

<b>Item No.</b> 14.	<b>Classification:</b> Open	<b>Date:</b> 7 June 2016	<b>Meeting Name:</b> Cabinet
<b>Report title:</b>		Policy for Considering Intervention under the Town and Country Planning Act 1990 to Enable Redevelopment to Proceed	
<b>Ward:</b>		All	
<b>Cabinet Member:</b>		Councillor Mark Williams, Regeneration and New Homes	

## **FOREWORD – COUNCILLOR MARK WILLIAMS, CABINET MEMBER FOR REGENERATION AND NEW HOMES**

Southwark has a proud record of welcoming appropriate development to our borough where it delivers real benefits for our residents. In the past few years this has included new homes, new affordable homes, contributions to build new council homes, jobs for our residents, new parks, and most recently the brand new Castle Leisure Centre at The Elephant. To enable development in the future we may need to use section 227 powers under the Town and Country Planning Act 1990 to help stalled schemes move forward. Section 237 allows local authorities to over-ride third party rights so that they cannot be injuncted, but instead have to be settled via compensation based on the impact on value of the affected property. This report sets out the council's approach should such approaches be made to the council, and will only be considered in the last resort to enable much needed development to come forward so that we can continue to tackle the housing crisis head-on and deliver the investment in our social infrastructure our residents need.

## **RECOMMENDATIONS**

That Cabinet agrees:

1. That it will consider using the provisions of s227 of the Town & Country Planning Act 1990 on a case by case basis to enable stalled developments to proceed.
2. To adopt the principles set out in Appendix A of this Report to evaluate applications to use the provision of s227 of the Town & Country Planning Act 1990.

## **BACKGROUND INFORMATION**

3. Southwark as a place has changed radically in the past twenty years and continues to change dynamically in response to the needs and aspirations of the community and its place within London an international city. The council has been instrumental in these changes through planning policy and use of its property assets. Private landowners in their ability to foresee demand and development opportunities for their assets have played a key role too in this transformation. To respond to future demands in land use e.g. housing and employment the council will continue to facilitate the reuse of land where in doing so it accords with adopted policy.

4. The assembly of sites for redevelopment is often a difficult and risky process involving purchase of land and then achieving vacant possession. Some sites contain multiple ownerships. Assembly is made even more difficult by the existence of third party rights over land such as the right for persons to cross over land or where neighbouring owners to enjoy the right of light to their property and the intended development interferes with that. The more mature the area, the greater the likelihood of such rights. Where these rights exist, the ultimate developer (who may differ from the assembler) is unlikely to proceed with the scheme until those rights are extinguished. The reason for this is the development could be halted if the beneficiary of a right obtains an injunction from the court.
5. Site assemblers (that may or may not be the ultimate developer but hereafter included in the term “developer”) will endeavour to extinguish such third party rights by negotiation and this often results in the beneficiary receiving a cash payment and/or mitigation work to waive the right. However where one or more beneficiary is either not prepared to negotiate the waiver of the right or is seeking such a sum that makes the development unviable a scheme will not be able to proceed even though it would deliver policy aspirations. The situation can be compounded in the short to medium term if buildings have been vacated and are boarded up and left to deteriorate as a result of the stalled development process.
6. In recognition that there are occasions, where the existence of third party rights over land can frustrate the development process, s237 of the Town and Country Planning Act 1990 gives local authorities the ability to over-ride such rights. In doing so, interference with them is no longer actionable by way of an injunction but is a matter of compensation based on the diminution in value of the beneficiary’s land interest as a result of the interference. Where compensation cannot be agreed, it will be determined by the Upper Tribunal (Lands Chamber).
7. To avail itself of the s237 power to over-ride third party rights the local authority must own the land in question and appropriate the land for planning purposes as provided for in s122 of the Local Government Act or s232 of the Town and Country Planning Act 1990. Appropriation is the internal process whereby a local authority changes the purpose for which it holds land, for instance from say housing purposes to planning purposes. Where land is acquired under s226 (by compulsion) or s227 (by agreement) of the Town and Country Planning Act 1990 it automatically benefits from the over-riding of third party rights set out in s237. The over-riding described benefits subsequent owners of the land concerned.
8. Where the council is assembling land for regeneration, land is acquired for planning purposes (under s226 by compulsion if necessary or s227 if by agreement) (hereafter referred to as “s227 powers”) and in doing so s237 is engaged such that any third party rights are over-ridden (beneficiaries are still entitled to compensation). Where land to be assembled is already owned by the council but held for another purpose it is appropriated for planning purposes and the cabinet has periodically approved reports that provide for this.
9. It therefore follows that where third party rights are genuinely stalling/preventing development an option is for the local authority to acquire the development site for planning purposes and then to dispose of it back to the developer.
10. Land development is generally a multi-million pound enterprise with many considerable risks. Developers will understandably seek to mitigate risk and uncertainty. The latter is of particular relevance. Where a risk is ascertained it

