Explanatory Memorandum to: **The Town and Country Planning (Overriding Easements and Other Rights and Applications and Appeals by Statutory Undertakers) (Wales) Order 2015**

This Explanatory Memorandum has been prepared by the Department for Natural Resources 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 Town and Country Planning (Overriding Easements and Other Rights and Applications for Planning Permission by Statutory Undertakers) (Wales) Order 2015.

Carl Sargeant AM
Minister for Natural Resources

15 September 2015

1. Description

Use of land: power to override easements and other rights

1.1 On some land there are restrictive covenants and easements or other rights which affect land owned by other people[1]. When development on land held for planning purposes takes place (often following compulsory purchase) it is sometimes necessary to override these rights and allow appropriate compensation for the owners of the rights. The following provisions were intended to allow the overriding of these rights:

i) Paragraph 6 of Schedule 28 of the Local Government, Planning and Land Act 1980
ii) Section 19 of the New Towns Act 1981
iii) Paragraph 5 of Schedule 10 of the Housing Act 1988
iv) Section 237 of the Town and Country Planning Act 1990

Throughout this Explanatory Memorandum these provisions are referred to as "the paragraph 1.1 provisions".

1.2 The provisions listed above confer an immunity to carry out building operations on land acquired for planning purposes. It empowers the relevant local authority to interfere with rights where land has been acquired or appropriated for planning purposes provided that development is in accordance with planning permission and compensation is paid.

1.3 The rights might, for example, permit access over the site that is to be developed from neighbouring land or the land to be developed could be subject to a restrictive covenant that prevents the land from being used for a certain purpose.

1.4 The statutory objective which underlies the paragraph 1.1 provisions is that, provided that work is done in accordance with planning permission, and subject to payment of compensation, the relevant local authority should be permitted to develop their land in the manner in which they, acting bona fide, consider will best serve the public interest. To that end, it is recognised that the local authority should be permitted to interfere with third party rights and compensation paid for the infringement

1.5 However, in the case of *Thames Water Utilities v. Oxford City Council (1999)*, it was determined that rights could only be removed during the erection, construction or carrying out or maintenance of any building or work on land and doubt was cast on the ability to remove rights on a permanent basis.

1.6 To remove this doubt, amendments are required to the provisions in paragraph 1.1 and this Order will make these amendments. Similar amendments have already been made to legislation in England and the Welsh Development Act 1975 in relation to land in ownership of the Welsh Ministers.

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[1] These are referred to collectively as 'rights' from this point forward.

1.7 The report by the Independent Advisory Group (IAG) on the reform of the planning system in Wales[2] ("The IAG Report") recommended that the power to override easements and other rights should be brought in line with England through applying the powers under section 203(1) of the Planning Act 2008 as soon as practicable.

1.8 In response, the statutory instrument makes provisions to allow rights on land, which has been acquired or appropriated by a public authority, to be overridden for the use of the land, i.e. on a permanent basis, and not just for the carrying out of works on that land in accordance with planning permission.

Applications and appeals by statutory undertakers

1.9 Where a planning application by a statutory undertaker is called in for determination by the Welsh Ministers or a decision by a local planning authority is appealed against by a statutory undertaker under section 78 of the Town and Country Planning Act 1990 ("the 1990 Act"), section 266(1) of the 1990 Act in Wales currently requires the case to be dealt with jointly by the Welsh Ministers and the appropriate Minister i.e. Secretary of State. This can cause significant delays to the process and increase the cost to a statutory undertaker of applying for planning permission in Wales.

1.10 The Order makes an amendment to section 266(1) of the 1990 Act to remove this delay so that the default position for called in applications and appeals by statutory undertakers in Wales is that they are dealt with solely by the Welsh Ministers unless otherwise directed.

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

2.1 In relation to the power to override easements and other rights, 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 provisions listed in paragraph 1.1 above in England were made under section 194(1) of, and Schedule 9 to, the Planning Act 2008 which came into force on 6 April 2009.

2.2 This Order is subject to the Assembly's affirmative procedure.

3. Legislative background

Use of land: power to override easements and other rights

3.1 Section 194(1) of, and Schedule 9 to, the Planning Act 2008 ("the 2008 Act") came into force in England on 6 April 2009 which clarified the scope of the powers for relevant local authorities to override covenants restricting the use of

[2] "Towards a Welsh Planning Act: Ensuring the Planning System Delivers", a report to the Welsh Government by the Independent Advisory Group, June 2012.

land in England that had arisen due to the *Thames Water Utilities v Oxford City Council (1999)* decision.

