

CABINET

17 March 2020

Title: Appropriation and Acquisition of Land at North Street / London Road, Barking	
Report of the Cabinet Member for Regeneration and Social Housing	
Open Report	For Decision
Wards Affected: Abbey	Key Decision: No
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Accountable Director: Ed Skeates, Development Director, Be First	
Accountable Strategic Leadership Directors: Claire Symonds, Chief Operating Officer, and Graeme Cooke, Director of Inclusive Growth	
Summary	
<p>By Minute 33 (18 September 2018) Cabinet agreed to enter into a residential-led joint development scheme on land owned by the Council and Robyna Ltd (the Developer) whereby the Council would acquire the freehold ownership of the Developer's site and grant the Developer a head lease on the combined sites (the Land) for 250 years subject to the payment of a head rent. In addition, the Council would provide the Developer with a construction loan of up to £35m.</p>	
<p>The Developer has since made a full planning application in joint names with the Council for a 196-unit residential scheme of which 35% will be affordable units. Detailed planning discussions have taken place with the Council's planning officers and the GLA, and a public consultation exercise undertaken. On 25 February 2020, the Council's Planning Committee resolved to grant planning permission subject to the completion of a section 106 agreement and referral of the application to the GLA.</p>	
<p>During the scheme's development, various interests have been identified which have the potential to give rise to a 'rights of light' claim. These could result in an actionable nuisance claim and an injunction to prevent or delay the development. The Council can mitigate such claims through the use of its appropriation powers.</p>	
<p>This report seeks a resolution recommending that the Council use its powers to appropriate land and buildings on the north side of London Road, Barking (the Council's Land) for planning purposes under section 122 of the Local Government Act 1972 (the LGA) and to acquire from the Developer the former White Horse Public House, North Street, Barking IG11 8JE (the Developer's Land) for planning purposes under section 227 Town and Country Planning Act 1990 (TCPA).</p>	

Recommendation(s)

The Cabinet is recommended to:

- i) Agree the approach of notifying, engaging with and negotiating with third parties before using powers to address third party rights under Section 203 of the Housing and Planning Act 2016 (HPA) as set out in the report;
- ii) Approve, subject to the (i) implementation of the approach for engaging and negotiating (as necessary) with third parties; (ii) grant of planning permission free from challenge; (iii) exercise by the Developer of its option to proceed with the Development; (iv) conclusion of the appropriate consultation exercise; and (v) appropriate indemnity (with adequate security) being provided in respect of any claims for compensation or costs arising from the appropriation and exercise of section 203 powers, the use of the Council's statutory powers to:
 - (a) acquire the Developer's land for planning purposes (namely the construction of the Development (defined below)) in accordance with section 227 of the Town and Country Planning Act 1990 (TCPA);
 - (b) appropriate the Council's land for planning purposes in accordance with section 122 of the Local Government Act 1972 (LGA), noting that the land is no longer required for the purpose for which it is currently held; and
 - (c) subsequent use of the Council's powers under sections 203 – 206 of the HPA 2016 in respect of the Land to override third party interests of neighbouring properties infringed by the Development.
- iii) Subject to the Chief Operating Officer being satisfied that the terms of the recommendation at i) and ii) above have been met, to delegate authority to the Chief Operating Officer, in consultation with the Director or Law and Governance and the Cabinet Member for Regeneration and Social Housing, to fully implement and effect the recommendations ii) (a) – (c) above;
- iv) Subject to i) to iii) above and to the Developer notifying, engaging and negotiating (as necessary) with third parties in accordance with the agreed strategy (and the Chief Operating Officer being satisfied with the Developer's efforts to comply with the same) prior to the exercise of the delegated authority, to authorise the Director of Law and Governance, or an authorised delegate on her behalf, to settle and execute on behalf of the Council all the necessary documents required to implement the recommendations in the report; and
- v) Delegate authority to the Chief Operating Officer to acquire the Developer's land in accordance with section 227 of the TCPA, appropriate the Council's land pursuant to section 122 of the GLA and use of the Council's powers under sections 203 – 206 of the HPA in respect of the land to override third party interests infringed by the development.

Reason(s)

The recommendations in the report will help to facilitate new affordable homes in the borough, and as such are aligned to its strategy for Inclusive Growth.

