

# Newsletter

March 2016

**nplaw**

Public Sector Legal Expertise

[www.nplaw.co.uk](http://www.nplaw.co.uk)

## Welcome

Welcome to the first nplaw newsletter. We will be publishing it every two months and will send it by email to heads of law at councils in England and Wales. It isn't just aimed at heads of law, however. We hope that other members of local authority legal teams will want to receive it. To subscribe, all you have to do is email us (or, after our new website goes live on 11th April 2016, enter your email address in the box on the news & events page). If you decide you want to stop receiving it, just let us know.

## Introduction to nplaw

So who are nplaw and what is this newsletter all about? Well, a lot of you will already know that nplaw is the shared local authority legal service that undertakes legal work for most local authorities in Norfolk. You will probably know too that we are hosted by Norfolk County Council and based at County Hall in Norwich. nplaw has been going for over five years now and employs some 80 staff. But we don't just carry out work in Norfolk. We also undertake work in specialist areas for other councils in England and Wales. There has been a lot of talk over the past few years about council legal teams trading with other local authorities in order to achieve efficiencies. At nplaw we have put this into practice. Over the past 12 months we have carried out work in specialist areas in places as far apart as Holyhead in Wales, Taunton in the south west, Hastings in the south and Helmsley, Yorkshire in the north.

## How we can help?

Which brings us on to the second question posed above: what is this newsletter all about? Put simply, we want to raise our profile. We want other councils to know about the type of help that we can provide and some of the specialist services we can deliver. And why do we want to do this? To help out colleagues in other council legal teams when they are thinking of outsourcing some work, or when they find that they need help in a crisis. Sometimes when specialist help is required the reaction can be to obtain this from private practice. It is not always known that this work can be done by experts within the public sector. Alternatively, it may be that temporary assistance is required because a member of your team is off sick for an extended period or because there is an unexpected peak of work. We can offer help during such a period, as a convenient alternative to getting in a locum.

We do not intend, though, for the newsletter to be just a lot of advertising 'blurb'. We want it to contain articles on topics of interest to local authority lawyers. We want it to highlight difficult cases we have worked on and the lessons learned so that our colleagues can benefit.

In this first issue we have three articles:

- The practical use of section 237 of the Town and Country Planning Act 1990 to cleanse titles to land;
- Compulsory purchase – getting it right; and
- Fluency in the English language – a new code of practice for the public sector.

## Section 237 of the Town and Country Planning Act 1990 – a *must know* for property lawyers

Some lawyers know, and some don't, the magic that using section 237 can work in clearing awkward covenants and easements off a title. There is a similar mix of knowledge amongst developers. In a nutshell section 237 provides that:

- if a piece of land (with or without buildings) is acquired or appropriated by a local authority for planning purposes; and
- it is then developed (by the Council or a successor in title) in accordance with a planning permission; and
- that development interferes with covenants or easements:

those covenants and easements are extinguished and the person who previously had the benefit can claim compensation.

That is it in a nutshell. There are few further points to highlight. Firstly, it is the person carrying out the development who is responsible for paying the compensation. However if they default in making the payment, the person can claim against the local authority. It is usual therefore to have an indemnity covenant included in any legal agreement drawn up, to ensure that the council is covered against any default liability. Secondly, the amount of compensation is based on the diminution in the value of the claimant's land as a result of no longer enjoying the easement or benefitting from the covenant. There is no 'ransom element' to the compensation, which might have been extracted in any commercial agreement for release. Thirdly, it must be remembered that when land held by a council for planning purposes is disposed of under section 233 of the TCPA 1990, there is a requirement to either get 'best consideration' or Ministerial Consent. The General Disposal Consent does not apply to planning disposals.

We regularly use section 237 to clear rights granted under *right to buy* transfers or leases from general amenity land that is to be sold for new housing development. It is not uncommon for *right to buy* transfers and leases to grant quite extensive rights of access over *estate* land. Subsequently the local authority decides that part of the *estate* land should be sold for the development of some additional units of accommodation. Appropriating the relevant land to planning purposes before it is sold allows the new housing development to take place without any worries about infringement of rights or covenants. Of course, the purchaser will be responsible for any compensation claims from people who previously enjoyed the rights. In practice such claims are rare. It is an unusual case where the extinguishment of some general rights of access has actually resulted in a decrease in the value of the house or flat.

A recent use of section 237 concerned a proposed development of over 230 houses on a site just outside Norwich. The landowner had obtained permission for two accesses to the site, one being land subject to a covenant that prevented its use as a roadway. The landowner sought to negotiate a release of the covenant with those who benefited from it, but this proved impossible. The council and the landowner agreed that the council would acquire the land from the landowner at nil cost under planning powers and then immediately lease it back to it on a long lease. Section 237 was therefore engaged and the construction of the roadway, as authorised by the planning permission for the housing development, will extinguish the restrictive covenant.

So when dealing with the disposal of local authority land for development, if you have awkward covenants and easements that you want to get rid of, give a thought to using this power.

## Compulsory purchase orders - getting it right

More councils seem to be making CPOs than ever before, with a lot of them relating to empty homes. Lawyers at nplaw have long experience of undertaking compulsory purchase work for councils across England and Wales. Projects range from single plots of land to multi million pound regeneration schemes. It is not as difficult as some people think and by following a few golden rules you should be successful. Here are our top tips.