3.2 Schedule 9 to the 2008 Act introduced powers that the use of any land in which has been acquired or appropriated by a relevant local authority for planning purposes is authorised if it is in accordance with planning permission, and not just for the erection, construction or carrying out or maintenance of any building or work on land. Schedule 9 to the 2008 Act currently amends the provisions in paragraph 1.1 above on an England only basis.

3.3 Section 203(1) of the 2008 Act confers on the Welsh Ministers the power to make an order giving effect in Wales to certain reforms to the land use planning system, which would otherwise have effect only in England. Section 203(2) of the 2008 Act gives the Welsh Ministers power to apply section 194(1) of, and Schedule 9 to, the 2008 Act in Wales.

Applications and appeals by statutory undertakers

3.4 Section 195 of the 2008 Act makes changes to section 266(1) of the 1990 Act in England which disapplies the requirement for applications by statutory undertakers that are either called in or appealed to be determined jointly by the Secretary of State or the appropriate Minister. Instead, a joint determination shall only occur where the Secretary of State or the appropriate Minister give a direction for a joint determination to occur in relation to the relevant called in application or appeal by statutory undertaker.

3.5 Section 203(1) of the 2008 Act confers on the Welsh Ministers the power to make an order giving effect in Wales to certain reforms to the land use planning system, which would otherwise have effect only in England. Section 203(2) of the 2008 Act gives the Welsh Ministers power to apply section 195 of that Act in Wales.

4. Purpose & intended effect of the legislation

Use of land: power to override easements and other rights

4.1 It had long been assumed that the paragraph 1.1 provisions enabled rights to be overridden not only while works were carried out in accordance with the grant of planning permission but also after the works ceased and the land was used for the purpose for which planning permission had been granted. This assumption was ruled to be incorrect by the Court in the case of *Thames Water Utilities -v- Oxford City Council (1999)* where it was held that the wording in section 237 of the 1990 Act (and, because of the similarity of wording, the other paragraph 8 provisions) only permitted the overriding of rights during the actual carrying out of the works permitted by the planning permission. It did not authorise the overriding of those right for the use of the land, albeit in accordance with the planning permission, after the completion of the works.

4.2. The inability of the paragraph 1.1 provisions, in relation to Wales, to authorise the continuation of the overriding of the rights after the completion of the works

threatened the effectiveness of those provisions in bringing forward sites for development and regeneration through doubt, uncertainty and delay as well as the potential for litigation if the question of rights is not resolved.

4.3. There was an unsatisfactory situation where works could be carried out but the land not able to be used or free of any restrictive rights. This anomaly has been rectified through the amendment of the legislation in England and the introduction of this amendment in Wales will ensure that the anomaly is corrected. The law of compulsory purchase and compensation is closely linked to the wider system of land law, which is not a devolved function, and there is a strong argument that the law in Wales on compulsory purchase should be the same as that in England.

4.4 In response to the public consultation on introducing the proposed amendments in Wales, there was support for maintaining the principle of maintaining coherence in relation to the law on compulsory purchase as recommended by the IAG on planning reform in Wales. One respondent stated that the proposed amendments will simplify the process of working with the planning permission for the benefit of the community and will ensure that development will not be prevented because of historic limitations which are no longer relevant.

4.5. The change to the paragraph 1.1 provisions will negate the need for local authorities to obtain expensive indemnity insurance for ancient and obsolete rights at a time when local authority resources are limited. Furthermore, it is intended to transform the paragraph 1.1 provisions into positive mechanisms to deliver certainty on land acquisition and provide a “clean title” to a development site i.e. a title uninhibited by encumbrances which might impede the achievement of the development. It was believed that the provisions did this until the judgment in *Thames Water Utilities v Oxford City Council (1999)*.

4.6 The Order will enable regeneration and development projects, which might otherwise face problems of implementation, to proceed more efficiently. It will correct an anomaly in legislation which has the current impractical situation where works can be carried out but then cannot be used.

Applications and appeals by statutory undertakers

4.7 Section 266(1) of the 1990 in Wales provides for the Welsh Ministers and the relevant Secretary of State to determine jointly applications for works by a statutory undertaker which are either called in or appealed. This can cause significant delay to the process and increase the cost to statutory undertakers of applying for planning permission.