1 Background

- 1.1 On 18 September 2018 (Minute 33); Cabinet agreed to enter into a residential-led joint development scheme on land owned by the Council and the Developer at the junction of London Road and North Street Barking. Upon the receipt of planning consent for the scheme, the Council would acquire the freehold ownership of the developer's land and grant the Developer a head lease on the combined sites for 250 years subject to the payment of a head rent. The Developer would then deliver the mixed tenure 22 storey residential scheme with 35% affordable units. In addition, the Council would provide the developer with up to £35m of construction finance.
- 1.2 In May 2019 a full planning application was submitted on behalf of the Council and the Developer for up to 196 residential dwellings, ground floor flexible commercial floorspace and ancillary residential management and resident facilities together with public realm and associated works (the Development). On 25 February 2020, the Council's Planning Committee resolved to grant planning permission pursuant to the planning application subject to the prior completion of a section 106 agreement and referral of the application to the GLA.
- 1.3 One of the Developer's conditions in respect of the land transaction is evidence as to the Council's willingness to appropriate the Land in order to facilitate the Development.
- 1.4 This report seeks the Cabinet's agreement to authorise the Chief Operating Officer to appropriate for planning purposes under section 122 of the LGA the Council's Land for the purpose of facilitating the Development and to acquire the Developer's Land for planning purposes under section 227 of the TCPA.

2 Rights of Light

- 2.1 The Council wishes to bring forward the Development as quickly as possible. It is considered to bring significant benefits in terms of housing, jobs and economic investment to Barking.
- 2.2 The Developer has been actively investigating the effect that the proposed Development will have on adjoining owners and has established that there are parties who have the benefit of various rights which will be affected by the Development. Parties who are affected by the infringement of their rights over the Land have the ability to bring injunction proceedings to prevent the Development. This could potentially halt the project and would result, at best, in a delay to the delivery of the Development.
- 2.3 By utilising the Council's statutory powers, once the Land is validly appropriated/acquired (as appropriate) for planning purposes and the planning permission has been granted, the Council will be entitled to rely upon the HPA 2016 to override existing relevant rights, interests and restrictions. Section 203 of the HPA 2016 ensures that building or maintenance work may be carried out and/or land used notwithstanding that it interferes with a relevant right or interest or breaches a restriction as to user, with those whose rights etc have been overridden being able to claim compensation (section 204).

- 2.4 Under such an arrangement, the Developer will provide the Council with an indemnity against the costs of appropriation including compensation payable, together with the legal and survey costs incurred by those affected.

3 Community Engagement and Consultation

- 3.1 The planning application for the Development has been the subject of an extensive public consultation.
- 3.2 A preliminary assessment of potential infringements of the proposed Development on existing rights to light enjoyed by properties bordering the Land has been undertaken by the Developer's rights of light surveyors (and has been reviewed by the rights of light surveyors appointed by the Council). The assessment has concluded that there would be potential infringements to a number of neighbouring properties. The infringements range in significance and further work (including measured survey information gained from having access to the affected properties) will be required to provide better clarity on their extent.
- 3.3 Prior to steps being taken to give effect to the resolution recommended, the Council's intention to use its powers of appropriation (so as to engage the provisions of section 203 of the HPA) will be publicised. The notice will invite anyone who considers they may be affected by the Development as a result of a third party interest to engage in respect of any outstanding issues the recipient may have. Parties considered to be potentially affected by the act of appropriation will be written to in order to explain that the Council is considering using its powers of appropriation and that this report has been made with the recommendation to engage section 203 of the HPA (subject to the conditions set out). The strategy for engagement and negotiation with affected interests will be secured by the deed of indemnity to be entered into between the Developer and the Council.
- 3.4 The deed of indemnity which the Developer is required to enter into will require the Developer to satisfy the Council that it is appropriate to authorise the use of section 203 powers. It will ensure that evidence of the Developer's engagement and negotiations will be presented to the Council. In particular, evidence will be required to the Council's reasonable satisfaction to demonstrate a reasonable attempt has been made to reach a negotiated settlement with those with third party rights affected by the Development who have come forward (including, but not limited to, a schedule setting out the progress of negotiations with such persons and copies of properly made objections received pursuant to the publication/consultation exercise). Any dispute which remains unresolved will be evaluated before any delegated decision is made, to ensure that reasonable efforts to release rights by agreement have been made by the Developer where claims have been made. If, notwithstanding reasonable attempts to reach a negotiated settlement regarding such claims, agreement cannot be reached and binding deeds of release entered into with affected owners bringing such claims in reasonable time to ensure that the Development comes forward in a timely manner, the report seeks delegated authority to the Chief Operating Officer to make the final decision to authorise use of section 203 powers once s/he is satisfied that the agreed engagement with third parties has taken place.

