LAW COMMISSION
CONSULTATION PAPER No 210

RIGHTS TO LIGHT

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on Rights to Light.

You can download the Consultation Paper free of charge from our website at: www.lawcom.gov.uk (see A-Z of projects > Rights to Light).

The response form includes the text of the questions and provisional proposals in the Consultation Paper, with space for answers. You do not have to respond to every question or proposal. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question and provisional proposal is followed by a reference to the Chapter of the Consultation Paper in which that question or proposal is discussed, and the paragraph at which it can be found. Please consider the discussion before responding.

We invite responses from **18 February 2013** to **16 May 2013**.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, wherever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name: The City of London Law Society (Land Law and Planning and Environmental Law Committees)
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Yes. Please see above.
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
Not applicable.
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

We would be grateful for any evidence that consultees can provide which illustrates the impact of possible rights to light claims on the funding of development projects. Are consultees aware of any developments which have failed to secure financing as a result of potential or actual rights to light disputes? If so, what are the costs associated with these types of frustrated developments? Consultation Paper, Part 1, paragraph 1.30
The respondent does not keep this type of specialist evidence.

We ask consultees to provide evidence as to the proportion of developments which involve rights to light, and evidence of any attendant delays. We would also be interested to know if consultees are aware of any plans for developments which have either been unable to go ahead or had to be altered because of rights to light disputes. Consultation Paper, Part 1, paragraph 1.35
The respondent does not keep this type of specialist evidence.

Do the figures of the costs of disputes discussed in Chapter 1 conform with consultees' experiences of the cost to a development of rights to light issues? Have these experiences changed since *Heaney* was decided? Consultation Paper, Part 1, paragraph 1.41
In general terms, following the *Heaney* decision, the respondent is aware of a big increase in the number of claims for damages and the size of the claims.

We ask consultees to provide us with evidence of the costs to developers of engaging with rights to light disputes, particularly with regard to: (1) the costs involved in preparing for rights to light disputes, including the costs of indemnity insurance, legal fees and the instruction of surveyors; (2) the cost to developments of delay caused by rights to light disputes; (3) the cost to developments of altering development plans as a result of rights to light disputes; and (4) the amounts set aside (expressed as a percentage of anticipated profits or otherwise) to deal with potential rights to light disputes. Consultation Paper, Part 1, paragraph 1.43
The respondent does not keep this type of specialist evidence.

We ask consultees to provide us with evidence of the costs to owners of rights to light of engaging in rights to light disputes. Consultation Paper, Part 1, paragraph 1.45
The respondent does not keep this type of specialist evidence.

We would be grateful for any evidence that consultees can provide about alternative ways in which rights to light disputes are commonly resolved and the costs of doing so, including evidence about the costs of a local authority using section 237 of the Town and Country Planning Act 1990 to resolve rights to light disputes. Consultation Paper, Part 1, paragraph 1.47
The respondent does not keep this type of specialist evidence.

We would appreciate any evidence that consultees can provide on how the amenity provided by natural light is, or might be, valued. Consultation Paper, Part 1, paragraph 1.49
The respondent does not keep this type of specialist evidence.

We invite consultees to make any further comments, or provide any additional evidence, which they feel may be relevant when assessing the practical and economic impact of rights to light.

Consultation Paper, Part 1, paragraph 1.51

We very much welcome the Law Commission's excellent paper and its balanced and thoughtful consideration of this critical issue. At a time when property development needs a boost, the Law Commission's carefully crafted analysis and proportionate proposals provide greater certainty for developers and less opportunity for procrastination by opponents of development.

However, we do not regard the paper as a "developer's charter", since the proposals provide significant protection for those with an interest in property seeking to protect their light. The proposals rightly highlight those who seek to exploit their private property rights to make some money, but thereby potentially stymie development that brings much needed general economic benefits. The proposals appropriately address those with such an agenda.

We consider that the proposals ensure that development rights are not unnecessarily obstructed, but at the same time property rights are respected. We also consider the tenor and line of your approach to be balanced and we applaud it in addressing the complex issues involved. We make a few observations in response to the following questions.

In general terms, we are somewhat concerned about the impact on these very important proposals of a failure to pass into law the Law Commission's proposed draft legislation in *Making Land Work*. With Parliamentary pressures, if that legislation never reaches the statute books, would this prevent these proposals seeing the legal light of day? Should the Law Commission make it clear that the rights to light paper is independent of *Making Land Work* and proceeds regardless of the ultimate fate of the Law Commission's recommendations on easements and covenants? We should add that we consider the proposed Law of Property Bill to be a major, desirable, step to modernise law relating to land covenants and easements.