4.8 Section 195 of the 2008 Act disapplies this provision in England except where the Secretary of State or the appropriate Minister give a direction that a joint determination should occur on the relevant called in application or appeal by a statutory undertaker.

4.9 In response to the public consultation on introducing the proposed amendment in Wales one respondent stated that it was particularly anomalous that called in

application and appeals by a statutory undertaker in Wales should be subject to determination jointly with the Secretary of State for Environment, Food and Rural Affairs given this department does not have direct responsibility for any Welsh internal matters.

4.10 The Order applies section 195 of the 2008 Act in Wales which has an effect that the default position for called in applications and appeals by statutory undertakers in Wales will be that they are dealt with solely by the Welsh Ministers. Joint determination of called in applications and appeals by statutory undertakers could still occur where the Welsh Ministers or relevant Secretary of State give a direction to this effect.

4.11 The Order intends to reduce both the time taken for decisions to be made on called in applications and appeals by statutory undertakers and the cost to statutory undertakers of applying for planning permission. The reason for making the Order is to:

- reduce the overall time that it takes for these types of cases to be determined, and the delay and additional cost that this can cause;
- remove the duplication in the decision making process for these types of cases;
- improve the efficiency and effectiveness of the decision making process for these types of cases; and
- provide for more certainty in the decision making process where there is only one decision maker.

4.12 The Order aims to limit the proposals decided jointly to those called in applications and appeals by statutory undertakers that require a joint decision. It provides for the Welsh Ministers or the relevant Secretary of State to be able to make a direction to enable that to happen in such circumstances.

5. Consultation

Use of land: power to override easements and other rights

5.1 The proposed change to legislation was consulted upon in the 'Proposed Amendments to Legislation on the Power to Override Easements and Other Rights' consultation paper between 6 October 2014 and 16 January 2015 (WG23294).

5.2 The consultation document can be accessed via the following links:

English

http://wales.gov.uk/consultations/planning/amendments-to-easements-and-other-rights/?status=closed&lang=en

Welsh

http://wales.gov.uk/consultations/planning/amendments-to-easements-and-other-rights/?skip=1&lang=cy

5.3 From this consultation, there was overall support for the proposal. Of those who directly answered the question on whether the relevant legislation should be amended, 91% (of 42 respondents) supported the proposed changes to legislation.

Applications and appeals by statutory undertakers

5.4 The proposed change to legislation was consulted upon in 'Planning and Related Decisions of the Welsh Ministers' consultation paper between 7 November 2014 and 30 January 2015.

5.5 The consultation document can be accessed via the following links:

English

http://wales.gov.uk/consultations/planning/planning-and-related-decisions-of-the-welsh-ministers/?status=closed&lang=en

Welsh

http://wales.gov.uk/consultations/planning/planning-and-related-decisions-of-the-welsh-ministers/?skip=1&lang=cy

5.6 From this consultation, there was overall support for the proposal. Of those who directly answered the question on whether the relevant legislation should be amended, 69% (of 29 respondents) supported the proposed changes to legislation.

6. Regulatory Impact Assessment (RIA)

Use of land: power to override easements and other rights

6.1 A RIA is not considered necessary for this provision for following reasons:

- The Order brings certainty to existing legislation that was considered to be effective until uncertainty was created when it was challenged in a court case. It will put beyond doubt the issue of overriding easements and does not make any substantive change to policy nor has major policy impact. The RIA completed by the UK Government for this particular provision of the Planning Act 2008 made no specific reference to the need for the Welsh Ministers to complete a separate RIA when applying this provision in Wales.

- The effects of the Order are not wide ranging. Each proposal to use the powers will be subject to individual approval which will consider the merits, the effects if any on third parties and any compensation payments.

- The Order applies primary legislation in Wales i.e. section 194(1) of, and Schedule 9 to, the Planning Act 2008.

Applications and appeals by statutory undertakers

6.2 A RIA is not considered necessary for this provision for following reasons:

- The Order makes an alteration to the existing procedure for the determination of called in applications and appeals by statutory undertakers and it clarifies the role of the Welsh Ministers and the Secretary of State.

- The Order does not make any substantive change to policy nor has major policy impact.

- The Order applies primary legislation in Wales i.e. section 195 of the Planning Act 2008.

6.3 In general, 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.