

Explanatory Memorandum to the Welsh Development Agency Act 1975 (Amendment) (Wales) Order 2013

This Explanatory Memorandum has been prepared by the Department for the Economy, Science and Transport and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Welsh Development Agency Act 1975 (Amendment) (Wales) Order 2013.

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11 October 2013

1. Description

Under the provisions of paragraph 6 of Schedule 4 of the Welsh Development Agency Act 1975 the Welsh Ministers are able to remove restrictions affecting the title of property in their ownership to enable development and regeneration projects to proceed.

However, in the case of *Thames Water Utilities v. Oxford City Council (1999)*, it was determined that restrictions could only be removed during the construction phase and doubt was cast on the ability to remove restrictions on a permanent basis.

To remove doubt, amendments are required to the Welsh Development Agency Act 1975 and this Order will make these amendments. Similar amendments have already been made to legislation in England.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

In 2004 the Law Commission in its Report to the UK Government on compulsory purchase procedure and compensation included recommendations to clarify this matter as part of a major review of compulsory purchase law. Professional bodies urged for the law to be amended and changes to the various Acts containing powers to override easements in England were made under section 194(1) and Schedule 9 of The Planning Act 2008 which came into force on 6 April 2009.

Section 194(2) of the 2008 Planning Act gives the Welsh Ministers an order making power to make a similar change to Schedule 4 of the Welsh Development Agency Act 1975.

3. Legislative background

The relevant Order making power of the Welsh Ministers for this legislative change is under section 194 of the Planning Act 2008. Section 194(2) of the Act gives the Welsh Ministers an order making power to make changes to Schedule 4 of the Welsh Development Agency Act 1975. The Order will follow the affirmative resolution procedure.

4. Purpose & intended effect of the legislation

Land is often subject to restrictive covenants and easements or other rights which affect land owned by other people. When development on such land takes place (sometimes following compulsory purchase) it is often necessary to

override these rights and allow appropriate compensation for the owners of the rights.

Paragraph 6 of Schedule 4 of the Welsh Development Agency Act 1975 was intended to allow the overriding of these covenant rights. However, the Thames Water decision has held that the Act only applied during construction and so rights are revived once the completed development is in use. This means that the owners of the original rights, the most troublesome being restrictive covenants, can claim them again. The problem affects not only the Welsh Government but also the developer, its funding institution, future investors and former owners of the benefit of the revived covenants. The Welsh Government is not normally affected financially because a purchaser deriving title indemnifies it for any liabilities (such as compensation) that may arise.

The problem was not apparent until the case of *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 & Country Planning Act 1990 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. The wording in the WDA Act is similar to that in the Planning Act, hence the need for the legislation change.

The effect of the amendment will be to allow the Welsh Government to override covenants, easements and other rights on a permanent basis to enable building or other works to be erected, constructed, carried out or maintained on land. Planning consent for the proposed development is required and compensation must be paid to the beneficiary of the restriction.

As well as benefiting the Welsh Government when it develops land, the benefits can also be transferred to subsequent owners and developers. In such cases the party responsible for compensation will be determined when the land is transferred.

The legislation will enable regeneration and development projects, which might otherwise face problems of implementation, to proceed.

Options

Option A: Do nothing.

Option B: Introduce legislation to amend paragraph 6 of Schedule 4 of the Welsh Development Agency Act 1975 in order to allow easements and other rights to be overridden to enable development to take place.

5. Consultation

Public consultation was undertaken between 14th December 2010 and 8th March 2011 under Consultation reference WAG10-10131. The consultation document can be accessed via the following links.

English:

<http://www.webarchive.org.uk/wayback/archive/20130613231452/http://wales.gov.uk/consultations/businessandconomy/101214overriding/?status=closed&lang=en>

Welsh:

<http://www.webarchive.org.uk/wayback/archive/20130615073942/http://wales.gov.uk/consultations/businessandconomy/101214overriding/?skip=1&lang=cy>

Consultation responses were received from the Law Society, the Royal Institution of Chartered Surveyors, Compulsory Purchase Association, the North Wales Association of Town & Larger Community Councils, Eversheds solicitors, Geldards solicitors and Evocati Compulsory Purchase Consultancy. The proposed changes were overwhelmingly supported by all the respondees.

The proposed amendments to the WDA Act were not progressed immediately following the consultation exercise and in view of the time that has lapsed since the consultation took place, on the advice of the Policy Support Unit, the respondees were written to at the end of August 2013 to ask if their previous comments were still valid and if they wished to make any additional comments. Five responses were received confirming that their original responses were still valid.

6. Regulatory Impact Assessment (RIA)

A RIA is not considered necessary for the following reasons:

- The Order only brings certainty to existing legislation that was considered to be effective until uncertainty was created when it was challenged in a court case.
- The effects of the Order are not wide ranging. Each proposal to use the powers will be subject to individual Welsh Government approval which will consider the merits, the effects if any on third parties and any compensation payments.

The Order has no impact on the statutory duties of Equality of Opportunity, Welsh Language and Sustainable Development set out in sections 77 -79 of the Government of Wales Act 2006 or on any statutory partners (Partnership Council, Local Government Scheme and Voluntary Sector Scheme) set out in sections 72-75 of the Government of Wales Act 2006.