can be quantified and mitigation measures taken. However where there is uncertainty of a significant nature a developer is either unlikely to proceed until that uncertainty is resolved or may withdraw from the proposed development.

11. Where there are third party rights that will be interfered with when land is developed these are enforceable at law. In reality, the beneficiaries will seek a court order to stop the development (an injunction). The court will consider the application and decide either to award damages or if it the interference is deemed of such a degree that damages will not properly compensate the beneficiaries grant an injunction that will prevent the development proceeding. Cabinet will appreciate the risk of abortive costs in commencing a development, then having it halted pending a court hearing and then having to reinstate as a consequence of an injunction is such that developers will not proceed. Even if the court determine that damages is appropriate compensation, these may be substantial based on a share of the development value of the scheme and far in excess of the loss of value arising to beneficiaries as a result of the interference. This uncertainty/risk will also halt developments.
12. Where the council acquires land under s227 powers in order to override third party rights, the beneficiaries will receive compensation based on the value of their properties with the right versus the value of the property without the right. This compensation is based on the diminution in value of the affected property. If agreement between the parties is not possible it will be determined by the Upper Tribunal Lands Chamber. For example:

*Users of a commercial building have a rear access via an adjoining owner's land that is now to be developed; using the rear access will no longer be possible when development commences.*

<i>Value of commercial building with the right</i>	<i>say £1,600,000</i>
<i>Value of commercial building without the right</i>	<i>say <u>£1,500,000</u></i>
<i>Diminution in value</i>	<i>£100,000</i>

13. Diminution in value can be reasonably accurately assessed in advance and factored into development calculations thus removing the risk/uncertainty described in paragraph 11. The right to compensation by the beneficiaries is claimable against the council exercising its s227 powers but the developer will have indemnified the council so will ultimately pick up this cost.
14. The council has received some enquiries from development site owners if it will intervene to enable stalled or stalling developments to proceed. It is therefore appropriate for cabinet to decide if it will consider such intervention. In order to both give clarity to prospective applicants and for consistent decision making a policy should guide the consideration of such applications.

#### **KEY ISSUES FOR CONSIDERATION**

15. As previously mentioned, the basic premise of the proposed intervention is that the council acquires land for planning purposes and disposes of it back to the original vendor. Except for relatively low value transactions where the director of regeneration has delegated authority, the power to buy or sell land is reserved to the cabinet.
16. Case law suggests the over-riding of a right that would otherwise be actionable by law (such as the ability to seek an injunction against a new building interfering

with existing light) may be an interference with human rights. Therefore in considering using the acquisition/disposal machinery advocated it is necessary to consider the human rights of the person(s) whose rights are being over-ridden and the proportionality of this. In other words, will the council's intervention to bring about a development that would not otherwise happen, result in something that benefits the wider community to such an extent that it is reasonable to deprive an owner of her/his right to seek through the courts an order to stop that development?