1. If in doubt as to whether someone has an interest in the land, include them in the order and serve them anyway.
2. If the landowner has died without making a will, or if you don't know whether there is a will, follow the service requirements in section 18 of the Law of Property (Miscellaneous Provisions) Act 1994. This ties in with section 9 of the Administration of Estates Act 1925.
3. In ascertaining who has an interest in the order land you need to make *diligent enquiries*. These are not CID type enquiries and if you don't know the name and address of the owner after making reasonable enquiries you can serve the statutory notice by displaying it on the site.
4. Normally you pay stamp duty land tax on the acquisition of land pursuant to the CPO. Remember that you may be able to rely on the exemption in section 60 of the Finance Act 2003 (compulsory purchase facilitating development by a third party).
5. If you are doing an empty property CPO, you should refer to paragraph 51 of the National Planning Policy Framework in your statement of reasons. This contains government policy encouraging councils to bring empty properties back into use and to use CPO powers where necessary.
6. If you are acquiring land for a statutory function of the authority, covenants and easements incompatible with the project are extinguished (at least while the land is being used for the statutory purpose). If you are CPOing land for third party development, easements and covenants affecting the land continue. To get round this, you should CPO the land under section 226 of the TCPA 1990 and then you can rely on section 237 to extinguish the easements and covenants.
7. If you acquire title to CPOed land by way of a General Vesting Declaration, the previous freehold, leasehold and mortgage interests are extinguished and turned into rights to claim compensation. The council does not need to set aside any sale proceeds for meeting these compensation claims provided it recognises that a claim may be made that it will have to meet.
8. If you operate cabinet government, decisions to make CPOs (save for listed building CPOs under section 47 of the Listed Buildings Act 1990) are for the cabinet part of the decision making process.
9. Provisions in the Housing and Planning Bill will, if passed, enable Inspectors to decide CPO cases instead of the Secretary of State.
10. If you find belongings on a CPOed property which may be of value, consider serving a notice under section 41 of the Local Government (Miscellaneous Provisions) Act 1982 on the previous owner. This will have the effect of vesting the items in the Council if they are not collected in 28 days.

## Fluency in the English language - a new code of practice for the public sector

Under Part 7 of the Immigration Bill 2016 all public bodies and any organisation providing services of a public nature will have an obligation to ensure that staff in a 'customer-facing role' have sufficient fluency in the English language to be able to do their job properly. Similar provisions apply to the Welsh language. The duty applies to all staff irrespective of whether they are employed, self-employed or agency workers and the length of their contract. The Government has issued a draft code of practice available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/467731/Draft\\_Code\\_of\\_Practice\\_on\\_the\\_English\\_Language\\_Requirement\\_for\\_Public\\_Sector\\_Workers\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467731/Draft_Code_of_Practice_on_the_English_Language_Requirement_for_Public_Sector_Workers_.pdf)

An exact commencement date has yet to be confirmed but we expect the duty to become effective by October 2016.

### How do you assess proficiency in English?

The draft code gives examples of what examination certificates would be viewed as acceptable. It also explains that it is perfectly legitimate to make this assessment at a job-interview.

### What happens if staff are not sufficiently fluent?

They should be supported and the employer should pay for any training to help them achieve proficiency. If a member of staff cannot achieve this, he or she should be redeployed to a non-customer facing role. Only if there is no alternative employment should dismissal be contemplated.

### Complaints procedures and management

Appropriate complaints procedures should be introduced to enable members of the public to complain about fluency issues. This could be done by simply updating existing complaints procedures. The draft code confirms that an employer does not have to respond to complaints that are vexatious, oppressive or which amount to harassment.

Following a complaint, the employer must consider whether or not the individual member of staff was sufficiently fluent in the English language, give that person sufficient opportunity to comment on the complaint and if it is upheld, explain what remedial action will be undertaken in relation to the fluency duty.

### Equality Act 2010

The Equality Act needs to be complied with so that no discrimination complaints can be made. There is a high risk of complaints of indirect racial discrimination due to the need to speak English fluently. It is a defence to show that there is a legitimate aim (need to comply with a legal duty or a customer need for fluent English speakers) but it is also necessary to show that implementation is proportionate. This can be demonstrated by accurately assessing the level of fluency for each job, and ensuring that any training is supportive but justified, that redeployment is handled fairly and that dismissal is only a last resort.

### Action points for senior managers and HR

1. Fully explain this new duty to all customer facing staff.
2. Update existing recruitment and selection practices and train all staff involved in this.
3. Update contracts of employment to state that this is an occupational requirement for the role.
4. Update complaints procedures.
5. Comply with the Equality Act 2010.

### And finally

We hope that you have found this first newsletter useful. We will have a stand at the LLG Weekend School that takes place this year over the period 7<sup>th</sup> to 10<sup>th</sup> April at Warwick University. If you'll also be attending, please come and visit us. We'd love to hear your news and views.

**If you have any queries relating to this newsletter or wish to seek advice,  
please contact:**

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*Whilst every effort has been made to ensure that the content of this newsletter is up-to-date and accurate, no warranty is given to that effect and nplaw does not assume responsibility for its accuracy and correctness. The update summarises latest legal developments but is no substitute for specific legal advice after consideration of all material facts and circumstances.*



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