Matthew White examines the new power to override easements and other rights under section 203 of the Housing and Planning Act 2016

Many property lawyers will already be familiar with section 237 of the Town and Country Planning Act 1990 (TCPA 1990), which gave local authorities the power to override easements and other rights in relation to land that has been acquired or appropriated for planning purposes. On 13 July 2016, section 237 was repealed and replaced by a new power in section 203 of the Housing and Planning Act 2016 (HPA 2016). This article examines the new power and explains the circumstances in which it might be used by property lawyers.

THE OLD LAW

Section 237 of the TCPA 1990 provided that the erection, construction or carrying out of any building or work on land which has been acquired or appropriated by a local authority for planning purposes, or any use of that land, is authorised if it is done in accordance with planning permission, notwithstanding that it involves: (a) interference with an interest or right to which section 237 applied; or (b) a breach of a restriction as to the user of land arising by virtue of a contract.

The interests and rights to which the section applied were any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support, save for the rights of statutory undertakers and rights under the electronic communications code.

In recent years, property owners have increasingly turned to section 237 to overcome easements, restrictive covenants and, in particular, rights of light that threatened to prevent planned development of their land from proceeding. The powers are governed by public rather than private law, however, and the prerequisites for their use are stringent. Fortunately, the threat of using section 237 proved sufficient to bring recalcitrant counterparties to the negotiating table in the majority of cases, without the local planning authority actually having to exercise its powers in practice.

Now, just as developers are becoming familiar with the procedures and tests for the use of section 237 to address their development constraints, and local planning authorities are becoming more comfortable with exercising their powers for this purpose, the HPA 2016 has abolished section 237 and replaced it with a new power.

THE NEW LAW

Although the structure and language of section 203 are different, the effect appears to be similar to that of section 237. Section 203 provides that a person may use land or carry out building or maintenance work, even if it involves interfering with a relevant right or interest or breaching a restriction as to the user of land arising by virtue of a contract.

There must also be planning consent for the building or maintenance work and the work must be carried out on land that has become vested in or acquired by a specified public authority or appropriated by a local authority for planning purposes. Relevant rights or interests are the same as under section 237, although rights enjoyed by the National Trust are now also excluded.

Transitional provisions deal with land that was acquired or appropriated by the public body before the date that section 203 came into force.

One might therefore question why the government felt it was necessary to change the law. Close scrutiny of the new provisions reveals three reasons.

First, the powers are extended to a range of public bodies in addition to local authorities, including the National Assembly for Wales, urban development corporations, housing action trusts and the Homes and Communities Agency.

Second, section 203 requires that the building or maintenance work or the use of the land in question is for purposes related to the purposes for which the land was vested, acquired or appropriated by the public body. This was not an express requirement of section 237, but effectively codifies the decision in Midtown Property Company Ltd v City of London Real Property Company Ltd [2005] EWHC 33 (Ch), in which Mr Justice Dyson held that any development seeking to rely on section 237 must be related to the planning purposes for which the land was originally acquired or appropriated.

Third, there is a new requirement that the relevant public authority ‘could acquire the land compulsorily’ for the purpose of the development in question. This appears to have been introduced in recognition of the legal position that had emerged over the last two decades, almost certainly to the point that it had become indisputable, that relying on section 237 to overcome property rights was the equivalent of those rights being compulsorily acquired.

It follows that section 237, and now section 203, involve an interference with human rights under article 1 of protocol 1 of the European Convention on Human Rights and, where residential properties are affected, also under article 8. The interference must be properly considered...
by the public authority before vesting, acquiring or appropriating land with the intention of section 203 being engaged.

How the new compulsory purchase requirement will be interpreted remains unclear. A narrow interpretation would require only that the authority has compulsory purchase powers available to it in relation to the land and works in question. This is probably no more onerous than the previous position in relation to section 237, where compulsory purchase principles were applied anyway – most notably in relation to the need for the authority to be satisfied that there is a compelling case in the public interest for the exercise of its powers.

A broader interpretation would require the authority to go further towards establishing that a full justification exists for the use of compulsory purchase powers in relation to the development. This would potentially include a legally binding commitment from the developer to actually deliver the development for which the powers are required, as well as satisfaction that the project is fully funded. However, I believe that the narrow interpretation is the correct one.