17. In the considering the above question, it is recognised that every such case must be looked at on its own merits. However for the reasons set out in paragraph 14, cabinet is recommended to approve principles to evaluate applications that may be received. The principles set out in Appendix A are therefore commended to cabinet. The following paragraphs set out the rationale for them.

### **The Principles set out in Appendix A**

18. *Paragraph (a)* sets out the context of the document in accordance with paragraph 14 of this report.
19. *Paragraph (b)* requires the development should normally have been consented to by the planning committee. The council's powers under s227 exist 'in the interests of the proper planning of an area in which the land is situated'. Therefore without a consent from the committee it is unlikely this criterion is fulfilled. There may be occasions when an application is not consented to by the committee but consent is gained on appeal. In these circumstances, cabinet may consider in its opinion the development is not 'in the interests of the proper planning of the area' and decline to utilise s227 powers. There may however be exceptional circumstances where an application was refused by committee and granted on appeal where as a result of a policy change in the intervening period cabinet may feel the development does satisfy the 'proper planning' test.
20. *Paragraph (c)* requires the applicant to demonstrate there is not a reasonable alternative development scheme for the site that avoids interfering with third party rights. In reality, a developer will have considered this at an early stage with a view to designing around those rights as this will provide greater certainty and less risk to the scheme. However, particularly in central London, this may not be possible without losing critical mass and other benefits of the proposed development,
21. *Paragraph (d)* requires that the council's involvement is a matter of last resort and that it must be satisfied that without intervention there is little prospect of the developer and third party right beneficiaries reaching agreement to enable the scheme to proceed. It is not the council's place or intention to determine where one or more financial offers have been made to beneficiaries if those offers are right. Instead, it needs to be satisfied that the developer has made reasonable and genuine efforts to reach agreement with the beneficiaries. Since such offers probably have been made on a without prejudice basis and are time limited it will probably not be possible to report them to cabinet. In practice, the council's director of regeneration will be given sight of relevant offers and details of negotiation progress and recommend to cabinet if in his opinion this principle has been satisfied by the developer.
22. *Paragraphs (e-g)* means that the council's intervention will be at no cost to the public purse. Before using s227 powers the council must be satisfied it is

covered for all its costs including compensation to the beneficiaries and professional, legal and administrative expenses. In this connection, a bond may be necessary because in rare circumstances the ultimate developer may differ from the one that requests the use of s227 powers. Once such powers are exercised those third party rights are capable of being overridden and a strict duty to pay compensation rests with the council and there may be a change in land ownership before resolution. The bond will protect the council in these circumstances.

23. *Paragraph (h)* means the arrangement for the transfer of land to the council and then back to the developer must not result in the council breaching its statutory duties. It is likely developers will seek to mitigate their liability to Stamp Duty Land Tax through transactional arrangements. The terms must not result either in a breach of the council's statutory obligations or by facilitating inadequate taxation payment charges.
24. *Paragraph (i)* confirms that in using its s227 powers the council must do so in compliance with its Public Sector Equality Duty (see paragraphs 26-29 below).
25. *Paragraph (j)* requires the council to look at the use of its s227 powers in the round in each case and to consider if their use is proportionate in the circumstances before it.

#### **Community impact statement/public sector equalities duty**

26. The Equality Act 2010 imposes a general equality duty on public authorities (PSED), in the exercise of their functions, to have due regard to the need to:
  - Eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act.
  - Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it.
  - Foster good relations between people who share a relevant protected characteristic and those who do not share it.
27. For the purpose of the PSED the following are 'protected characteristic' considerations:
  - Age
  - Civil partnership
  - Disability
  - Gender reassignment
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex and sexual orientation.
28. This report sets out the principles to be applied where the council is asked to acquire land and then to transfer it back to the original vendor in order that third party rights over the land are overridden. This ultimately may result in individuals losing the ability to enforce those rights at court in order that the wider community can benefit from a development. The principles provide a decision making framework with a view that applications are determined proportionately taking account of individual rights and wider community benefit.

