



## **A legal guide to Easements**

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## Compulsory Purchase



Where negotiation fails the service provider may need to instigate its compulsory purchase powers.

The compulsory purchase powers for these services are located in:

- ▶ Electricity: Schedule 3 to the Electricity Act 1989 (EA 1989).
- ▶ Gas: Schedule 3 to the Gas Act 1986 (GA 1986).
- ▶ Water and sewerage: section 156 of, and Schedule 9 to, the Water Industry Act 1991 (WIA 1991).

## Compulsory Purchase - Procedure



- ▶ The procedure requires the service provider to:
  - ▶ Determine the land or rights that are being compulsorily acquired, and demonstrate that compulsory purchase is justified.
  - ▶ Undertake an information gathering exercise to determine all interests that will be affected by use of the compulsory purchase powers. This will include sending statutory notices (which may prompt landowners to engage in negotiation).
  - ▶ Publicise the draft order. If no objections are received within the specified time limit, which must be at least 21 days from the date of publication, the draft order may be confirmed. If the draft order is confirmed, there is then a six-week period within which the confirmed order can be challenged. If objections to the draft order are received, either a public inquiry or a hearing must be held, or the written representation procedure must be followed.

## Electricity connections



- ▶ **Duty to make a connection** - A DNO is obliged to make (and maintain) a connection between its distribution system and any premises when required to do so by any of the following:
  - ▶ The owner of those premises.
  - ▶ The occupier of those premises.
  - ▶ A licensed supply company acting with the authority of the owner or occupier of those premises.

## Necessary wayleave



When a DNO wishes to install or retain an electric line on third party land, but cannot agree this with the relevant third party landowner or occupier, the DNO has the right, in certain circumstances, to apply to the Secretary of State for a wayleave. A wayleave granted under this power is known as a necessary wayleave.

## When can a necessary wayleave be obtained?



The DNO must show that it is necessary or expedient to install the electric line or equipment for purposes connected with its distribution licence, and that the relevant third parties have not granted a suitable easement or wayleave to permit installation.

A necessary wayleave cannot be used to authorise the installation of an electric line on (or over) a dwelling, or where a planning permission exists which, if implemented, would result in a dwelling. For this purpose, dwelling includes any garden, yard, outhouses and appurtenances belonging to, or usually enjoyed with, the dwelling. Underground lines beneath a dwelling can be authorised by a necessary wayleave.

## Gas connections



- ▶ Principle legislation contained within the Gas Act 1986 and the Utilities Act 2000.
- ▶ “GTs” network operating companies that control the gas infrastructure, known as gas transporters. GTs are responsible for dealing with applications for a new connection

## Duty to make a connection



- ▶ GTs have a general duty to develop and maintain an efficient and economical pipeline system to convey gas, and to comply, so far as it is economical to do so, with reasonable requests to connect to that system and to convey gas to any premises (section 9(1)(b)(i), GA 1986).
- ▶ In addition, a GT must connect premises to a gas main (and maintain the connection) when required by an owner or occupier, where:
  - ▶ the premises are situated within 23 metres of the gas main (section 10(2)(a), GA 1986). In these circumstances, the GT would supply and lay the necessary pipe to connect the premises to that main;
  - ▶ the premises could be connected to a main by a supply pipe supplied and laid (or proposed to be supplied and laid) by the owner or occupier (section 10(2)(b), GA 1986).

## Procedure to request connection



The person requiring the connection must serve notice on the GT specifying:

- ▶ The premises for which the connection is required.
- ▶ The day on which the connection is required, which must not be earlier than a reasonable time after service of the notice.
- ▶ Where premises are connected under section 10(2)(b) of the GA 1986:
- ▶ The GT can require the person seeking the connection to accept any terms that it is reasonable in the circumstances to require them to accept, and to indemnify the GT against any liability arising from laying the supply pipe (section 10(3A), GA 1986).
- ▶ The pipe supplied and laid by the owner or occupier will vest in the GT, together with any rights and liabilities that relate to its laying, maintenance, repair, alteration or removal.