4 Options and Analysis

- 4.1 Do nothing: if the Council decides not to acquire and appropriate the Land (as set out in this Report and so as to engage section 203 of the HPA 2016) there is a very real risk that the Development (and its associated benefits) would not be delivered. Even if the Developer was minded to proceed in such circumstances, there is the potential (in the absence of appropriation) that proceedings brought by affected adjoining owners could stop or delay the Development's delivery.
- 4.2 If the joint development were not to proceed, each party would retain the ability to develop their own sites in isolation. This would fail to maximise the potential of the combined site at this strategically important gateway to the centre of Barking, directly leading to less units being delivered for residents of the borough.
- 4.3 Acquire and Appropriate: by exercising appropriation and acquisition powers so as to engage section 203 of the HPA 2016, it would serve to mitigate the risks of bringing forward the Development by removing the threat of injunction proceedings for the infringement of rights etc over the Land. Affected parties will be entitled to compensation but they will not be able to bring injunction proceedings to delay or stop the Development.

5 Financial Implications

Implications completed by: David Dickinson, Investment Fund Manager

- 5.1 There are no direct financial implications arising from this report.
- 5.2 The indemnity secured from the Developer (in a form acceptable to the Chief Operating Officer) will ensure that any claims and costs arising from third parties as a result of the appropriation will be met by the Developer.

6 Legal Implications

Implications completed by Dr Paul Feild, Senior Governance Lawyer, Legal

Statutory Power to Appropriate/Acquire

- 6.1 The Council's power to appropriate land under section 122 of the LGA is exercisable on the determination that the Council's Land "is no longer required for the purpose for which it is held immediately prior to appropriation." The Council's Land comprises of an area of hardstanding used for a combination of bus services including the terminus for the No. 169 bus route, rail-replacement bus provision and service resilience generally. The public do not access the lay-over facility. A report setting out alternative arrangements for bus provision in the town centre has been prepared and Be First has secured TfL's approval to its proposals. It is proposed that the bus lay-over facility will be relocated to a combination of three other nearby locations depending on service requirements. It is therefore the case that the Council's Land will no longer be required by the Council for the purpose for which it is currently held. It is now required for planning purposes namely the construction of the Development. Officers therefore consider that the requirements of section 122 of the LGA are satisfied.

- 6.2 In respect of the Developer's Land, section 227 of the TCPA provides that the Council may acquire by agreement any land which they require for any purpose for which a local authority may be authorised to acquire land under section 226, as to which see further below.
- 6.3 Any reference to acquisition for planning purposes and, by virtue of the provisions in section 246 of the TCPA, appropriation for planning purposes is regarded as a reference to acquisition or appropriation for purposes for which the land can be compulsorily acquired under section 226 TCPA.
- 6.4 By virtue of the provisions in section 226(1A) of the TCPA a local authority must not exercise the power granted under section 226(1)(a) unless it thinks the development, redevelopment or improvement on or in relation to the land is likely to contribute to the achievement, the promotion or improvement of any one or more of the following objectives – the economic, social and/or the environmental well-being of the area.
- 6.5 The key objectives of the Development are to provide much needed housing to attract working residents who can help support a widening of the town centre's retail and leisure offer as well as social, economic and environmental benefits to Barking's community. In addition to bringing employment opportunities, the flexible commercial floorspace will also serve to re-activate currently blank frontages along North Street and London Road. The following have also been identified as benefits of the Development:
- (a) the provision of 196 high quality residential units (125 for let within the Private Rented Sector and 71 affordable dwellings provided as discount market rent);
 - (b) 472 sqm (GEA) of flexible commercial ground floor space capable of responding to future occupier demand to accommodate retail, office, community and/or leisure uses;
 - (c) public realm and highway improvements to enhance the appearance of the existing street scene and encourage footfall along London Road; and
 - (d) residential-led development in accordance with the Barking Town Centre Strategy, Barking Town Centre Housing Zone and the GLA's London Riverside Opportunity Area, where there is a primary focus on the delivery of new homes.
- 6.6 It is the view of officers that the Council's Land and the Developer's Land could be acquired compulsorily under section 226(1)(a) in order to facilitate the carrying out of redevelopment and that such redevelopment would advance all three objectives identified at section 226(1A) (namely, the promotion or improvement of the economic, social and environmental well-being of the area). Accordingly, it is considered that the requirements of section 226 and section 227 of the TCPA are satisfied so as to engage section 203 of the HPA 2016. However, a local authority cannot properly exercise these powers unless it considers that it has good reason to interfere with third party rights etc or breach restrictions that would be overridden by section 203 of the HPA 2016 as outlined below.

