



Written Evidence to the Public Bill Committee on the Housing and Planning Bill 2015 – 2016

INTRODUCTION

Herbert Smith Freehills LLP is a leading international law firm. Herbert Smith Freehills' London Planning team has extensive experience in the field of planning and real estate law and has advised on many of the most high profile and complex property developments in the country. Our clients include landowners, property developers, government departments and agencies, local authorities, charities, financial institutions, and energy and infrastructure promoters.

COMMENTS ON CLAUSE 137 OF THE HOUSING AND PLANNING BILL: POWER TO OVERRIDE EASEMENTS AND OTHER RIGHTS

Summary

1. Herbert Smith Freehills have some technical concerns with the current drafting of clause 137 of the Bill and uncertainty over these issues is already having the effect of inhibiting property development. We should be grateful if this uncertainty could be expressly addressed in subsequent versions of the Bill.
2. Our concerns with clause 137, as it relates to the current section 237 of the Town and Country Planning Act 1990 (which is due to be replaced by clause 137), are that:
 - i. Clause 137 does not expressly state that successors in title to land owned by a specified authority will benefit from the power to override easements and other rights.
 - ii. Clause 137 only relates to land vested in or acquired by a specified authority on or after the section comes into force.
 - iii. We note that the new power relates only to the carrying out of building or maintenance work; and erecting or constructing any building (clause 137 (2)(c) and (4)(c)). These phrases are not in established usage under planning law in this context. In our view, this is likely to lead to further uncertainty over the scope of the new power.
3. We have included drafting suggestions below.

Background

4. We note that Schedule 11, paragraph 8 of the Bill repeals section 237 of the Town and Country Planning Act 1990 and equivalent provisions in other Acts, to be replaced by clauses 137 and 138 of the Bill (as is explained in clause 139).
5. Section 237 of the Town and Country Planning Act 1990 allows easements and other rights which would otherwise prevent development being carried out to be overridden. Certain criteria must be met for this to happen: land is appropriated or acquired by the local planning authority for planning purposes and, according to principles of compulsory purchase, there must be a compelling case in the public interest.
6. There is a considerable body of existing caselaw in relation to section 237 of the Town and Country Planning Act 1990. Key cases include:
7. *R v. City of London Corporation and Royal Mutual Insurance Society ex parte Mystery of the Barbers* 1 (1997) 73 P & CR 59: this case interpreted section 237 of the Town and Country Planning Act 1990 as allowing successors in title to the land appropriated or



acquired by the authority to benefit from the powers to override easements and other rights.

8. *Midtown Property Company Limited v. City of London Real Property Company Limited* [2005] EWHC 33 (Ch): this case supported and refined the *Barbers* case and decided that the development making use of the powers must be related to the planning purposes for which the land was originally acquired or appropriated.

Comments

9. We understand that the intention of clause 137 is to enlarge the power to override easements and rights. In particular, the clause appears to remove the requirement for land to be acquired or appropriated specifically for planning purposes, as required by the current section 237. Assuming this is correct, it would be helpful if it could be confirmed in the explanatory notes to the Bill (and to the Act once it receives Royal Assent). This will help to clarify the Government's purpose behind this legislative amendment.
10. We welcome the proposed changes on the basis that it should not be necessary for land to be held by local authorities for planning purposes in order for rights to be capable of being overcome. The existing legal protections which govern the use of the power already provide adequate safeguards and the additional requirement for land to be held for planning purposes is arbitrary and no longer necessary.
11. We do, however, have some technical concerns with the current drafting:
 - i. Clause 137 does not expressly state that successors in title to land owned by a specified authority will benefit from the power to override easements and other rights.
 - ii. Clause 137 only relates to land vested in or acquired by a specified authority on or after the section comes into force.
12. These two issues are causing uncertainty for our developer clients who are currently preparing planning applications, or are planning to carry out development that already has planning permission, on land which is or has been vested in a local authority. It is not clear whether, following the Act coming into force, this land will benefit from clause 137.
13. This is already having the effect of inhibiting property development due to the uncertainty that it has given rise to and we should be grateful if this uncertainty could be expressly addressed in subsequent versions of the Bill.
14. Furthermore:
 - iii. We note that the new power relates only to the carrying out of building or maintenance work; and erecting or constructing any building (clause 137 (2)(c) and (4)(c)). These phrases are not in established usage under planning law in this context.
15. In our view, this is likely to lead to uncertainty over the scope of the new power. For example, it is not clear whether it would apply to infrastructure works. Use of the term "development" would be more appropriate because that term is defined in the Town and Country Planning Act 1990 and its scope and meaning is already very well established in law (rather than 'carrying out of building or maintenance work' or 'erecting or constructing any building').



RECOMMENDATIONS

16. In relation to our points (i) and (ii) above, we suggest that clause 137(2)(b) is amended as follows:

(b) *the work is carried out on land that has at any time ~~on or after the day on which this section comes into force~~ become vested in or acquired by a specified authority, and*

17. And that clause 137(4)(b) is amended as follows:

(b) *the land has at any time ~~on or after the day on which this section comes into force~~ become vested in or acquired by a specified authority, and*

18. We do not consider that this would amount to retrospective effect since it relates only to future works on or uses of land and simply replicates the effective existing position under section 237 of the 1990 Act. However, should this be a concern then we would support the alternative proposal put forward by the City of London Corporation, namely a new subclause as follows:

(5A) *For the purposes of subsection (2)(b) or (4)(b), land which has been vested in or acquired by a specified authority before the date on which this section comes into force is to be regarded as having been acquired on that date if it is subject on that date to—*

(a) any power repealed by Schedule 11, or

(b) any power to appropriate land for a purpose for which the authority is also authorised to acquire land compulsorily.

19. In relation to our point (iii) above, we suggest that clause 137(1) is amended as follows:

(1) *A person may carry out development to which this subsection applies even if it involves ...*

20. And that references to *building or maintenance work* in clause 137(2) are replaced with references to *development*, and that the reference to *erecting or constructing any building* in clause 137(4)(c) is replaced with *development*.

21. Finally, the definition of *building or maintenance work* in subsection (7) should be omitted and replaced with a statement that *development* is to be read in accordance with section 55 of the Town and Country Planning Act 1990.

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