## No necessary wayleave



- ▶ A GT has no statutory right to acquire a wayleave over private land, although it does have compulsory purchase powers (section 9(3) and Schedule 3, GA 1986).

## Water and sewerage connections



- ▶ The Water Industry Act 1991 (“WIA 1991”) vested compulsory powers to enter land to lay pipes and sewers in water suppliers and sewerage undertakers. The main power to enter land to construct water mains and sewers is in section 159 of the WIA 1991.

## Water connections



- ▶ The principal legislation governing the water industry is the WIA 1991, as amended by the Water Act 2003 (WA 2003).
- ▶ There are two types of water suppliers:
  - ▶ Water-only companies that supply water and maintain the associated piping.
  - ▶ Water supply and wastewater companies that, in addition to supplying water, are also responsible for wastewater and wastewater infrastructure.

## Duties to make connections



### ► Duty to provide a water main for domestic purposes

A water supplier has a duty (subject to conditions) to provide a water main that can be used to supply premises in its area with water for use for domestic purposes (section 41(1), WIA 1991). Domestic purposes means drinking, washing, cooking, central heating and sanitary purposes (section 218(1), WIA 1991). The premises do not have to be used for domestic purposes. They can be used for commercial purposes other than a laundry business or for the preparation of food and drink for consumption off the premises (section 218(3), WIA 1991).

## Water



The conditions that apply to the duty to provide a water main are that:

- The water supplier has been served with notice, by the owner or occupier of premises that are in a locality in the supplier's area, to provide the water main.
- The premises consist of buildings or part of buildings, or the premises will so consist when proposals to erect buildings are completed.
- Certain financial conditions are satisfied (section 42, WIA 1991).



## Water



There are some legitimate excuses for not connecting to the water main, for example:

- ▶ The nearest main is a trunk main.
- ▶ The nearest main carries water for non-domestic purposes.
- ▶ Any necessary financial contribution towards the cost of the new water main or service pipe or security for its payment is outstanding.
- ▶ A water meter for the new supply has still to be agreed.
- ▶ The service pipe has not yet been laid on the development site so there is nothing to connect to.

## Supply for non-domestic purposes



Where a request is made for a water supply for non-domestic purposes, the water supplier has a qualified duty to provide the supply. The water supplier does not need to provide a new supply for non-domestic purposes where, to do so, the supplier would:

- ▶ Incur unreasonable expenditure in carrying out work to meet all its existing obligations to supply water for domestic or other purposes and probable future obligations to supply water for domestic purposes.
- ▶ Otherwise put at risk its ability to meet any existing or probable future obligations. (Section 55, WIA 1991.)

## Obtaining the necessary rights through third party land



Where a new water main or service pipe will pass over third party land, the water supplier or the developer or owner of the land may need to acquire appropriate easements to install the pipes and subsequently access them for repairs and maintenance.

Water rights are not usually acquired by wayleave. Direct negotiation of an appropriate deed of grant of easement will be the quickest solution. If direct negotiation is unsuccessful, the water supplier may need to use its compulsory purchase powers.

## Compulsory purchase



A water supplier has statutory power to:

- ▶ Acquire land it requires for the purposes of, or in connection with, the carrying out of its functions. The power extends to the creation of new interests and rights over land and the extinguishment of rights and interests (section 155, WIA 1991).
- ▶ Lay a water pipe (including service pipes) under a street (section 158, WIA 1991).
- ▶ Lay a water pipe, whether above or below the surface, in any land that is not a street, with ancillary rights of entry to maintain and repair (section 159, WIA 1991). In the case of a service pipe, this power only applies where there is an existing service pipe which is to be replaced, or where the water supplier is required to lay the service pipe by virtue of section 46(3) to 46(5) of the WIA 1991 (see Duty to install a service pipe in a street).
- ▶ The section 159 powers are exercisable after giving reasonable notice to the owner and occupier of the land, who have no right to object. Compensation is payable for any depreciation in the value of the land attributable to the presence of the pipe plus an allowance for disturbance and actual losses (Schedule 12, WIA 1991).
- ▶ Enter any premises for the purposes of determining whether, or how, to exercise the powers in sections 158 and 159 of the WIA 1991 and to exercise them (section 168, WIA 1991).
- ▶ Where the water supplier does work on, under or over a street, it may have to comply with the NRSWA 1991 (New Roads and Street Works Act 1991.)

