

Section 203 as a regeneration tool?

Michele Vas addresses the lack of consistent guidance when it comes to implementing s203



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It has now been two years since s203 of the Housing and Planning Act 2016 became operative, replacing s237 of the Town and Country Planning Act 1990 (TCPA). While s203 does not entirely resemble its predecessor, this does not appear to have dampened or affected the development industry's confidence on the benefits of using the provision, and it continues to be utilised as part of the development process.

Section 203 is a useful tool for de-risking development. Its purpose and effect is to allow third-party rights in or over land to be lawfully interfered with. It enables development to take place, free from a threat of injunction, where it would otherwise stall pending negotiations and resolution being reached with a third party.

The main differences introduced by s203 (when replacing s237) include:

- extending the scope of bodies capable of engaging section 203 powers to not only local authorities, but to other bodies with compulsory purchase powers, such as the GLA and certain statutory undertakers in relation to land; and
- expressly permitting the use of s203 where a breach of a restriction or interference with a right arises by either the building works associated with the development or its actual use.

The benefits of s203 as a regeneration tool are widely accepted. However, guidance on the administrative process to be followed when utilising it is distinctly lacking.

This is all the more unhelpful when its use is akin to the use of compulsory purchase order (CPO) powers given its purpose is to permit interference with individual property rights. Secondary legislation (Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004) sets out the administrative process to be followed when making a CPO, the purpose being to ensure that anyone with a property interest is formally alerted to the interference and has the right to object to the use of a CPO. Similarly, detailed guidance ('Compulsory Purchase process and the Crichel Down Rules: guidance') has been issued by the government to be adhered to when using CPO powers. A raft of other public law requirements should also be assessed when utilising CPO powers, such as the Public Sector Equalities Duty, consideration of human rights impact and the need for there to be a compelling case in the public interest for interfering with or acquiring third-party interests.

No such guidance exists for the use of section 203 powers. As a consequence, there is a lack of consistency between public bodies when seeking to utilise s203, albeit a more formalised approach is evolving through practise.

Scope

Section 203 authorises interference with rights as long as they are 'annexed to land' and/or 'adversely affecting other land' (ie a dominant and servient tenement relationship). Section 203 powers are usually engaged, for example, to lawfully interfere with a neighbouring property's right to light, or perhaps to override a restrictive

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covenant on the land which affects the property's purposes, which may be contrary to development proposals.

The scope of s203 is wide and authorises:

- the erection, construction, carrying out or maintenance of any buildings or work or the use of land in accordance with a planning permission, where such activities would otherwise be in breach of:
 - easements permitting third-party access over a development site from neighbouring land;
 - a restrictive right of light covenant benefiting an owner adjacent to the development site; or
 - a restrictive covenant arising under a contract, ie prohibiting the land from being used for a certain purpose.

Statutory undertakers and electronic communications code operators are not affected by s203 because s203(9) makes clear that the power is not available in respect of a 'protected right' (see box below).

Section 271 of the TCPA provides a procedure for resolving conflicts

between statutory undertakers and an appropriating authority, where the undertaker has apparatus on, or rights relating to, land that has been appropriated for planning purposes. The National Trust is also offered special protection from the use of s203.

Where section 203 powers are invoked, the third party affected by the exercise of the powers is entitled to compensation pursuant to s204. The basis for compensation is equivalent to the diminution in value to property arising as a consequence of the interference. The loss will only occur, and the right to compensation arise, once the interference has taken place. While the party interfering with the right is liable to pay compensation, the ultimate liability for payment of that compensation in default rests with the body exercising section 203 powers. Where such powers are being invoked for the benefit of developers, an indemnity arrangement should first be put in place to ensure the public body remains insulated from future liability for compensation.

Key issues

Certain conditions need to be met in order to properly exercise and confer the benefit of s203. Namely, the following:

- The subject land:
 - has become vested in or acquired by a 'specified authority' or 'appropriated' by a local authority for 'planning purposes' as defined by s246(1) of the TCPA (after s203 came into force on 13 July 2016); or
 - constitutes 'other qualifying land' prior to s203 coming into force on 13 July 2016;
- planning consent is in place for building, maintenance work or use of the land and such works or use are to be carried out on the land;
- the authority or 'qualifying authority' could acquire land compulsorily for the purposes of the building or maintenance works or use; and
- the building or maintenance works or use is related to the purposes for which the land was vested, acquired or appropriated.

There are a couple of issues arising from these conditions.

The first is what is meant by the relevant authority 'could' acquire land compulsorily for the development proposed? The general view is that this should be interpreted narrowly and be confined to the question of whether the authority has compulsory purchase powers which would enable it to acquire the land for the purpose for which it is to be developed rather than being able to demonstrate that there is a case for CPO. This would make sense; compulsory purchase by itself is not always capable of clearing all interests affecting land (for example an easement) or practical (rights of light benefiting a series of neighbouring properties).

