

Item No. 17.	Classification: Open	Date: 20 June 2017	Meeting Name: Cabinet
Report title:		Acquisition of up to nine sub-Leasehold properties at the Signal building, 91 Newington Causeway, SE1 6BN	
Wards affected:		Chaucer	
From:		Cabinet Member for Regeneration and New Homes	

FOREWORD - COUNCILLOR MARK WILLIAMS, CABINET MEMBER FOR REGENERATION AND NEW HOMES

The council has made a huge commitment to its residents to deliver large numbers of affordable homes over the coming years, but we can only be successful if the planning conditions we place upon the properties are complied with. When we discovered that affordable units in the development at 91 Newington Causeway were being used for open market housing, we took immediate legal action in the High Court to get the properties back into affordable housing use. In order to facilitate settlement of that claim, resulting in up to 9 flats going back into affordable housing use, authority is sought for the council to acquire those properties for affordable housing use.

RECOMMENDATIONS

That the Cabinet:

1. Authorises the Head of Property to acquire the leasehold interests in Flats 2 - 7 and 9 - 11, 91 Newington Causeway, SE1 (the "Properties") as part of settlement of High Court proceedings reference HC-2016-001745.

BACKGROUND

2. The Properties are located within what is commonly known as the 'Signal Building', a 22 storey predominantly residential tower situated adjacent the railway bridge on the east side of Newington Causeway and situated within the Elephant and Castle opportunity area. The Signal Building is identified in bold on the attached Ordnance Survey extract at Appendix 1.
3. The scheme was first granted planning permission in 2009 and was finally completed and ready for occupation in 2015. Consent was granted for a '22 storey mixed use building incorporating a 65m² café/kiosk, 365m² of commercial floor space and 38 residential units with basement area containing plant and an energy centre, together with two wind turbines at roof top level.' The approved scheme provided for 11 of the 38 residential units to be affordable and offered as intermediate rent.
4. An application by the developer was subsequently received to vary the section 106 agreement in 2013. A deed of variation was agreed by the planning authority to change the Affordable Housing Obligation (AHO) from intermediate rented housing to shared

ownership housing. This was approved in October 2014. Planning permission was granted on the basis that these 11 flats would be offered on shared ownership terms to households in need of affordable housing in Southwark.

5. Following concerns raised about other sites in the borough involving the registered provider and its financial backers, and having made an application to court for disclosure of relevant documents, Southwark Council brought a claim in the High Court against a number of parties including the current leaseholders of the Properties in June 2016, seeking to enforce the AHO. Trial is listed to commence between 5 and 7 July 2017 with a time estimate of 15 days.
6. In the claim, the council seeks a declaration that the Properties are still bound by the AHO, notwithstanding certain transactions between the Registered Provider appointed to sub-let the affordable units, known as London District Housing Association (LDHA), its financial backers in the “Trademark” property investment group, and individuals who signed purported shared ownership leases.
7. The council also seeks an injunction to enforce that obligation, which in practice will require the leaseholders to convey the flats to a Registered Provider to be offered on shared ownership or intermediate rent terms.
8. The council has mediated with and reached a confidential settlement with LDHA and the Trademark group entities. The council has also mediated with the leaseholders on two occasions and heads of terms for settlement are now being discussed.

KEY ISSUES FOR CONSIDERATION

9. The council has already recovered 16 units at the Jam Factory development for affordable housing use, at no net cost to the public purse, following settlement of a High Court claim against LDHA and certain Trademark group entities, which was running in parallel with this claim. The council seeks the same outcome in respect of the Properties.
10. There are a number of factors which militate in favour of the grant of an injunction (as opposed to the payment of damages):
 - the delivery of affordable housing is of prime strategic importance to the council and it appears most unlikely that the council would be awarded, or recover, damages sufficient to replace the 9 Properties
 - the council believes that the sums paid by the leaseholders for the Properties were significantly less than their full market value, and that the leaseholders knew this at the time they acquired them
 - it is the council’s understanding that the Properties, with the exception of one of them which is used as weekday accommodation, were bought as buy-to-let investments and are currently let to and/or occupied by market tenants or family members
 - whilst the current leaseholders will suffer significant financial losses if the AHO is enforced against them, insofar as this is the fault of third parties they may be able to recover those sums from those third parties including their conveyancing solicitors,

the seller, the seller's agents and the seller's solicitors. Claims have been intimated by some of the leaseholders already, though no Court proceedings have yet been issued, so far as officers are aware.

11. The council took due steps to warn potential purchasers about the AHO. Not only was the section 106 agreement registered as a local land charge but, on 9 October 2015, the council caused a note to be made on the register of local land charges in respect of Newington Causeway as follows:

'The council is investigating a potential breach of the Section 106 agreement affecting flats 1-11. Please contact Emily Springford on 020 7525 5778 or at emily.springford@southwark.gov.uk if you require further information.'

