*** case the effect of relying on section 237 is akin to compulsory purchase of rights.
60. A local authority considering such a transaction would have consider all the relevant factors including those set out in **Appendix 1** to this paper. Subject to such careful consideration, I do not consider that such a transaction could be said to be inconsistent with the statutory scheme. The purpose of section 203 is to allow development to be carried out in the public interest. If a local authority concludes that it is necessary to engage section 203 to facilitate the carrying out of beneficial development there would be no conflict with the statutory objective.

Compensation

61. The compensation payable pursuant to section 204 HPA 2016 is considered above.
62. I have identified the advice given in the DCLG Guidance on Compulsory Purchase Process, namely that they should seek to negotiate with landowners to acquire land and rights by agreement. When conducting such negotiations the basis for agreeing price is relatively clear. The price offered will reflect the amount that a claimant would receive under the statutory compensation code. The position when seeking to acquire rights of light is somewhat different. Damages payable in lieu of an injunction to restrain a breach of rights

of light may be calculated on some basis other than diminution in value (e.g. ***Wrotham Park*** damages).

63. In a compulsory purchase case a local authority is likely to be held to have made reasonable attempt to secure land or rights by negotiation if it offers to pay a sum equivalent to compensation under the statutory code, and the claimant seeks compensation on some other basis. However in the case of rights of light, an authority or landowner may be prepared to pay compensation based on diminution in value of the claimant's land, whereas a claimant may seek a payment based upon the measure applicable when considering damages in lieu.
64. In those circumstances the local authority will have to consider whether it is necessary to appropriate or acquire the land. Consideration of that issue will depend upon the facts of the case. However, if a local authority seeks to acquire or appropriate land in order to resolve a dispute relating solely to compensation, the authority will have to consider whether reliance on section 203 is necessary; any report to committee will have to be drafted with great care.
65. It is likely that a local authority will conclude that it is not necessary to appropriate or acquire the land if those entitled to the rights are prepared to relinquish them on payment of a sum equivalent to the sum payable if damages were awarded lieu of an injunction, whereas a local authority is likely to conclude that appropriation is necessary if owners of right are not prepared to relinquish them and indicate that they wish to seek an injunction.
66. Those entitled to rights of light who are seeking to negotiate with a developer of the servient land, and who wish to avoid engagement of s.203 by a specified authority, may best protect their position by indicating that they are unlikely to seek an injunction, but that they would pursue a claim for damages in lieu. If a landowner pursued such a course of action it would be difficult for a local authority to conclude that acquisition of the servient land (to engage s. 203) was necessary in order facilitate its development.

Conclusion

67. As is clear the decision whether to appropriate or acquire the land in order to engage the provisions of section 203 will turn on the facts. I anticipate that developers faced with the threat of an injunction to prevent them implementing a planning permission may seek

assistance from the local authority. The local authority should tread carefully when considering whether such assistance can be given in a particular case.

Landmark Chambers,
180, Fleet Street,
London EC4A 2HG

25th October 2017

This paper is not intended to contain legal advice and should not be relied upon as such. The appropriate action to take in a particular case will depend on the facts, and advice should be taken based upon the relevant facts.

APPENDIX 1

Criteria to be applied by a local planning authority when considering whether appropriation of land for planning purposes in order to engage the provisions of section 203 of the Housing and Planning Act 2016 is necessary:-

Is there a compelling case in the public interest that the powers conferred by section 203 of the Housing and Planning Act 2016 should be engaged in order that the building or maintenance work or use proposed can be carried out within a reasonable time? and in particular, whether all the following criteria are satisfied:

(i) Has planning consent for the proposed development been granted.

(ii) Will appropriation or acquisition of the land and consequent engagement of section 203 of the Housing and Planning Act 2016 facilitate the development for which planning consent has been granted, or for a similar development.

(iii) Is the development for which planning consent has been granted likely to contribute to the achievement of one or more of the following objects:

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.

(iv) If the development for which planning consent has been granted is carried out, will there be infringements of one or more relevant rights or interests as defined in section 205(1) of the Housing and Planning Act 2016 or breach of a restriction as to user of land, which cannot reasonably be avoided;

(v) Can it be concluded that the rights to be interfered with cannot reasonably be released by agreement with affected owners within a reasonable time (and has adequate evidence of satisfactory engagement, and where appropriate negotiation, been provided);

(vi) Is the ability to carry out the development, including for financial or viability reasons, prejudiced due to the risk of a dominant owner applying for an injunction to restrain the anticipated breach of the rights, and have adequate attempts have been made by the intended developer to remove the injunction risks;

(vii) Would a decision to appropriate the land in order to engage section 203 of the Housing and Planning Act 2016 be broadly consistent with advice given in the DCLG Guidance on Compulsory Purchase Process etc. (2015) (and any replacement thereof) so far as relevant.

(viii) The use of the powers is proportionate in that the public benefits to be achieved outweigh the infringement of human rights (in particular those identified in Article 8 and Article 1 Protocol 1 of the ECHR);