In order to benefit from s203, a planning permission needs to be in place. However, there is no need for the land to have been acquired or appropriated specifically for the development with the benefit of planning permission. The legislation requires that the development should be for 'purposes related to the purposes' for which the land was acquired or appropriated, thereby conferring sufficient flexibility. This is important as large schemes will

What is a 'protected right'?

A 'protected right' in s203(9) means:

- a right vested in, or belonging to, a statutory undertaker for the purpose of carrying on its statutory undertaking; or
- a right conferred by, or in accordance with, the electronic communications code on the operator of an electronic communications code network (and expressions used in this paragraph have the meaning given by para 1(1) of Sch 17 to the Communications Act 2003).

There is no statutory definition of the term 'planning purposes'. Instead, s246(1) of the TCPA states that reference to the appropriation of land for planning purposes means reference to any purpose for which land can be acquired under one of the following:

- s226 of the TCPA (power to compulsorily acquire land for development and other planning purposes);
- s227 of the TCPA (corresponding power to acquire land by agreement for the purposes set out in s226 of the TCPA); or
- s52 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (power to acquire a listed building of special architectural or historic interest and any land adjacent to the building that is required for its preservation or for access).

inevitably be altered or amended over time. The land therefore need not be specifically acquired or appropriated for the development with the benefit of planning permission; this would act as a significant constraint to development if that were a prerequisite to engaging s203.

An appropriating authority may resolve to apply s203 to land at the same time that it resolves to acquire or appropriate it (or at any time afterwards). However, s203 can only be exercised once the land 'has been acquired or appropriated' by a local authority for planning purposes or 'has been vested in or acquired' by a specified authority (s203(2)(b) and 3(b)). Thus, the acquiring authority cannot be said to have exercised its powers under s203 until the freehold of the land is registered to it or until it has appropriated land it already holds for planning purposes.

Any person who is intending to rely on the benefit of s203 for development cannot do so until it is a 'person deriving title under' the appropriating authority (ie a successor in title). Detailed consideration is required as to what is meant by 'deriving title'. Depending on whether the land is already within the ownership of the public body, or is held by a private company, will influence the structure put in place to facilitate the benefit of s203 being passed on through title.

There have been examples in the past where a private owner retains the freehold but grants a long leasehold interest to a local authority to allow s203 to be washed over it. The leasehold interest is then either collapsed and/or new interests are created out of the freehold interest. In either scenario there is an argument that the freehold does not benefit from s203 as this is not an interest which has been derived directly from the public body. Careful consideration should therefore be given to how land arrangements are structured.

Restrictions on the use of the power

As already identified, the use of s203 is akin to the use of CPO powers on the basis it interferes with private property interests and it is applied to land which has been acquired or appropriated for planning purposes. A public authority contemplating use of section 203 powers should be first satisfied that it is

prudent to do so having regard to the usual public law principles.

Specific considerations it should have regard to are:

- What are the rights likely to be interfered with? It has not been uncommon for s203

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(or its predecessor s237) in the past to be used as a 'mop-up' process, washed over a site as a precautionary measure, in the event that any third-party rights subsequently came to light. From the perspective of transparency, there should be visibility at the point of making a decision both by the decision-maker as to the impact it is likely to have on individuals, and by the individuals themselves so that they have an understanding of how the exercise of section 203 powers could impact on them.

- Is the use of s203 a last resort? Before initiating s203 the public body should interrogate the extent to which the promoter of the development has reasonably engaged with those third parties who are the beneficiaries of any rights and the level of negotiations undertaken in order to reach agreement on the release of any right/restriction. There can be a reluctance to make third parties aware of potential rights they may have as it may lead to third parties having unrealistic expectations as to the value of their rights, together with the time it can take to negotiate any releases. However, this does not preclude an obligation to make reasonable efforts to acquire by agreement; if third parties are not willing to treat on reasonable terms then this is a factor the public body can take into account in reaching a decision on whether to engage s203.

- Is the use of s203 necessary in that it will facilitate the development, redevelopment or improvement of the land? The public authority should consider if there are any alternatives available which would avoid the need to exercise section 203 powers. For example, considering

whether scheme amendments (during the planning process) can reasonably be accommodated to remove the need to interfere with third-party rights, and if so if this would impact on the public benefits provided by the scheme.

- Assess and investigate the level of compensation likely to be payable if section 203 powers are utilised and put in place appropriate indemnity arrangements if needed.
- Notice should be given to the affected parties of the exercise of section 203 powers. The extent of notice and form that should be taken is likely to vary depending on the circumstances of each case. Although at the very least, parties affected should be informed of and directed to any committee report seeking authority to use section 203 powers prior to such authorisation being given.
- Authorisation to use section 203 powers should always be taken in the context of having assessed the human rights implications and the public sector equality duty pursuant to s149 of the Equality Act 2010.

Conclusion

Section 203 is potentially a powerful tool to aid regeneration in its own right. Clearer guidelines procedurally on its use would be welcome but any body considering the exercise of s203 should be careful about doing so behind closed doors. ■