12. No up-to-date local land charges search was made on behalf of the leaseholders, which would have revealed the above note. This together with the very unusual features of the transactions may give rise to a claim in negligence against the conveyancing solicitors. Alternatively the leaseholders may be able to prove actionable misrepresentation about the transactions by the seller and those acting on its behalf, and seek damages on that basis.
13. The council considers that it does not need to prove that there is a route of recovery for the leaseholders for its claim for an injunction to succeed, as in any event the balance of the public interest favours protecting the interests of the public in need of affordable housing, as opposed to the private interests of investors.
14. One of the arguments relied on by the leaseholders in their defences is that it would be impossible for them to comply with the AHO by selling their Properties to a Registered Provider. In order to cut through this argument and in order to facilitate settlement, the council has offered (subject to Cabinet approval) to purchase the Properties for their affordable housing value. In this respect valuations have been undertaken by Gerald Eve LLP to determine these values. These are detailed in the closed report.
15. In order to achieve its primary objective from the litigation, officers seek authority for the council to purchase the Properties. The proposed terms of purchase are detailed in a closed report, in light of the fact that discussions with the leaseholders are being conducted on a confidential, 'without prejudice' basis. Further detail on the leasehold transactions is also contained in the closed report.
16. Authority to acquire property interests is delegated to the Head of Property in individual cases where the acquisition price is below £100,000, unless the acquisition is part of an already agreed scheme. The valuations of the individual Properties will exceed this limit and Cabinet approval is therefore required.
17. Officers therefore seek authority for the council to offer to purchase the Properties either for its own use as affordable housing or for onward sale to a Registered Provider.

Policy implications

18. The recommendation is consistent with one of key principles of the council's Housing Strategy i.e. we will use every tool at our disposal to increase the supply of all kinds of homes across Southwark.

19. The recommendation conforms with the guidance contained within the councils' Supplementary Planning Document on affordable housing.

Effect of proposed changes on those affected.

20. As a result of these proposed actions the leaseholders face the potential for significant financial loss; however, this may be mitigated by action, brought by them, against other parties connected to this matter.

Community impact statement

21. The acquisition of these Properties will ensure that they are then made available as affordable housing to households in need of affordable housing in Southwark.

Resource implications

22. This report recommends the acquisition of the Properties by agreement from the current leaseholders on terms outlined in a closed this report.
23. Acquisition expenditure will include reasonable incidental management and legal charges as well as Stamp Duty Land Tax (SDLT) if applicable. It is believed that Stamp Duty Land Tax will not currently be payable as the council will benefit from an exemption in these circumstances.
24. Holding costs: Service charge and ground rent will be payable for periods that the Properties remain unoccupied after acquisition, efforts will be made to keep this to an absolute minimum.
25. There are no other risks or costs involved.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Democracy

26. Cabinet is recommended to approve the acquisition of 9 leasehold properties on terms set out in the closed report.
27. As set out in the report at paragraph 16, the acquisition of land and property where the price exceeds £100,000 is a decision reserved to the Cabinet.
28. Pursuant to section 120 of the Local Government Act 1972 the council can acquire any land by agreement, whether inside or outside the council's area, for the purposes of any of its functions, or for the benefit, improvement or development of the council's area.
29. By virtue of subsection (2) of that section the council may acquire land, notwithstanding that the land is not immediately required for the purpose for which it is required. The report confirms that the Properties will be used for affordable housing, either by the council or by a Registered Provider, should the council transfer the Properties at a later date. The provision of housing is one of the council's statutory functions.

30. Cabinet is advised that there is legal authority to proceed with the acquisition of the Properties.

Strategic Director of Finance and Governance

31. This report is requesting Cabinet to authorise the Head of Property to acquire leasehold interests in nine properties subject to a High Court claim. The claim is in respect of what the council believes to be a breach of the section 106 agreement affordable housing obligation for this development.
32. The Strategic Director of Finance and Governance notes the acquisition of the properties by the council is not the only restitution possible. It would, for example, be possible for another registered provider to acquire properties, but as noted at paragraph 14, this is likely to prove difficult and be protracted.
33. Acquisition of the properties constitutes capital expenditure and would form part of the council’s Housing Investment Programme. The programme is overcommitted compared to projected resources and close monitoring is therefore required. If acquired for social rent whether by the council or through onward sale, the council would be able to apply right to buy capital receipts towards 30% of the cost of purchase. The use of right to buy capital receipts is not permitted for the acquisition of shared ownership properties, and other funding sources would, therefore, be required.
34. If settlement is agreed on the basis set out in the closed report, or the council is successful at trial, the properties would be acquired at or near to their affordable housing value, which would be significantly below market value. The settlement is subject to negotiation, and should terms be agreed on this basis, the cost will be reported in the next capital monitor following the purchase.
35. Service charges payable would be an expense for the Housing Revenue account that would be recoverable from tenants and or leaseholders.

Reasons for urgency

36. The council wishes to be in a position to enter in an unconditional settlement and to be clear that all necessary approvals have been obtained.

Reasons for lateness

37. The timing of the High Court hearing together with ongoing mediation between the parties has impacted upon and delayed the drafting of this report.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
None.		

APPENDICES

No.	Title
Appendix 1	OS plans, 91 Newington Causeway (Highlighted in bold)

AUDIT TRAIL

Cabinet Member	Councillor Mark Williams, Cabinet Member for Regeneration and New Homes	
Lead Officer	Eleanor Kelly, Chief Executive	
Report Author	Paul Davies, Principal Surveyor	
Version	Final	
Dated	16 June 2017	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments sought	Comments included
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	Yes
Date final report sent to Constitutional Team	16 June 2017	