We provisionally propose that prescription should be abolished for rights to light.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.48

There is some difference of opinion on this proposal among those responsible for this response.

A number of us strongly consider that the Law Commission's proposal is an excellent one. The uncertainties involved in ascertaining whether property interests benefit from a prescriptive right to light are a major delaying factor and consequential cost in property development. We understand that the Law Commission cannot interfere with existing prescriptive rights, but the proposal at least means that no new prescriptive rights to light will be created and over time this source of uncertainty will reduce.

The proposal to abolish prescriptive rights to light prospectively should apply not only to prescription at common law and under the Prescription Act 1832, but also prescription by lost modern grant.

Part of the sentiment behind supporting abolition is the objection that a negative easement, of which most property owners are blissfully unaware, can then be used to extract a windfall, perhaps disproportionate to the loss actually suffered by the property owner. By doing nothing, the property owner acquires rights and we agree with the Law Commission that some (but not all) owners are concerned not about the light being lost, but instead about how money can be extracted from the developer.

For those of us who supported the proposal to abolish prescriptive rights to light, we are happy with the proposal for transitional provision mentioned in paragraph 3.50.

However, there is concern among some of us about the implications of abolishing prescriptive rights to light prospectively. This may lead parties on certain transactions to focus on whether rights to light should be expressly granted, which could present difficulties in negotiations. There is also the anomaly of rights to light being the only prescriptive easement abolished.

Although property owners rarely think about the legal basis on which light passes through their windows, they may be unhappy with the future prospect of a more fragile basis for their enjoyment. Also, as the Law Commission noted in paragraph 3.79 of *Making Land Work* in relation to prescription generally, abolition may lead to unforeseen problems such as the inadvertent omission of easements from transfer documentation.

It should also be borne in mind that developers in future may well benefit from the Notice of proposed obstruction procedure in terms of dealing with some of the consequences of prescriptive rights to light.

One of the current problems with prescriptive rights to light is the potential multitude of claims from tenants in a multi-let building scenario. One suggestion, although not universally supported, would be to provide that prescriptive rights to light continue, but only for those who own a freehold interest or a leasehold interest granted for more than seven years. The seven year period ties in with leases that require registration at the Land Registry (making their existence more self-evident), but also removes from the equation leases (usually with little financial value) that are unlikely to be relevant in terms of conferring prescriptive rights. This suggestion could be

seen as a middle ground.

One of the reasons for some of us not favouring the proposal to abolish prescription in relation to rights to light is that it would lead to some property owners, who suffer severe loss of light, and, therefore, amenity, having no legal rights of redress. The common law has developed upon the distinction that an action for nuisance will not lie unless backed by a prescriptive right to light.

Should not some thought be given to a measure allowing claims in nuisance for cases where there is severe loss of amenity to a property in general (as distinct perhaps to certain windows) in those circumstances? Any measure allowing claims in nuisance should, it is suggested, be made subject to constraints on availability to prevent the abundance currently brought on the basis of prescribed rights, in order to preserve the objective of balanced relief of development from current problems.

Certainly, if prescriptive rights to light are to be abolished prospectively, this imposes an even greater responsibility on the planning process (and "daylighting") to protect those who may be adversely impacted by the particular development. However, will this be undermined by permitted development rights potentially increasing, for example, in relation to house extensions?

Consultees, in particular those who do not wish to see the abolition of prescription for rights to light, are asked to tell us their views on the procedural requirements for the service and registration of light obstruction notices under the Rights of Light Act 1959, and whether they wish to see any reform or simplification of those requirements.

Consultation Paper, Part 3, paragraph 3.54

The general view is that the procedure under the 1959 Act is cumbersome and should be simplified. It is recognised that the protective provisions involved serve an important purpose, but they lead often to the process being avoided rather than utilised.

We ask consultees whether reform is needed to the principles governing when an obstruction of light is actionable and, if so, we would be grateful for consultees' suggestions for reform.

Consultation Paper, Part 4, paragraph 4.43

We agree with the Law Commission that the current subjective legal test for when an obstruction is actionable (namely, if it deprives the benefiting party of sufficient light for the beneficial use of the building for any ordinary purpose for which it is adapted) is the correct test. The greater flexibility that this test provides is, generally, helpful and, while perhaps less certain than a more objective test, it should allow for fairer outcomes.

We agree that the current position of a court being able to take account of artificial light when assessing the remedy, strikes the appropriate balance. Artificial light should not be taken into account when deciding whether an obstruction is sufficiently serious to be actionable. If it was, this could make it very difficult for the many

commercial buildings that use large amounts of artificial light, to succeed in actions for light obstruction. While such buildings predominantly use artificial light, natural light remains important.

