

25 September 2003

Circular L 15/03 (WSP)

To each local authority

CONSENT TO RUN PIPES THROUGH PRIVATE LAND

A Chara,

The purpose of this Circular is to provide clarification on correct procedure for obtaining consent to lay pipes under private land. In summary, two approaches are available, involving:

- (a) acquisition of "way-leaves" in the traditional manner, either under the Public Health (Ireland) Act 1878 or using updated acquisition powers under the Planning and Development Act 2000, or
- (b) exercising powers to place pipes in the ground in accordance with the simplified procedures provided for in section 182 of the Planning and Development Act 2000 (i.e., without acquiring "way-leaves").

Way-leaves

General authority for sanitary authorities to lay water main and sewers through land is provided for in sections 18 and 64 of the Public Health (Ireland) Act 1878. Sections 202/203 of the Act also enable sanitary authorities to acquire land (by agreement or compulsory purchase).

In addition to the acquisition of land per se, the provisions of sections 202/203 have traditionally been applied in the water services sector to the acquisition of "easements" (usually known as "way-leaves") for the purpose of running pipes through land. Such interpretation arises from the inclusion of "easements" in the definition of land under section 2 of the 1878 Act.

Notwithstanding this, and the possibility therefore of assessing compensation for acquisition of way-leaves under sections 202/203, practice has developed

that compensation for way-leaves is generally payable under section 274 of the 1878 Act. This may reflect a possible legal ambiguity surrounding whether payment is in respect of an "easement" in the first instance, rather than simply exercising power to lay pipes through the land. In any event, section 274 gives a right to compensation to any person who sustains any "damage" arising from the exercise of any powers under the Act, and provides for referral to arbitration in the event of a dispute.

Alternative acquisition powers are provided for in section 213 of the Planning and Development Act 2000, which provides general authority for local authorities to acquire land, way-leaves or other rights over land or water for the purposes of any of their functions, either by agreement or compulsorily. Section 213(4) of the 2000 Act provides that, where required, CPO procedures would be applied in accordance with section 10 (as amended by section 86 of the Housing Act 1966) of the Local Government (No.2) Act 1960.

Difficulties with the acquisition of way-leaves

While acquisition of way-leaves is a well-tried method of establishing rights to lay pipes through lands, difficulty is occasionally experienced in gaining physical access to lands for this purpose. To cater for this, section 271 of the 1878 Act provides for a mechanism to enforce powers of entry, and enables a sanitary authority to apply for a court order where an owner or occupier refuses access. However, these procedures, which require that the landowner or occupier actually refuses access before they can be initiated, have been found to be unsatisfactory in some instances. For example, the continuing absence of a formal refusal from a landowner or occupier to a request for access has been used as a mechanism to attempt to extract additional and inappropriate levels of compensation against the possibility of last-minute refusal of access to a duly appointed contractor (in the knowledge of potentially large compensation claims if a contractor is prevented from starting on the appointed date).

Similar difficulties can potentially arise with the application of section 213 of the Planning and Development Act 2000 for this purpose. In the circumstances,

an alternative procedure was provided for in section 182 of the 2000 Act, which both addresses the difficulty and simplifies the process generally.

Section 182 of the Planning and Development Act 2000

Section 182 of the 2000 Act revolves around powers to lay pipes through land rather than the acquisition of way-leaves for this purpose. In addition to this simplified approach, the section also shifts the prerogative on to the local authority, in the face of refusal by a landowner or occupier to provide a definite response, to initiate proceedings to have the position of the landowner or occupier determined.

Under section 182 a local authority is authorised to lay pipes "including water pipes, sewers or drains" through any land, and to access them from time to time for maintenance and renewal. Such action is subject to the consent of the owner and occupier of the land. The local authority may also erect and maintain notices indicating the position of such pipes in any land.

Section 182(4) provides that a consent "shall not be unreasonably withheld", and, at the initiative of the local authority where it considers that consent is being unreasonably withheld, enables it to appeal to An Bord Pleanála for a determination. If the Board subsequently determines that consent has been unreasonably withheld, it is deemed that the consent has been given, and the local authority is accordingly empowered to proceed with the works in accordance with the provisions of the section.

Compensation is payable in accordance with section 199 of the Act, which provides for restitution where it is shown that the value of an interest in the land is reduced or that a person has suffered damage by being disturbed in his or her enjoyment of the land. Detailed procedures on compensation are set out in Part XII, Chapter 1 of the Act.

Distinction between section 182 and the acquisition of way-leaves

It should be noted that section 182 of the 2000 Act does not confer on a local authority any power to acquire a way-leave or land. Section 182 confers only

the power to run a pipe and any ancillary apparatus through a stretch of land, and accordingly, its operation would not result in a burden being registered on the landowner's title.

Where a section 182 procedure is opted for, it is essential to avoid reference to acquisition of way-leaves in any related documentation or notification. Such a purpose is beyond the scope of the section, and such reference could undermine or invalidate any subsequent appeal taken by the authority.

It is a matter for each local authority to decide in any particular instance whether it wishes to acquire a way-leave or operate under the simplified procedures provided for in section 182. In general, it would not be appropriate to opt for section 182 where it is envisaged that a way-leave will be required in the foreseeable future. In any event, where it is found necessary to acquire a way-leave subsequent to the conclusion of a section 182 procedure, the fact that An Bord Pleanála may have determined under that section that a consent had been unreasonably withheld can not be interpreted as a commitment or guarantee that any future CPO for a way-leave will be confirmed by the Board.

Application of Section 182

When applying section 182, a local authority should notify relevant landowners and occupiers of its intention to lay pipes and to erect any necessary signs (as indicated) through a given stretch of land, and request their consent. Notification should indicate that in the event of consent not being given the local authority may appeal to An Bord Pleanála in accordance with section 182(4) for a determination that consent has been unreasonably withheld. Written documentation of the notification and request for consent should be retained, in case an appeal to An Bord Pleanála becomes necessary.

Notification should also refer to compensation being payable in accordance with section 199 of the 2000 Act, preferably quoting the provision, and set a reasonable time for providing consent having regard to the possible need of a recipient to consult advisors. Again, to reiterate, the notice should not refer to the acquisition of a way-leave.

In the event of an appeal to An Bord Pleanála, copies of all correspondence with relevant landowners and occupiers in relation to the request for consent should be submitted with the application to the Board. Documentation submitted to the Board should also indicate the nature, function, design and location of pipes, etc. to which the request for consent relates.

Acquisition of a way-leave

If a way-leave is required, a local authority may enter into negotiations under sections 202/203 of the 1878 Act. At this stage however, it is preferable to opt for the more modern code provided for under section 213 of the 2000 Act. Application of the 2000 Act will help to establish a standardised approach to land acquisition for all local authority services.

Any queries arising from this guidance may be addressed to the undersigned in the first instance.

Mise le meas,

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To: each County and City Manager, Director of Water Services and Town Clerk
Copy to: GCCC, AMAI, CCMA, Ombudsman's Office, An Bord Pleanála and Regional Authorities.