

Item No. 26.	Classification: Open	Date: 13 March 2018	Decision Taker: Cabinet
Report title:		Air – Rights above Damory House Abbeyfield Estate Rotherhithe	
Ward:		Rotherhithe	
Cabinet Member:		Councillor Mark Williams, Regeneration and New Homes	

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

Our commitment to build 11,000 new council homes by 2043 is both bold and challenging. Achieving this will make an enormous positive difference to the local community. Southwark is predominantly a densely developed inner-city area and to provide these new homes we must make better use of our land. The recommendations in this report will help to de-risk the site in question. This in turn will give assurance to prospective builders and result in a lower tender cost for the proposed new development. Resources are scarce so it is vital we control cost to maximise the number of new homes we can provide.

The land in question forms part of the Abbeyfield Estate, the proposals to build new homes – including an increase in the number of council homes – recently received resolution to proceed at planning committee. The Gateway 1 report to begin the procurement to deliver these proposals is also being considered by cabinet today. The scheme of which this site forms part will see new council homes built above Damory and Thaxted Houses, new homes built above Maydew House, the Bede Community Centre being moved to a new home underneath Maydew, and the current Bede site being released to build new homes – including council homes. In total the proposals will deliver 199 new council homes – an increase of 60 council homes compared to the number that were in Maydew House. The proposals also include significant landscaping improvements and a new public entrance onto the fantastic Southwark Park from the Abbeyfield Estate next to Maydew House.

The recommended appropriations will enable the construction of these homes to proceed without the risk of an injunction from a nearby landowner. However if a landowner is adversely affected as a result of the recommendations s/he will have the ability to claim compensation for the loss in value to their property as a result.

The report will therefore pave the way for much needed council housing, will improve the public areas of the estate and provide a better connection to Southwark Park.

RECOMMENDATIONS

That Cabinet:

1. confirms that the air-rights above Damory House Abbeyfield Road shown edged on the plan at Appendix A that are currently held for housing purposes are no longer required for that purpose and approve the appropriation of the rights to

planning purposes to facilitate the carrying out of the development proposals for the area in accordance with section 226 of the Town and Country Planning Act 1990 and section 122(1) of the Local Government Act 1972.

2. confirms that following completion of the appropriation at paragraph 1 the air-rights above the property edged on the plan at Appendix A will no longer be required for planning purposes and approve the appropriation of the rights to housing purposes in accordance with section 9 of the Housing Act 1985 and section 122(1) of the Local Government Act 1972.

BACKGROUND INFORMATION

3. Damory House is a 1960s built four storey building with garages to the ground floor and dwellings above. It forms part of the Abbeyfield Estate and is situated to the north-west of Maydeu House. It is shown edged on the plan at Appendix A. Following an options appraisal, Cabinet in March 2012, resolved in consultation with local residents to pursue a regeneration of part of the Abbeyfield Estate. This provides for the vertical extension and refurbishment of Maydeu House, Thaxted Court and the subject property together with the demolition and redevelopment with housing of the Bede Centre.
4. On 25 February 2015 Council Assembly approved the current Council Plan. This sets out Fairer Future promises one of which is: *quality affordable homes*. Within this commitment is the policy to improve housing standards and build more homes of every kind. This promise was in fact reinforcing previous policy to directly provide additional housing to meet the need for affordable housing within the Borough.
5. In pursuit of this a number of sites throughout the borough have been identified as providing capacity for additional new homes. Once identified, the development of those sites is consulted upon with the local community, a planning application is made and if appropriate planning consent is granted for the proposed new homes. Thereafter, if there are any third party rights that present a risk to the development Cabinet has been asked on a number of occasions to appropriate the site to mitigate such risk. This report is another to enable the de-risking of a development that will provide new additional housing for social rent.
6. On 7 February 2018 Planning Committee resolved to grant consent for refurbishment and extension of Damory House and Thaxted Court. In relation to Damory House it will provide:
 - ❖ refurbishment of existing residential block
 - ❖ two storey vertical extension to provide fourteen new dwellings
 - ❖ landscaping and public realm improvements
7. All fourteen of the new homes will be for letting on secure Council tenancies. All will be two bedroom dwellings
8. The quantum to be let on secure tenancies at Damory House needs to be considered in the overall Abbeyfield regeneration picture. In particular, it contributes to an overall increase in provision notwithstanding the reduction arising at Maydeu House as a consequence of the tenure allocation aspect of the regeneration. The table below demonstrates the overall regeneration picture in relation to secure tenancy dwellings.