We provisionally propose that a court may award damages in substitution for an injunction in rights to light cases if the grant of the injunction would be disproportionate, bearing in mind:
(1) the size of the injury in terms of loss of amenity (which can include consideration of whether artificial light is usually used by the claimant);
(2) whether a monetary payment will be adequate compensation;
(3) the conduct of the claimant;
(4) whether the claimant delayed unreasonably in bringing proceedings; and
(5) the conduct of the defendant.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.50

We wholeheartedly support the Law Commission's proposal to introduce a new statutory test re-stating *Shelfer* with modifications, but only in relation to rights to light.

While Lindley LJ in *Shelfer* stated that the jurisdiction to award damages should be exercised in only "very exceptional circumstances", those circumstances in the judge's view included "cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has conducted himself as to render it unjust to give him more than pecuniary relief;" or where the acts complained of are already finished. AL Smith LJ in his guidance highlighted that damages may be given for small injuries that can be adequately compensated by a money payment and where an injunction would be oppressive. Unreasonable delay, for example, by the claimant may disentitle him or her to an injunction.

The courts' application of the *Shelfer* criteria in subsequent cases has led to some uncertainties as to whether an injunction or damages will be awarded. In particular, concern has been expressed at the application of *Shelfer* in the subsequent *Regan* and *Heaney* decisions. While an injunction is the starting point following *Shelfer*, have the courts sufficiently considered whether those admittedly "very exceptional circumstances" apply? Have the courts adequately considered whether the grant of an injunction will be oppressive, or how the claimant has behaved, such as dilatoriness in bringing a claim?

The inconsistency of the courts' approach in the cases post-*Shelfer* demonstrates the need to introduce the statutory test as to when damages will be awarded in substitution for an injunction in rights to light cases, which will clearly provide greater certainty as to when an injunction will be granted.

The focus in the statutory test that a court may award damages if the grant of the injunction would be disproportionate is, in our view, appropriate. While oppression was mentioned in *Shelfer*, it has not been given adequate weight in all the cases. Is the requirement for a developer to remove part of an already constructed building justified where the losses are small and the affected neighbour has been tardy in making a claim? We, therefore, consider that the emphasis on whether the grant of the injunction would be disproportionate, is key.

We welcome the test's reference to particular factors to be borne in mind in determining whether an injunction is disproportionate. These factors address concerns highlighted by the cases including the claimant's conduct; unreasonable delay in bringing proceedings; and whether money is adequate compensation. We are pleased to note that the factor of loss of amenity specifically mentions use of artificial light. This brings the *Shelfer* criteria into the 21st Century and explicitly

makes artificial light a relevant consideration in deciding whether damages will suffice.

We also welcome the Law Commission's assurance that there needs to be flexibility in deciding whether the grant of an injunction would be disproportionate. The factors mentioned may be key, but they may not be the whole story in every situation.

We also agree that "public interest" should not be specifically included as a factor for the reasons mentioned in paragraphs 5.52 and 5.53.

We wonder whether the factors should also include whether the claimant has a lease and its length and nature. If the claimant's interest in a building is short-lived, should this not impact on the likelihood of a successful injunction claim?

We would be grateful for consultees' views on limiting to rights to light cases reform of the test for when damages may be awarded in substitution for an injunction.

Consultation Paper, Part 5, paragraph 5.56

While there may be a little intellectual unease in having a different test for rights to light cases from cases involving an infringement of another easement or a breach of a restrictive covenant, we accept the Law Commission's recommendation. Rights to light cases appear to be the key mischief where there is a critical need for greater certainty. We would not want enactment of the proposed test to be held up by consideration of whether it has other applications. At some future time, perhaps, the Law Commission can consider whether the statutory test for rights to light has a wider application.

We would be grateful for consultees' views on the options for reform of the method of assessment of equitable damages explored in Chapter 5. We would also be grateful for consultees' views on the introduction of a cap on the amount of equitable damages that may be awarded and how this could be achieved in practice.

Consultation Paper, Part 5, paragraph 5.94

Current judicial methods for assessing equitable damages may sometimes appear a little opaque. Witness the "felt right" test applied in *Tamares* and *Heaney*.

There is also some concern that a property owner, who has acquired a right to light without doing anything, can, potentially, have a share of the profits generated by the proposed building that causes the light to be obstructed. We do acknowledge, though, that the developer needs the owner's release to develop. Does this justify, however, an equitable damages payment out of all proportion to the value of the dominant owner's property and more akin to a ransom?

The proposal to allow all easements (including existing rights to light) to be modified or discharged by the Lands Chamber under section 84 of the Law of Property Act 1925 would mean that, if the application was successful, the dominant property owner would receive far less compensation than the ransom value now commanded. This may influence negotiations over a price for release. However, section 84 will not be applicable in situations where, for example, the restriction is not obsolete.