## Sewerage Connections



- ▶ The principal legislation governing sewerage undertakers is the WIA 1991 (as amended by the WA 2003) and the Flood and Water Management Act 2010 (FWMA 2010).

## Primary duty to make a connection



A sewerage undertaker has a duty (subject to conditions) to provide both a public sewer and a lateral drain to connect premises to that sewer (section 98, WIA 1991). This duty only arises where:

- ▶ The sewer or drain is needed for domestic sewerage services (not trade effluent disposal). Details of the domestic sewerage services required must be specified in the connection notice.
- ▶ The premises consist of buildings or part of buildings, or the premises will so consist when proposals to erect buildings are completed.
- ▶ The premises are in the area managed by that sewerage undertaker.
- ▶ The sewerage undertaker has been served with a notice as follows:
  - ▶ in the case of a requisition for a public sewer for a locality, either a notice from the owners or occupiers of several premises in that locality to provide the public sewer or a notice from the local authority; or
  - ▶ in the case of a requisition for a lateral drain for particular premises to connect to an existing sewer, either a notice from the owner or occupier of the premises that will be drained by the lateral drain or a notice from the local authority.
- ▶ Any financial conditions imposed by the sewerage undertaker have been satisfied.

### Duty to permit landowner to make a connection to public sewers



This differs from the duties already discussed because it is the owner or occupier that carries out the work of connection. An owner or occupier of premises is entitled to connect to a public sewer so as to discharge domestic sewage, surface and storm water (section 106, WIA 1991). The procedure is:

- ▶ Before connecting to the sewer, the owner must give notice of the proposed connection to the relevant sewerage undertaker (section 106(3), WIA 1991). This notice must give details of the way the connection will be made (for example, the method and standards).
- ▶ Within 21 days after receiving a connection notice, the sewerage undertaker may give notice to the owner or occupier, refusing permission to connect (section 106(4), WIA 1991). This is only possible where the sewerage undertaker believes that the proposed method of connection:
  - ▶ is not to a standard reasonably required by the undertaker (section 106(4)(a), WIA 1991); or

### Duty to permit landowner to make a connection to public sewers – continued



- ▶ would be prejudicial to the sewerage system (section 106(4)(b), WIA 1991). This does not give the sewerage undertaker as much control as is necessary (see Enhanced control over new connections).
- ▶ The sewerage undertaker can opt to do the connection works itself, if it opts within 14 days of the original notice. If it does so, the owner or occupier cannot make the connection. The sewerage undertaker can require its reasonable estimate of the cost of the work to be paid to it before it does the work (section 107, WIA 1991).
- ▶ Before starting the connection work, the owner must give reasonable notice to any person directed by the undertaker to superintend the carrying out of the work, and give that person reasonable facilities to do so (section 108(1), WIA 1991).

## Compulsory purchase



A sewerage undertaker has statutory power:

- ▶ To acquire land it requires for the purposes of, or in connection with, the carrying out of its functions. The power extends to the creation of new interests and rights over land, and the extinguishment of rights and interests (section 155, WIA 1991).
- ▶ To lay sewers and lateral drains under a street (section 158, WIA 1991).
- ▶ To lay sewers and lateral drains, whether above or below the surface, in any land that is not a street, with ancillary rights of entry to maintain and repair (section 159, WIA 1991).
- ▶ The section 159 powers are exercisable after giving reasonable notice to the owner and occupier of the land, who have no right to object. Compensation is payable for any depreciation in the value of the land attributable to the presence of the pipe plus an allowance for disturbance and actual losses (Schedule 12, WIA 1991).
- ▶ To enter any premises for the purposes of determining whether, or how, to exercise the powers in sections 158 and 159 of the WIA 1991 and to exercise them (section 168, WIA 1991).