29. Decisions for individual applications are likely to be taken by the cabinet since the acquisition and disposal of land is a not a matter that can be delegated to officers unless it is of relatively low value (see paragraph 40 of this report) and the intervention set out in this report is only likely to apply to schemes where the land value significantly exceeds the delegation thresholds. Such decisions will follow reports setting out the circumstances of the applications and how those applications meet the principles set out in Appendix A of the report. Paragraph (b) of the Appendix requires a planning application to have been consented to and as part of the planning process there will be the usual consultation with affected parties.

### **Resource implications**

30. As confirmed in paragraph 22 of this Report and paragraphs (e)-(g) of Appendix A the council will not consider s227 requests until it is satisfied all its costs of doing so will be fully met by the applicant.

### **SUPPLEMENTARY ADVICE FROM OTHER OFFICERS**

#### **Director of Law & Democracy**

31. The report recommends that cabinet will consider applications to the council to use its powers under s227 of the Town and Country Planning Act 1990 on a case by case basis and that it will adopt the guidelines set out in this report for doing so.

32. Section 227 of the Town and Country Planning Act 1990 ("TCPA 1990") provides that "...a London Borough 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".

33. Section 226 TCPA 1990, which deals with compulsory acquisitions, sets out the purposes for which local authorities may acquire land compulsorily as follows:

- "s226 (1) (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land,
- (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated".

Section 226 (1A) goes on to say that "... a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects –

- (a) The promotion or improvement of the economic well-being of their area;
- (b) The promotion or improvement of the social well-being of their area;

(c) The promotion or improvement of the environmental well-being of their area”.

34. Provided the cabinet is satisfied that the requirements in section 226 and section 227 are satisfied, there are adequate legal powers in the TCPA 1990 to allow the council to acquire land by agreement under s227.
35. However, as this report makes clear, the council would be using its powers to acquire land by agreement under s227 in order that the provisions of s237 could be engaged.

Section 237 provides : “(1) subject to subsection (3), the erection, construction or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves –

- (a) interference with an interest or right to which this section applies, or
- (b) a breach of a restriction as to the user of the land arising by virtue of a contract.”

36. Section 237(5) provides that the liability to pay compensation to a third party whose rights have been interfered with is enforceable against the local authority. It is for this reason that, as the report states at paragraph 22, the council would need to ensure that it was adequately indemnified in respect of any claims arising.

37. As the report indicates, the council would subsequently seek to dispose of land it had acquired pursuant to section 227 in order that a developer could carry out development on that land (as envisaged by the wording in brackets in s237(1) recited above). Section 233(1) TCPA 1990 provides that “Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order:

- (a) to secure the best use of that or other land and buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or
- (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority”

Section 233(3) provides that “The consent of the Secretary of State is also required where the disposal is to be for a consideration less than the best that can reasonably be obtained...”

38. As set out in the report cabinet would need to be satisfied in respect of any disposal that the consideration for the disposal was not less than the best that can reasonably be obtained. If it was the case that the consideration was less

than the best that can reasonably be obtained, the consent of the Secretary of State would be required.

39. In considering whether to acquire and then dispose of land for a planning purpose in order to take advantage of section 237, it is clear from the above that legal powers exist, these need to be considered in the context of the purpose of the use of those powers, i.e. in order to facilitate development but enabling interference with the rights of third parties. As the report highlights, the council will be required to look at every case on its own merits and carry out a balancing exercise to ascertain whether the interference with private rights is proportionate to the public interest in enabling the proposed development to proceed. The council would also need to consider the impact on any rights enjoyed by neighbouring owners arising out of the Human Rights Act 1997.
40. The council's constitution (Part 3C) provides that the acquisition of land and property, outside any scheme already agreed by members, where the market value is more than £100,000, is a decision reserved to cabinet. Similarly reserved to cabinet is any decision relating to the disposal of leasehold and freehold interests in land and property where the market value is more than £750,000.
41. The Housing and Planning Act 2016 received Royal Assent on 12 May 2016. It contains new provisions relating to the power to override easements and other rights which will, when they come into force, replace s237 TCPA. No date has yet been given for the coming into force of those sections, which will have the same effect as s237 in that they will enable third party rights to be overridden.

