Forsters

Rural Land and Business

Dealing with access issues in Infrastructure Projects

A land manager's perspective

There is an undeniable friction between landowners and occupiers of land and infrastructure providers, promoters and developers.

Much is being discussed at government policy level in an attempt to alleviate this friction, with provisions in the Planning and Infrastructure Bill designed to 'streamline' the process and the new Electricity Infrastructure Code of Practice May 2025 a hopeful guide designed to make the process better.

What does this actually mean for landowners? And how can landowners best take control of the process for themselves?

Often, no matter how much influence is applied from a policy perspective, human behaviour and agendas will so often dominate the relationship. Interference with private property rights is, quite understandably, one of the most emotive topics and we can't help but feel that this aspect too often gets forgotten.

When the need arises for new infrastructure (here we are focusing on electricity) the likelihood is that landowners will have got wind of a project on the horizon. The next thing very often will be a letter from an 'Acquiring Authority' followed swiftly by proposed draft licences and notices requesting or, in some cases, demanding access for intrusive and non-intrusive surveys. And so it begins.

Perhaps at this juncture it is important to point out that we are still dealing with the ultimate use of Compulsory Purchase Powers. They are what they say on the tin.

What does the law say?

- Section 172 of the Housing and Planning Act 2016 gives power to an 'Acquiring Authority' to access required for a project for the purpose of carrying out surveys.
- The section 172 procedure is often used as an alternative to the older section 53 Planning Act 2008 power, which requires approval from the Secretary of State.
- Guidance emphasises that the acquiring authority **MUST** use reasonable endeavours to obtain access voluntarily, before serving a section 172 Notice.
- An acquiring authority (for the purposes of the cheaper and easier section 172 power) is defined as "*...a person who could be authorised to acquire compulsorily the land to which the proposal...relates (regardless of whether the proposal is to acquire an interest in or a right over the land or to take temporary possession of it)*". There are often very real concerns about whether person exercising the power actually qualifies as an acquiring authority.
- The power gives the acquiring authority very broad rights to enter and survey in connection with a proposal to acquire an interest in or right over land. This includes *searching, boring, excavating/leaving apparatus/taking samples/aerial survey/ any other activities required to comply with directives on environmental impact of development and/or on natural habitats on flora/fauna*.
- A section 172 Notice must be served on owners **AND** occupiers at least 14 days' notice before the first day of access.
- Notice must contain an explanation of the landowners rights of compensation for any damage caused and, if intrusive, the details of what they intend to do.
- If a landowner or occupier has physically prevented access, an acquiring authority can apply for a warrant from the Magistrates Court authorising use of force if a person has prevented or is likely to prevent access, and it is reasonable to use force.
- A warrant will be limited to that which is reasonably necessary, and the warrant has to specify the number of occasions it is to be used. Note that time periods for access under a Warrant can still be extensive. Warrants can often come with a costs order against a landowner and the potential for a £1,000 fine upon conviction if access is still refused.

What happens in practice?

The above summarises what is provided for under statute and associated guidance. The obligations on both sides rest heavily on 'reasonableness'. And again; human behaviour.

What actually happens can be very different. More often than not, letters will be sent requesting access. Letters will contain a draft licence which landowners are asked to sign there and then. If the licence is not signed in its un-negotiated and un-amended form, the implication will be that the acquiring authority will rely on its section 72 powers for access anyway. These letters will be swiftly followed up by section 172 notices.

Attempts to negotiate the Access Licence are costly and in circumstances where they are attempted, will often fall on the deaf ears of the developer and no progress will be made.

Notices will be followed up with, strictly speaking, unauthorised survey visits by unknown surveying contractors within the 14 day notice period and at times that could be deemed reasonable and unreasonable in equal measure.

It is understandable why the process so often gets of to a dreadful start.

What can landowners do?

First and foremost, landowners should remember that engagement is **NOT** approval.

In the first instance, the *Access for Surveys* process should allow for landowners and occupiers to seek professional advice from agents and lawyers. This cost should be met by the acquiring authority.

- **How to deal with costs**

  In the case of energy project developments, very often the acquiring authority will be an SPV with no money, more likely debt. This is normal.

  What is also normal is for an acquiring authority to pay landowners reasonable costs for negotiations for an Access Licence. To achieve this, landowners should request this by way of funds on account or by way of a solicitors undertaking (which is effectively a legally binding promise).

- **What can you get out of the access arrangements**

  The costs provided for above should be sought from the developer at the outset and landowners would be well advised to focus on engaging their professional advisors to push hard in negotiations over access arrangements.

  Access requirements are likely to be bespoke to each landowner and occupier and there is scope to agree the timings, notice periods and importantly, provision for damages and compensations and imposing an appropriate duty of care and regulations and rules around access. In summary, **more control**.

And if these attempts fail?

The sanctions and implications for each party where a party has failed to act 'reasonably' is far from even, in our view.

If a landowner has reacted to the inevitable fear of uncertainty of major upheaval on its land, it will be threatened with costs orders, warrants and unknown contractors surveying its land at unreasonable hours. It will be quickly deemed an unreasonable NIMBY or BANANA (to coin a new expression, *build absolutely nothing anywhere near anything*). And unfortunately, the lack of engagement at the outset is more likely to result in the use and exercise of CPO powers to deliver the ultimate infrastructure project with little or no input from the landowner or occupier. If ever there was a missed opportunity for engagement with the very individuals who know and understand the land, **here it is**.

On the other hand, if a developer flies close to the line of 'reasonableness', what will be the consequences?

In the first instance, most likely **delay**. A delay in getting on to do surveys, bad surveys and missed surveying windows. And this will cost the developer. Ironically, the cost of this could have been better applied to supporting and facilitating the positive engagement and onboarding of landowners. And later down the line, a slapped wrist at a planning enquiry?

But in reality, poor conduct by a developer is not always enough to change the overall outcome.

What can landowners do?

It is all too easy to *tell* landowners to 'engage'. What does that even mean when in most instances, it is impossible?

We have looked at the balance of power in the section above and the implications of this for landowners and developers. One example of a distressed landowner being unfairly treated by the process is, unfortunately, unlikely to tip the balance.

But similar examples from all landowners affected? Much more powerful. And whilst this may not change the ultimate decision, the reputational and financial implications for a developer will be real to them and their funders. Could this instigate behavioural change? Who knows.

There is much to do to coordinate the response from landowners where projects impact multiple landowners. It is necessary to give the developer something to work with and, far more importantly, **no excuse** not to engage constructively and fairly.

So this is what you can do. Record everything and pool the information amongst affected neighbours. Know your legal rights and insist that your costs are met so you are not left out of pocket. Get your advisors on board to help you navigate the process. And always remember, engagement is not approval.

Our key team

Polly Montoneri
Partner
Rural Land and Business
T +44 20 7863 8589
E polly.montoneri@forsters.co.uk

Matthew Evans
Partner
Planning
T +44 20 7399 4802
E matthew.evans@forsters.co.uk

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