## Disputes



- ▶ The electricity and gas industries are regulated by The Office of the Gas and Electricity Markets (Ofgem). A dispute regarding connection should be referred to Ofgem, who may determine the dispute and make an order, or refer the matter to arbitration.
- ▶ The water and sewerage industry is regulated by the Water Services Regulatory Authority, more commonly known as Ofwat. A dispute regarding the terms and conditions for a water or sewerage supply should be referred to Ofwat, who may determine the dispute or refer the matter to arbitration.

## So what is an easement?



- ▶ An easement is a right benefiting a piece of land (known as the dominant land) that is enjoyed over another piece of land owned by someone else (servient land).
- ▶ An easement does fall within the definition of “land” (section 205(1)(ix)LPA 1925) and exists at law only if granted in fee simple or for a term of years absolute.
- ▶ An easement is more than just a permission or licence it is a proprietary right and runs or enures for the benefit of the dominant land and if registered correctly binds successors in title of the servient land (section 187 LPA 1925).



A right must have all of the following characteristics to be an easement:

- ▶ There must be dominant land (which enjoys the benefit of the easement) and servient land (over which the easement is exercised).
- ▶ The right must accommodate the dominant land;
- ▶ The dominant and servient land must be owned by different persons.
- ▶ The right must be capable of forming the subject matter of a grant.

**The right must accommodate the dominant land**

To be an easement, the right must be one that:

"accommodates and serves the dominant land, and is reasonably necessary for the better enjoyment of that land, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership more valuable, it is not an easement at all, but a mere contractual right personal to the two contracting parties".

**(Lord Evershed MR in Re Ellenborough Park [1955] EWCA Civ 4.)**

**The dominant and servient land owners must be different persons**

"unity of seisin" - an easement cannot exist where the dominant and servient tenements are in common ownership and possession. The underlying rationale is that "you cannot have an easement over your own land".

### Creation of Easements in title deeds



- ▶ Express grant by deed - Deed of Grant
- ▶ Conveyances/transfer - Section 62 of the law of Property Act 1925 - provides that a conveyance of land shall be deemed to include and shall operate to convey, with the land, all ways, watercourses, privileges, easements, rights and advantages whatsoever.
- ▶ Statute
- ▶ Will
- ▶ Implied grant
- ▶ Prescription
- ▶ Contract
- ▶ Proprietary estoppel
- ▶ Leases

### Common Types of Easements



- ▶ Positive easements
- ▶ Negative easements



### Rights that are not easements



The following are rights and not easements:

- ▶ Licences
- ▶ Profits à prendre
- ▶ Restrictive covenants
- ▶ Natural rights
- ▶ Public rights and customary rights

### Easements related disputes



- ▶ Interference with an easement
- ▶ Remedies
- ▶ Declaratory relief
- ▶ Injunctions
- ▶ Damages
- ▶ Abatement of a nuisance

## Case Law Update



- ▶ **Gore v Naheed and another [2017] EWCA Civ 369** - Easement – Right of way. The Court of Appeal, Civil Division, held that terms of a conveyance of a right of way were wide enough to include direct access to the claimant's garage for parking in connection with the residential use of his property, but would not extend to a tenant of the garage alone.
- ▶ **Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and another [2017] EWCA Civ 238** - the Court of Appeal considered whether the High Court was correct to find that the right to use a golf course, swimming pool or tennis court was capable of being an easement.
- ▶ **Winterburn v Bennett [2016] EWCA Civ 482** - the Court of Appeal considered if a land owner could prevent easements arising by prescription by placing notices on its land.

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# Thank you



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