We consider that the Law Commission should give further thought to the introduction of a statutory cap on equitable damages in a rights to light context, in order to avoid disproportionate awards far exceeding the actual loss suffered by the dominant owner.

If the Law Commission does decide that there needs to be some legislation on equitable damages, it may be helpful also to clarify that assessment of equitable damages should take account of whether the dominant property is residential or commercial and how much reliance there is on artificial light (unless the Law Commission considers that this is already covered by the existing law).

We provisionally propose that a court should not be able to grant an injunction to prevent or remedy an infringement of a right to light where the dominant owner has received a Notice of Proposed Obstruction and has not protected his or her right to an injunction in accordance with the procedure described in Chapter 6 and illustrated by the draft clauses at Appendix C of this Consultation Paper.

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.47

In general terms, we agree with the principle of the process. It is important to bring matters to a head, injunction-wise and to address those who manipulate their rights to extract ransoms, with the consequential adverse impact on potential developments and the economic benefits that they may bring.

We welcome the Law Commission's acknowledgment in paragraph 6.9 that the procedure "will be used as a last resort following extensive negotiations which have failed to result in agreement". However, it is quite possible that developers may well want to get the ball rolling as soon as possible in view of the time periods integral to the process, in order to flush out potential claimants and better understand as early as possible how many potential injunction situations they may face.

In a situation where the dominant property has a large number of tenants, the procedure will be very bureaucratic with notices and the ensuing process applying to maybe 50 or 100 tenants in a building. We would ask the Law Commission to consider if there is any way of streamlining the notice procedure in relation to tenants in a building.

We also wonder whether property owners or tenants may use the procedure for tactical reasons to drag matters out for as long as possible. If this can be proven, should there be costs consequences? The introduction of the statutory test as to when damages will be awarded in substitution for an injunction in rights to light cases should deter some from such a tactical approach.

We would be grateful for consultees' comments on the detail of the Notice of Proposed Obstruction procedure as provisionally proposed, including:
(1) the form and content of the notice;
(2) the rules governing service of the notice;
(3) the third-party effect of the notice;
(4) responding to the notice by a counter-notice and issuing proceedings;
(5) multiple-notices and shelf-life; and
(6) cost recovery.

Consultation Paper, Part 6, paragraph 6.48

The respective four month periods to respond and negotiate seem about right – a sufficient time to respond and negotiate, but not so long as to unreasonably halt the development process.

We consider that the five year time limit for putting into effect the obstruction mentioned in paragraph 6.33 is about right (in view of possible delays in the construction process). However, with the best will in the world, developers' plans can change and result in a greater infringement. In that regard, we do wonder whether the inability to serve a further NPO for five years is unduly restrictive. Should the period be three years, after which the existing NPO can be withdrawn and replaced with a new one and the procedure starts again?

More precision is needed in terms of the developer's continuing obligation to inform the dominant owner of changes to its plans, mentioned in paragraph 6.45. What does such an obligation entail – how often, what mode of communication?

Also a little more clarity is needed on what happens if the dominant owner does not issue proceedings if negotiations are unsuccessful at the end of the four months. If the Law Commission considers that the Civil Procedure Rules cover the position, perhaps this can be expressly stated.

We would be grateful for consultees' views on the suitability and practicability of limiting the Notice of Proposed Obstruction procedure to use in relation to rights to light benefiting commercial premises only.

Consultation Paper, Part 6, paragraph 6.50

The obvious problem with such a limitation is how the procedure should be applied to a mixed commercial and residential use building. Many developments are mixed use and, if the notice procedure is intended to provide greater comfort to developers in relation to injunctions, the procedure will ultimately fail if it cannot be used for half the tenants in a building who are residential.

We accept that perhaps some residential tenants may not be best placed to respond promptly to the notice, but the same point could be applied to some commercial tenants, not all of whom are large and wealthy corporations.

We consider that no convincing argument has been presented for limiting the notice procedure to commercial premises.

We would be grateful for consultees' views on whether the law of abandonment through alteration of apertures should be reformed and, if so, how the current law could be improved. Consultation Paper, Part 7, paragraph 7.48
We agree with the Law Commission's view expressed in paragraph 7.47 based on the courts' pragmatic attitude to this issue.

We provisionally propose that the jurisdiction of the Lands Chamber of the Upper Tribunal should be extended so as to enable it to make orders for the modification or discharge of existing rights to light. Do consultees agree? Consultation Paper, Part 7, paragraph 7.132
We agree with the Law Commission's proposal.