Power to interfere with rights

- 6.7 As can be seen from the above, reliance in due course on section 203 of the HPA 2016 in order to override the rights etc of adjoining owners in respect of the Land is

possible where the requirements of section 226 of the TCPA are met. Therefore, the requirement to be satisfied, that is, that there is a compelling case in the public interest so as to engage powers under section 203 of the HPA 2016 having regard to the European Convention on Human Rights, must apply before construction of the Development commences.

- 6.8 The enabling provisions in s203 (1) and (4) of the HPA are required for the construction, maintenance and use of the Development, to the extent that this will interfere with private rights of adjoining owners. The operative provisions in section 203-205 are necessary in order to override these rights etc, including any unknown rights that may impede the construction or use of the Development.
- 6.9 If the Council does not exercise its powers under section 203 of the HPA 2016 and the works are commenced, the Development would potentially be infringing those affected owners' rights etc over the Land. Various remedies up to and including injunction would be available to the injured parties depending on the rights infringed on. The consequences of an injunction for the Council would be a delay in the delivery of the Development or the Development (and the benefits that it would bring to the local community) not coming forward at all.

Equalities impact assessment

- 6.10 In deciding to proceed with the exercise of appropriation and acquisition so as to engage section 203 of the HPA 2016, the Council must pay due regard to its Public-Sector Equality Duty (PSED), as set out in Section 149 of the Equalities Act 2010 (the **2010 Act**). The PSED provides that a public authority must, in the exercise of its functions, have due regard to the need to:
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 6.11 Consideration must also be given to whether, if the decision is made to go ahead, it will be possible to mitigate any adverse impact on a protected group, or to take steps to promote equality of opportunity by, for example, treating an affected group more favourably.
- 6.12 Officers are mindful of this duty in making the recommendations in this Report. Generally, it is considered that the impacts of the Development are positive. The proposals would comprise measures to ensure that 10% of the residential units are wheelchair accessible homes. The proposed residential and commercial elements will also have level pedestrian access from London Road with 4 car parking spaces exclusively for use by blue badge holders. This is considered a significant improvement on the current offer.
- 6.13 Within the process of engaging and negotiating with affected third parties, allowances will be made to account for vulnerable parties in accordance with the PSED.

Human Rights

- 6.14 Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with the European Convention on Human Rights (the **ECHR**).
- 6.15 In this case a decision to override easements and other rights represents an interference with rights protected under Article 1 of the Protocol to the ECHR (the right to peaceful enjoyment of possessions) and Article 8 of the ECHR (right to respect for private and family life, home and correspondence). Any decision to interfere with such rights must strike a fair balance between the public interest associated with the Development and the interference with private rights. In light of the clear public benefit associated with the Development and a compelling case in the public interest for the use of the powers to override rights and given that any person who can show that they held an interest in any of the Land will be entitled to compensation in accordance with the relevant statutory provisions, it is considered that the interference with the private rights of those affected would be lawful, justified and proportionate.
- 6.16 The Council is of the view, therefore, that the exercise of its powers in accordance with this Report is compatible with the ECHR.

Resource Implications

- 6.17 Prior to the acquisition of the Developer's Land, the Developer will be required to provide the Council with an indemnity (supported by appropriate security) in respect of any claims for compensation or costs arising from the appropriation and exercise of section 203 powers, including any liabilities and costs arising from any judicial review of the Council's actions.
- 6.18 The initial compensation estimate reflects assumptions on the layouts of the adjacent buildings. Internal inspections of properties will be carried out to ensure an accurate understanding of the Rights of Light loss on the existing layouts is reflected in discussions about the level of compensation payable.
- 6.19 An allowance has been included within the project budget to cover Rights of Light claims, based on the initial assessment of the book value of the affected properties. An overall project contingency budget has also been included.

Public Background Papers Used in the Preparation of the Report: None

List of Appendices:

- Appendix 1 - Site Plan and Land to be appropriated (shown outlined in red)