

CABINET

20 April 2021

Title: Land at North Street / London Road, Barking – Disposal Update	
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 Director: Graeme Cooke, Strategic Director of Inclusive Growth	
Summary	
<p>In September 2018 Cabinet agreed to enter into a 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 land and grant the Developer a head lease on the combined sites 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>In March 2020 Cabinet agreed to acquire the Developer's land and to appropriate land within its own ownership, in each case for planning purposes, and in October 2020 Cabinet agreed to increase the construction loan to £44m following a substantial increase in the size of the development.</p>	
<p>On 5 February 2021 Planning Consent was granted for residential-led development at the land (the "Development") (reference 19/00855/FUL).</p>	
<p>As a consequence of the planning negotiations, a marginal amendment is required to the proposed site boundary to facilitate the Development requiring an amendment to the previously agreed plans for both the ground lease and the acquisition and appropriation.</p>	
<p>The Developer is also now intent on transferring the Developer's land to a wholly owned UK registered company before such land is acquired by the Council for planning purposes. This successor company will then also undertake the Development.</p>	
<p>Approval is therefore sought to the revised area of: (i) land comprised in the lease for the combined sites (the "Land") shown on the plan at Appendix 1; (ii) the developer's land (as shown edged green on the plan at Appendix 3) (the "Developer's Land") to be acquired by the Council for planning purposes; and (iii) the land within the Council's ownership to be appropriated for planning purposes (being the remainder of the land edged red (and excluding the Developer's Land) as shown on the plan at Appendix 2 (the "Council's Land") (together with the Developer's Land, the "Appropriation/Acquisition Land") to enable the Development to proceed in accordance with the Planning Consent; and to contract with the associated legal entity of the Developer on the same terms as previously</p>	

agreed. For the avoidance of doubt, the red line shown along the northern boundary of each of the areas of land shown on the plans appended to this report at Appendix 1 and Appendix 2 is intended to abut the adjacent land title.

Recommendation(s)

The Cabinet is recommended to:

- (i) Agree, otherwise on the same terms as previously agreed by Cabinet under Minute 117 (17 March 2020), to:
 - (a) the acquisition of the Developer's Land for planning purposes pursuant to section 227 of the Town and Country Planning Act 1990, as shown edged green on the plan at Appendix 3 to the report;
 - (b) the appropriation of the Council's land for planning purposes pursuant to section 122 of the Local Government Act 1972 as required to deliver the Development in accordance with Planning Consent 19/00855/FUL, as shown edged red on the plan at Appendix 2 to the report;
 - (c) the disposal of the revised site area as required to deliver the Development in accordance with Planning Consent 19/00855/FUL, as shown edged red on the plan at Appendix 1 to the report;
- (ii) Approve the principle of contracting with a UK registered wholly owned subsidiary of the Developer on the same terms as previously agreed for the development;
- (iii) Delegate authority to the Managing Director, in consultation with Strategic Director of Law and Governance and the Cabinet Member for Regeneration and Social Housing, to agree (a) the new contracting party after appropriate due diligence had been undertaken, and (b) the contract documents to fully implement and effect the proposals set out in the report;
- (iv) Authorise the Strategic Director of Law and Governance, or an authorised delegate on her behalf, in consultation with the Managing Director, to execute all the legal agreements, contracts and other documents on behalf the Council; and
- (v) Delegate authority to the Managing Director to acquire the Developer's land pursuant to s227 of the Town and Country Planning Act 1990, appropriate the Council's land pursuant to section 122 of the GLA and use of the Council's powers pursuant to sections 203-206 of the Housing and Planning Act 2016 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 regenerate an empty site and as such are aligned to its strategy for Inclusive Growth and the Barking Town Centre Regeneration Strategy.