Element	Secure tenancy units*	
	Pre-regeneration	Post-regeneration
Maydew House	144	112
Bede Centre	0	57
Thaxted Court	24	38
Damory House	35	49
Total	203	256

* This analysis disregards units that have been sold under the right to buy as they were constructed for social rent and the status of the ones sold will be unaffected in tenure terms by the regeneration

9. The contract for the regeneration will shortly be procured and it is intended for construction to commence later this year.

FACTORS FOR CONSIDERATION

10. As the proposed extension will be higher than the existing block by up to two stories a lighting/sunlight report was part of the planning process obtained from a specialist surveyor. This report dealt with the regeneration proposals not only for the subject property but also the Bede Centre, Maydew House and Thaxted Court. Its conclusion is:

Our technical analysis shows that the surrounding properties will experience a very high level of compliance within the daylight criterion. Where breaches of guidance do occur, this technical assessment demonstrates that in the majority of cases, this is due to either low existing values (producing disproportionate percentage alterations) or the constraints imposed by the existing architectural design of the neighbouring properties.

Given the complexities of the site and the existing built urban context, we feel that the impacts to the surrounding residential are reasonable within the surrounding streetscape.

The sunlight criterion demonstrates a very good rate of compliance for such a dense urban Site. The majority of the apertures relevant for assessment show conformity with the BRE Guidelines. Where transgressions from guidance are noted, these are relatively minor in nature and there are clear mitigating reasons for them.

11. The report notes there will be a minor impact in lighting terms to some neighbouring properties but the Planning report concludes *the reduction in sunlight levels to these rooms with currently low sunlight levels is considered not to significantly affect the amenity of these rooms within neighbouring properties.* Whilst the identified daylighting/sunlighting impact to some neighbouring properties is low if the consented scheme is constructed there will nevertheless be some properties that have a minor reduced level of lighting and this poses a risk to the project. This is because affected persons may apply to the court for an injunction to stop construction proceeding. This may stop prospective builders from tendering for the contract or cause bids to be substantially inflated to reflect the risk of there being an application for an injunction and the delay and uncertainty that may cause, including frustrating the development scheme.

12. The Planning Committee's resolution to consent has taken into account daylighting and sunlighting issues. As part of the planning process that also included Thaxted Court around three hundred occupiers in the locality were directly consulted. Twelve responses (4%) were received none were in relation to lighting impacts. The following topics of objection were raised: pre-application consultation, strain on infrastructure, intensification of occupation on estate nuisance from construction works.

APPROPRIATIONS

13. The appropriation of land refers to the process whereby a council alters the purpose for which it holds land. Where land has been appropriated for planning purposes third party rights enjoyed over the land can be overridden. The beneficiaries of such rights may however claim compensation [equal to the loss in value of their property caused by losing the right] but cannot seek an injunction to delay or terminate the development. This will give the Council the certainty that having commenced construction works a person with the benefit of an unregistered (with the Land Registry) right over land (such as a right to light) cannot apply to the court to have the development stopped. This is a very important tool in enabling development to proceed on urban sites. As mentioned, the beneficiary of any such right is entitled to financial compensation for the loss of the right. The Council could either insure against such compensation claims but this will be costly or accept the risk of an injunction that may be fatal to development or result in perhaps significant unquantifiable costs.
14. The compensation persons affected by the loss of light may be entitled to is based on the value of their properties before the right has been infringed versus the value of the property after infringement has taken place; it therefore follows that there is no right of claim until the right has been adversely affected. If a compensation claim is made and agreement between the parties is not possible it will be determined by the Upper Tribunal (Lands Chamber).
15. Cabinet has resolved to appropriate a number of sites in similar circumstances. There is however a significant difference in this case because Damory House is not a vacant site and residents are and will remain in occupation throughout the work. S19(2) of the Housing Act 1985 provides *where a local housing authority have acquired or appropriated land for the purposes of this Part, they shall not, without the consent of the Secretary of State, appropriate any part of the land consisting of a house (flat or maisonette is a house for this purpose) or part of a house for any other purpose*. The Secretary of State has given some general consents subject to conditions including the houses are vacant (this will not apply here). This potentially creates a difficulty namely that to appropriate the subject blocks to planning purposes can only be done with the explicit consent of the Secretary of State.
16. As the right of light injunction risk only occurs because of the proposed additional two floors to the block where there is currently open air, the block and the airspace above can be treated separately for Council holding purposes. This is no different to other buildings held for more than one purpose e.g ground floor retail may be held for investment purposes and flats above for housing purposes. Therefore to enable the project to be de-risked the air-rights existing above Damory House are proposed to be treated differently to the building in situ the status of which is unaffected by the report and its recommendations.
17. The appropriation stages is summarised below:

