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Cleansing 3rd Party Rights

Inside

A spanner in the works

Getting a development proposal off the ground (no pun intended) can be difficult for a whole host of reasons. From difficulties in finding finance to difficulties arising from finding slow worms. Add to this list the tricky issue of discovering third party rights over your site. Rights that will be interfered with by your development. They can be a real spanner in the works. But at least with third party rights there is a statutory tool that may assist you.

Party time (not)

Third party rights are, effectively, rights that owners of adjoining or nearby land have over your site. These might include:

- A right to pedestrian access over a path that runs through where you want to build a terrace of houses;
- A right to light in favour of windows in an adjoining building – windows that will very much be in the dark when you build your office block;
- A restrictive covenant – which says that you can't use your site otherwise than as a single dwelling – when you want to convert the old Victorian mansion into 20 luxury flats.

The people with the benefit of these third party rights, known as dominant owners, can be a real headache

Interference with the rights of a dominant owner can lead (and has led) to significant financial claims being made. Worse, the dominant owner can, in certain circumstances, obtain an injunction to prevent your development taking place at all. And finally, to add insult to injury, it's not unheard of for a dominant owner to obtain a court order requiring a developer to take down all or part of a new development after it's been built.

A little bit of magic

There is an answer – s237 Town & Country Planning Act 1990.

Under s237, works done on land which has been acquired or appropriated by a local authority for planning purposes is authorised if it is done by the authority (or, importantly, a successor in title to the authority). The authorisation applies even if those works interfere with third party rights. The section also authorises the use of land in breach of restrictive covenants.

This means that land that is acquired or appropriated for planning purposes by a local authority is effectively cleansed. Interference with third party rights is converted into a right to compensation. That means you don't get off scot-free, you still need to compensate the dominant owner. But it does mean that they can't hold you and your development to ransom. They can't 'Just Say No'. Compensation payable is assessed on the basis of the compulsory purchase code (damages based on the diminution in the value of the dominant owner's property as a result of the works).

There are some notable exceptions (aren't there always) in respect of statutory undertakers' rights, for example, but for our purposes here the bottom line is that building works on land, and that land's subsequent use, is authorised under s237.

A little bit of detail

So what does appropriation actually mean?

A local authority can acquire and hold property for a variety of statutory purposes, to carry out its statutory functions. Changing the statutory purpose without changing the ownership of the land is described as appropriation. For the magic of s237 to work the local authority must either have originally acquired the land for planning purposes or appropriate land it already owns for planning purposes.

A little bit of a warning

As you might expect, dominant owners can sometimes be a tad upset when you produce your 'get out of jail card' in the form of a letter from your solicitor saying that s237 applies. What used to be a ransom position, with them in the driving seat, has now become a run of the mill claim for compensation. It's not unheard of for formerly dominant owners to go over the local authority's paperwork with a fine toothed comb to see if they can spot any flaws. If they do, they may be in a position to re-assert their dominance.

The relevant statutory provisions must be followed to the letter. The authority must evidence in its statutory reporting procedures that it has acted wholly reasonably in its approach. In cases of appropriation, this will require an explanation to be given about the relevant appropriation process, how the works serve the public interest and about how compensation is payable to those whose rights have been infringed. The authority must also show it has considered the prospect of the development proceeding without interfering with these rights – is there an alternative scheme which may avoid it?

If it's your development you would be well advised to keep a very keen eye on the local authority at each step and shout, and shout quickly, if you spot any mistakes. This can sometimes be a diplomatic minefield. It may put local authority noses out of joint if you are suggesting they're not doing their job properly – but it's worth it in the long run.

Battle of the bulge - an example

If you live in London you can't have missed the arrival on the skyline of the bulging shape of 20 Fenchurch Street – known as the Walkie Talkie Tower. Things did not go smoothly at the outset. The developers knew that rights to light were an issue. You can't build a 509 ft tall tower in one of the most densely built up parts of the world without infringing someone's rights to light. But the developers took an educated gamble that, whilst nearby owners might have a claim for damages, they wouldn't be able to stop the tower being built.

However, developer anxiety hit the roof (another unintended pun) following a 2010 Court case called Heaney. In Heaney, an injunction ordered newly constructed upper floors on a development to be taken down on the basis of an infringement of a neighbour's right to light. Cue sleepless nights – groundworks on the Walkie Talkie had already started.

The developers approached the City of London, the relevant local authority. The City agreed to acquire the freehold of the building site for planning purposes and then leased it back to the developers. This meant that all of the conditions necessary for s237 to apply were met, and the developers became successor in title to the City – so they could carry on with their development. The adjoining owners still had rights to compensation – but they didn't have the nuclear option of an injunction.

If you only remember five things, remember these five things:

1. The existence of a third party right over a development can be a pain in the neck. In certain circumstances those with the benefit will be able to stop your development.
2. s237 might well be the answer to your prayers...
3. ...but "it's complicated".
4. For s237 to work the local authority will need to have an interest in the land (e.g. own it) – even if only temporarily.
5. The statutory procedures must be followed to the letter for them to work.

An almost completely irrelevant fact:

Room 237 is the room around which Stanley Kubrick's film 'The Shining' is based, and into which no one should go.

...little bits of law

This is one in a series of leaflets published by Lewis Silkin LLP, providing information on a range of legal issues that face our developer clients. Other topics discussed range from boundaries to wildlife.

Professional advice should be obtained before applying the information in this client guide to particular circumstances.

For a full list of available leaflets please visit our website or contact patrick.brown@lewissilkin.com.

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