1 Background

- 1.1 In September 2018 Cabinet agreed (Resolution 33) to enter into a residential-led joint development scheme (the Development) 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 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.
- 1.2 In March 2020 Cabinet resolved (Minute 117) to acquire that part of the combined sites and within the Developer's ownership for planning purposes (namely the construction of the proposed development) in accordance with section 227 of the Town and Country Planning Act 1990 and to appropriate that part of the Land within the Council's ownership for planning purposes in accordance with section 122 of the Local Government Act 1972, noting that the land is no longer required for the purpose for which it is currently held; and subsequent use of the Council's powers under sections 203 – 206 of the Housing and Planning Act 2016 in respect of the combined sites to override third party interests of neighbouring properties infringed by the Development.
- 1.3 In October 2020 Cabinet resolved (Minute 33), as part of the Investment Acquisition Strategy Update, to increase the construction loan to £44m following a substantial increase in the size of the Development.
- 1.4 On 5 February 2021 planning consent for the Development (reference 19/00855/FUL) was secured following GLA Stage 2 approval and signing of the Section 106 agreement.
- 1.5 During the planning consultation process, various amendments were requested by the planning authority to improve the scheme. These included a slight re-orientation of the frontage towards Abbey Park which resulted in an amended site area. As a result, the area now required to facilitate the Development is marginally bigger. Accordingly, the Developer has now requested that the Cabinet is asked to re-consider its resolution of 17 March 2020 by reference to the full extent of the Appropriation/Acquisition Land required to implement the Development consented pursuant to the planning permission (reference 19/00855/FUL) as shown on the plan at Appendix 2.
- 1.6 In addition, the Developer now intends to transfer the ownership of the Developer's Land to a wholly owned UK registered company before undertaking the Development. Approval is therefore sought for the Council to contract with this associated legal entity on the same terms as previously agreed.

2 Proposal

- 2.1 The Development, as now approved by the planning authority under planning permission 19/00855/FUL, occupies a slightly amended plot with a marginally greater area (4%). The revised plot remains on land that is entirely within the control of the Developer or the Council.

- 2.2 The land to be acquired (being the Developer's Land) and the land to be appropriated (being the Council's Land) will be similarly subject to minor variation as shown on the plan at Appendix 2.
- 2.3 In recognition of the marginally increased site area, the Developer's consideration for the ground lease will be increased on a pro-rata basis.
- 2.4 The Developer has confirmed they will undertake the Development through a UK legal entity and will be transferring the property to a wholly owned company before contracting with the Council. The Council's solicitors will undertake appropriate due diligence on the new contracting party and ensure that the obligations and safeguards previously secured are maintained.

3 Community Engagement and Consultation

- 3.1 Please refer to earlier Cabinet reports. For the avoidance of doubt, the Developer remains subject to the Community Engagement and Consultation requirements of the Cabinet report of 17 March 2020, which shall be interpreted as applying to the extent of the Appropriation/Acquisition Land shown on the plan at Appendix 2. No specific community engagement and consultation points arising from this further report.

4 Options and Analysis

- 4.1 Do nothing: if the Council decides not to agree the revised area to be subject to acquisition and appropriation (as applicable) or contract with the associate company of the Developer, it is unlikely the Developer would proceed with the Development such that the key benefits of the Development (as set out in the Cabinet Report of 17 March) will not be realised.
- 4.2 The change in identity of the developer presents no additional risk to the Council. As previously agreed, the new party will be required to transfer the freehold of the Developer's Land to the Council upon exchange of contracts and will only be granted a building licence during construction. A long interest in the Land will only be granted once the Development is complete.
- 4.3 If the Development of the Land were not to proceed jointly, each party would retain the ability to develop their own sites in isolation. This would fail to maximise the potential of the development of both the Council's Land and the Developer's Land at this strategically important gateway to the centre of Barking, directly leading to less units being delivered for residents of the borough and reducing the benefits previously considered by Cabinet.

5 Financial Implications

Implications completed by: David Dickinson, Investment Fund Manager

- 5.1 The only direct financial implication arising from this report is the marginal additional consideration being paid as a direct result of the increased the larger site area based upon a pro rata increase to the original sum.

- 5.2 The arrangements for the construction loan remain as before, with the new party being required to invest 20% of the cost of delivering the scheme before the Council's construction loan is drawn. The right to take over in the event of default, project monitoring and to charge the completed scheme until repayment remain.

6 Legal Implications

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

- 6.1 This report is necessitated by the Developer seeking assurance that the decision of the Cabinet is informed by the definitive plan of the land to be appropriated. The legal implications of this report remain as those stated at paragraph 6 of the report to Cabinet dated 17 March 2020 and follows from paragraph 6.2 below.

Statutory Power to appropriate/Acquire

- 6.2 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.
- 6.3 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.
- 6.4 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. 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 Appropriation/Acquisition 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 Appropriation/Acquisition 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**). 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 Appropriation / Acquisition 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.
- 6.15 The Council is of the view, therefore, that the exercise of its powers in accordance with this Report is compatible with the ECHR.

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

List of Appendices:

- Appendix 1 – Revised site plan (for the Development Agreement and 250 year ground lease) shown outlined in red (the Land)
- Appendix 2 – Revised plan showing land to be acquired and appropriated shown outlined in red (the Appropriation/Acquisition Land)
- Appendix 3 – Revised plan showing the Developer's Land