Air - rights currently held for housing purposes

Appropriate from housing to planning



Third party rights infringed by development cannot be enforced by injunction

Appropriate from planning to housing



Construction of new housing can proceed

RATIONALE FOR RECOMMENDATIONS

18.
 - a) To bring forward the construction of new housing and the refurbishment of an existing vacant housing block
 - b) To de-risk the construction project so as to encourage the maximum number of bidders and achieve a lower construction
 - c) Taking forward Fairer Future promise of *quality affordable homes*
 - d) Fulfillment of a commitment to local residents

Community Impact Statement

19. The Council Plan was the subject of extensive community consultation that gave rise to the Fairer Future promise of *quality affordable homes*. The recommendations herein will enable the construction of seventeen new homes to proceed. New homes will improve the quality of life for their residents. Implementation of the recommendations may however have a minor adverse lighting impact on some nearby occupiers and some disturbance whilst construction work takes place.
20. The Equality Act 2010 requires the Council in the exercise of its functions to have due regard to the need to:
 - a) eliminate discrimination;
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
21. Relevant protected characteristics for the purposes of the Equality Act are :
 - Age
 - Civil partnership
 - Disability
 - Gender reassignment

- Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex and sexual orientation.
22. In carrying out appropriation the Cabinet must have due regard to the possible effects of such appropriation on any groups sharing a protected characteristic in order to discharge its public sector equality duty.
23. Based on the information available it is not believed that there are any particular groups sharing a protected characteristic that will be adversely impacted by the proposals.

Financial Implications

24. The refurbishment of the existing and construction of the new homes will have a significant cost and an approved budget exists for this. The budget will need to make provision for any compensation claims for diminution in value that may arise as a consequence of the construction of the new homes. The budget will be reviewed when the procurement process mentioned at paragraph 9 has been completed.
25. Where land is appropriated from the housing revenue account to the general fund there is a transfer of debt between the accounts. When land is appropriated from general fund to the housing revenue account this debt transfer is reversed.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law & Democracy

26. The report recommends the appropriation of the air rights above the council-owned land at Damory House, Abbeyfield estate for planning purposes, and thereafter, the appropriation of that property for housing purposes.
27. A council holds land and property for a variety of statutory purposes in order to perform its functions. A council is authorised by virtue of section 122 of the Local Government Act 1972 (“the 1972 Act”) to appropriate land within its ownership for any purpose for which it is authorised to acquire land by agreement, where is no longer required for the purpose for which it is held immediately before the appropriation.
28. The land must already belong to the council. Paragraph 3 of the report confirms that the land to be appropriated is part of the Abbeyfield estate and therefore in the council’s freehold ownership.
29. The property must be no longer required for the purpose for which it is currently held. The report confirms at paragraph 8 of Appendix B that the air rights are no longer required for housing purposes.
30. The purpose for which the council is appropriating the rights or property must be authorised by statute. It is proposed that the land is held for planning purposes.

This is a purpose which is authorised by statute. Section 246 of the Town and Country Planning Act 1990 (“TCPA 1990”) defines such purposes as, inter alia, those for which can be acquired under ss226 or 227 of that Act. Section 227 provides that a council may acquire land by agreement for any purposes for which it is authorised to acquire land compulsorily by s226 TCPA 1990.