**SUCCESORS IN TITLE**

Section 237 was particularly useful for property owners, because once land had been acquired or appropriated by a local authority for planning purposes, the power to override easements and other rights was available to both that local authority and also successors in title to the land in question.

It was therefore possible to create property structures whereby an interest in land that is affected by rights and easements that are inhibiting development is acquired by the local authority for planning purposes, thereby engaging section 237, and then transferred back to the original owner, who will inherit the benefit of section 237 to enable the development to proceed.

Unlike section 237, section 203 does not expressly extend the power to override easements and other rights to ‘those deriving title’ from the relevant public authority. However, the broad use in section 203 of ‘a person’ carrying out building or maintenance work or otherwise using land in breach of a relevant right or interest will operate in practice so as to enable successors in title to make use of the power. Private property structures can therefore still be established in order to engage section 203 where owners of affected properties are not prepared to release their rights by private treaty.

**LIMITATIONS ON THE USE OF SECTION 203**

Section 203 should not be viewed as a panacea to overcome all development constraints, nor as a substitute for conducting steadfast negotiations with the beneficiaries of easements and other rights that are affected by proposed development.

In addition to the strict statutory requirements, as a matter of public law, there are a number of further constraints on the use of section 203 which must be carefully considered before it can be relied upon. A summary of the main considerations is set out below.

1. **The interference test: what is the extent of the breach?**
   It must be demonstrated that relevant rights falling within the scope of section 203 exist and that the proposed development will breach those rights. This may be more difficult in the case of development for which only outline planning permission has been secured.

2. **The necessity test: will acquisition or appropriation facilitate the development?**
   The public authority must be satisfied that interference with the rights in question is necessary to allow the development to proceed.

3. **The last resort test: is private agreement possible?**
   It must be shown that the infringement of the rights in question cannot reasonably be avoided or released by agreement with the affected owners. All reasonable efforts must have been made to secure the release of the restrictions by private agreement, and it
will need to be demonstrated that those entitled to the benefits of the rights are not prepared on reasonable terms and within a reasonable time to release their rights.

4. The timing test: is it urgent or should further time be spent trying to reach private agreement?
The public authority will need to consider whether there are demonstrable reasons why there is a pressing need for it to exercise its powers to prevent delays in bringing forward the development.

5. The public interest test: will the acquisition contribute to wellbeing?
It must be shown that the development would, if carried out, contribute to the promotion or improvement of the social, economic or environmental wellbeing of the area in which the land is situated.

6. The cutback test: could the public benefits be achieved without interference with the rights in question?
The public authority will need to be satisfied that the benefits of the development could not be achieved without giving rise to all or some of the infringements for which section 203 is being engaged.

7. The proportionality test: will the public benefits outweigh the infringement of human rights?
The public authority must be satisfied that (i) there is a compelling case in the public interest to justify authorising the carrying out of the development, notwithstanding that it would involve interference with the rights in question; and (ii) that the public benefits arising from the development are proportionate to the interference with human rights.

8. The heritage test: will the development harm any heritage assets?
Where the development affects either a conservation area or a listed building or its setting, a local planning authority must discharge its statutory duties to have special regard / pay special attention to the preservation of those heritage assets.

9. The publicity test: has adequate consultation been carried out by the public authority prior to the use of its powers?
Affected owners must be given an opportunity to make representations to the public authority and for those representations to be properly addressed before a decision is made on whether to engage section 203. As a minimum, the authority should write to all affected owners to inform them that it is considering acquiring an interest in the relevant land, explaining the legal effect that this would have, and inviting comments before it proceeds. These consultation responses should then be taken into account before a final decision is made.

COMPENSATION
It is a common misconception that section 203 will operate to discharge the rights in question. It does not: the effect of section 203 is to authorise development notwithstanding any interference with those rights. The rights still exist, but are overridden, preventing the beneficiaries from obtaining an injunction to prevent development taking place. Compensation is payable calculated on a diminution in value basis. However, prior to the use of section 203, private treaty negotiations must be conducted on the basis of the measure of damages in lieu of an injunction – the legal scope for which is fortunately beyond the remit of this article.

CONCLUSION
The replacement of section 237 by section 203 represents a consolidation rather than any significant reform of the law on overcoming private property rights where the development of land is in the public interest. It nevertheless provides a timely opportunity for property lawyers to reacquaint themselves with the circumstances in which this statutory power is available and the limitations on its use.