#### **Strategic Director of Finance & Governance (FC15/58)**

42. The strategic director of finance and governance notes that, as stated within the resource implications, the costs are expected to be covered by the s227 applicant.

#### **BACKGROUND DOCUMENTS**

<b>Background Papers</b>	<b>Held At</b>	<b>Contact</b>
None		

#### **APPENDICES**

<b>Appendix</b>	<b>Title</b>
Appendix A	Principles for use of s227 Town & Country Planning Act 1970



## AUDIT TRAIL

<b>Cabinet Member</b>	Councillor Mark Williams, Regeneration and New Homes	
<b>Lead Officer</b>	Eleanor Kelly, Chief Executive	
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<b>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER</b>		
<b>Officer Title</b>	<b>Comments sought</b>	<b>Comments included</b>
Director of Law & Democracy	Yes	Yes
Strategic Director of Finance & Governance	Yes	Yes
<b>Cabinet Member</b>	Yes	Yes
<b>Date final report sent to Constitutional Team</b>	25 May 2016	

## APPENDIX A

**Principles for London Borough of Southwark considering using its powers under s227 of the Town and Country Planning Act 1990 to enable stalled developments to proceed.**

### **Context**

- (a) The decision to utilise the powers will usually rest with the Council's Cabinet that will consider each application on its own merits. However, to assist with potential applications this criteria document will guide both applicants and the Cabinet.

### **Planning Consent**

- (b) The Council's Planning Committee should have consented to the development to which the Council is being asked to exercise its powers under s227 and by the time any application to use s227 powers is made, the time limits for the planning committee's decision to be challenged in the courts should have passed. The existence of a consented scheme would enable the interests likely to be affected by development to be identified.

### **Alternative**

- (c) Is there a reasonable alternative way of developing the site to achieve the outputs of the consented scheme without interfering with third party rights? If there is, the Council will normally expect that option to be followed.

### **Last Resort**

- (d) Bona-fide negotiations must have taken place with the parties that will have their rights overridden with a view to those rights being released by agreement. Where those negotiations failed because of unrealistic demands by the beneficiaries of those rights and as a consequence the proposed scheme cannot proceed the Council will contemplate use of its s227 powers.

### **Indemnity**

- (e) The Council will require reimbursement in full of its costs in considering any s227 application even if the Council subsequently decides not to use its powers.
- (f) If the Council does decide to utilise s227, the applicant will have to meet in full the Council's costs in acquiring the site from the applicant and subsequently transferring the site back to the applicant. Such costs will include legal fees including counsel advice if deemed necessary, land registry fees, Stamp Duty Land Tax, surveyor fees and other bona fide costs.
- (g) Should the use of s227 result in compensation claims lodged against the Council the applicant must undertake to meet all the Council's costs in dealing with such claims and the compensation that may be determined either by agreement or by the Upper Tribunal (Lands Chamber).

**No breach of statutory duty**

- (h) The Council is obliged by s123 of the Local Government Act 1972 (land in general) and s233 of the Town and Country Planning Act 1990 (land held for planning purposes) when disposing of land to do so at best consideration therefore the terms of the transaction to effect the sale to the Council and the sale back to the applicant cannot result in a breach of this duty.

**Public Sector Equalities Duty**

- (i) The Council must be satisfied in exercising its s227 powers that in doing so it will not result in its Public Sector Equalities Duty being breached.

**Proportionality**

- (j) Taking all relevant considerations into account does the development scheme benefit the wider community to such an extent that it is reasonable to deprive beneficiaries of the rights the ability to seek through the courts an order to stop that development.