31. The purposes for which a council can acquire land pursuant to s226 TCPA 1990 include purposes “which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.” S226 also authorises the acquisition of land “... 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.” In the case of either s226 or s227 the acquiring authority must be satisfied that whatever development proposals it has for the land in question these are 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.” The Council’s plan to build new homes on the land, of which all are council homes for rent, is capable of falling within all three categories.
32. Section 203 of the Housing and Planning Act 2016 came into force on 13 July 2016. This section contains a power to override easements and other rights, and it replaces s237 TCPA.

S203 says :

“(1) A person may carry out building or maintenance work to which this subsection applies even if it involves

(a) interfering with a relevant right or interest...

(2) Subsection (1) applies to building or maintenance work where –

(a) there is planning consent for the building or maintenance work,

(b) the work is carried out on land that has at any time on or after the day on which this section comes into force

(i) become vested in or acquired by a specified authority or

(ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990 [*i.e. for purposes for which an authority can acquire land under ss226 and 227*]

(c) the authority could acquire the land compulsorily for the purposes of the building or maintenance work, and

(d) the building or maintenance work is for purposes related to the purposes for which the land was vested, acquired or appropriated as mentioned in paragraph (b).”

33. Consequently since the air rights have been appropriated for planning purposes building work may be carried out on land even if this interferes with rights or interests if there is planning consent for the building work; and the work must be for purposes related to the purposes for which the land was appropriated, in this

case planning purposes. By s204 those third party rights are converted into an entitlement to compensation to be calculated in accordance with ss7 and 10 of the Compulsory Purchase Act 1965. Paragraph 11 to appendix B confirms that this appropriation does not remove the rights to compensation.

34. This report confirms that the work being done on the land will be done in accordance with planning permission. Once the land has been appropriated and s203 triggered, that work will be authorised even where it interferes with third party rights.
35. Following the appropriation of the air rights for planning purposes it is recommended that the air rights are appropriated back for housing purposes, as the land is to be used for the provision of new housing. At that point, the land will no longer be required for planning purposes and will be appropriated for housing purposes.

Strategic Director of Finance & Governance

36. The recommendation is to appropriate the air rights above Damory House to facilitate its refurbishment and to add new housing. This appropriation is proposed to occur in such a way that it will have a neutral financial impact. However, a budget for the compensation and new homes proposed will need to be considered as part of the future capital programme budget setting process.

Strategic Director of Housing & Modernisation

37. This report ensures that the proposed refurbishment and additional housing at Damory House can progress with the avoidance of legal challenge. The light issues from the scheme are minimal and the scheme meets planning policy approval. Extensive consultation with local residents, together with a commitment to make 50% of the new social rented homes as part of the Abbeyfield Estate regeneration available to local residents in housing need leads the way in which social housing can be developed in inner cities. The scheme is a contribution to the Council's pledge to have a commitment to build 1,500 new homes by 2018.

BACKGROUND DOCUMENTS

Background Papers	Weblink
Cabinet report: Abbeyfield Estate: Options Appraisal for Maydew House, Thaxted Court and Damory House	Item 8 http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=302&MId=3821&Ver=4
Cabinet report: Abbeyfield Estate - Regeneration Project Update	Item 9 http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=302&MId=4245&Ver=4
Council Assembly report of 25 February 2015 adopting Council Plan	Item 2.1 http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=132&MId=4788&Ver=4
7 February 2018 Planning committee report	Item 5.3 http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=119&MId=5718&Ver=4

APPENDICES

Appendix	Title
Appendix A	Plan of Damory House
Appendix B	Rationale for appropriations of the land

AUDIT TRAIL

Cabinet Member	Councillor Mark Williams; Cabinet Member for Regeneration and New Homes	
Lead Officer	Eleanor Kelly; Chief Executive	
Report Author	Patrick McGreal; Regeneration - North	
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CONSULTATION WITH OTHER OFFICERS / CABINET MEMBER		
Officer Title	Comments Sought	Comments included
Director of Law & Democracy	Yes	Yes
Strategic Director of Finance & Governance	Yes	Yes
Strategic Director of Housing & Modernisation	Yes	Yes
Cabinet Member	Yes	Yes
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