

<b>Item No.</b> 25.	<b>Classification:</b> Open	<b>Date:</b> 24 March 2020	<b>Meeting Name:</b> Cabinet
<b>Report title:</b>		Elephant and Castle shopping centre - interference with property rights	
<b>Ward:</b>		Chaucer, North Walworth and St George's	
<b>Cabinet Member:</b>		Councillor Johnson Situ, Growth, Development and Planning	

## **FOREWORD - COUNCILLOR JOHNSON SITU CABINET MEMBER FOR GROWTH, DEVELOPMENT AND PLANNING**

This is the third of the trio of reports on the Elephant and Castle Shopping Centre. The Council is committed to ensuring the final and delivered shopping centre scheme is one the local community can be proud of and maintain our promise to support the traders in the coming months through to the completed new centre and the opportunity for them to return.

In line with the 2016 Cabinet decision, it is necessary to see this scheme come forward for the developer to know that in doing so any third parties rights that are interfered with cannot stop the scheme proceeding. It is recognised the consented scheme will cause some reduction in lighting to some nearby properties and we will expect the developer to engage to ensure there is full compensation for the infringement of rights, however there is also risk that the scheme may be halted by legal proceedings. There is a procedure under the Town and Country Planning Act 1990 whereby if the Council acquires an interest in the land that may cause the interference then if interference with rights does occur, the beneficiaries will have the right to financial compensation reflecting the loss in value to their property if any but will be unable to stop the development proceeding. This report recommends the Council acquires interests in the land concerned under the Town and Country Planning Act for this purpose. As is the case with the previous compulsory purchase report, there is extensive analysis of the legal basis for the Council's intervention and human rights implications arising from doing so. It also confirms the Council will only intervene when the developer gives the Council a full indemnity in respect of its costs including reimbursing any compensation payments arising as a consequence and a fully implementable planning permission.

This report like the other two form a key part of the Council's approach to enable the transformation of the Elephant and Castle town centre to proceed.

## **RECOMMENDATIONS**

That the Cabinet agrees

1. the Council entering into an agreement with Elephant Three Properties Limited ("E3") and Elephant & Castle Properties Co. Limited ("EC") for
  - (a) the acquisition by agreement by the Council of a leasehold interest from University of the Arts, London ("UAL") in the London College of Communication ("LCC") site shown edged green on the plan at Appendix A ("the LCC Site"). The acquisition will be under section 227 Town and Country Planning Act 1990 ("the 1990 Act") for the purpose of facilitating

- the carrying out of development, redevelopment or improvement on or in relation to that land; and
- (b) the disposal by the Council of the LCC Site by way of the grant of an underlease to UAL under section 233(1)(a) of the 1990 Act on the basis that the terms of that disposal appear to the Council to be expedient in order to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it.
2. the Council entering into an agreement with EC for
- (a) the acquisition by agreement by the Council of a leasehold interest (or interests) in the Elephant & Castle Shopping Centre site and other land in the vicinity of the Shopping Centre as shown edged red on the plan at Appendix B ("the East Site") and edged brown on the plan at Appendix C ("the Nib Site"). The acquisition(s) will be under section 227 of the 1990 Act for the purpose of facilitating the carrying out of development, redevelopment or improvement on or in relation to that land; and
  - (b) the disposal(s) by the Council of the East Site and the Nib Site by way of the grant of an underlease (or underleases) under section 233(1)(a) of the 1990 Act on the basis that the terms of the disposal(s) appear to the Council to be expedient in order to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it.
3. that the agreements referred to in recommendations 1 and 2 shall contain a full indemnity and financial security arrangements in favour of the Council and shall contain as a pre-condition to the entry into the resultant leases that the Director of Regeneration has received evidence that the LCC Site is the subject of a contract for sale between UAL and E3 and that a contract is in place between UAL and EC for the relocation of LCC to the East Site.
4. the Council entering into the leasehold acquisitions and disposals envisaged by the agreements in recommendations 1 and 2.
5. that the Council's intention in acquiring the leasehold interests under section 227 of the 1990 Act is to enable third party rights that exist over the LCC Site, the East Site and the Nib Site to be overridden pursuant to section 203 of the Housing and Planning Act 2016 ("the 2016 Act").
6. The Director of Regeneration be authorised on behalf of the Council to:
- (a) finalise the terms of and enter into (i) the agreements referred to in recommendations 1 and 2, and (ii) the resultant leases and underleases in accordance with the terms of the agreements;
  - (b) subject to completion of the agreements referred to in recommendations 1 - 2, pay compensation properly claimed where due to third parties arising from the interference of their rights over the LCC Site, the East Site and the Nib Site in accordance with section 204 of the 2016 Act;
  - (c) defend or settle (as appropriate) any compensation claims referred to the Lands Chamber of the Upper Tribunal in respect of rights that are

overridden due to the exercise of the Council's powers and to take all necessary steps in respect of any other legal proceedings that relate to the use of the aforementioned powers to override third party private rights over the LCC Site, the East Site and the Nib Site.

## **BACKGROUND INFORMATION**

### *Context*

7. Agenda items 23 and 24 advise the Elephant and Castle Shopping Centre is closing this year. The reports confirm there is a development scheme ("the Scheme") which benefits from full planning permission. The permission was the subject of an application in the High Court for judicial review and that claim was dismissed by the High Court on 20 December 2019. The High Court's judgment in favour of the Council on all grounds was the subject of an application to leave to appeal which failed in the High Court on all grounds but which may be pursued in the Court of Appeal. If it is, the outcome may not be known for several months.
8. It is desirable to enable the Scheme to be implemented. The delivery of the Scheme will require an enormous financial investment from the developer and its investors; in excess of £900 million. To commit to such an investment, the developer has to have the confidence that the Scheme can be delivered and will not be frustrated once commenced.
9. The Scheme will result in new higher buildings in the locality and their construction will reduce overall daylight and sunlight available to some existing properties in the locality. This was identified and carefully considered by the Planning Committee in determining the planning application for the Scheme. The extent of interference to daylight and sunlight was not considered to be of such severity to cause the planning application to be refused.
10. The planning application process in general does not (and is not meant to) consider the private rights which may exist over one property in favour of another property and which may be enforced by one property owner against another. Such rights might take the form of (for example) a private right of way over one property in favour of another; a restrictive covenant preventing something being done on a property to the benefit of another property; or a right of light across one property in favour of another property. As will be set out in this report, for the Scheme to go ahead, some interference with rights of light which exist over the Scheme site in favour of other land will need to occur. Interference with other property rights may also occur.
11. Where a property right is interfered with the person benefitting from the right can apply to the court for an injunction to prevent the interference. If the court deems it appropriate, the court can order action to be taken to remove that interference; or the court may award monetary damages instead. Beneficiaries of the rights do not need to make any application to court ahead of the work causing or potentially causing interference commencing. Indeed, they can if they want wait until after completion of the work. This therefore presents a significant risk to the developer - that having invested an enormous sum of money in one or more buildings it is subsequently required by the court to reduce the height of or remove the building(s) concerned or having substantial damages awarded against it. This is an unacceptable risk for the developer and makes financing the Scheme improbable.

12. Parliament has recognised that the issues described in the previous paragraph can prevent desirable schemes proceeding; through the 1990 and 2016 Acts it has given councils a mechanism to override such rights, whilst still giving beneficiaries a right to claim financial compensation for infringement of their rights. Section 203 of the 2016 Act allows rights to be overridden if certain pre-conditions are met, one of which is the vesting or acquisition of land in a local authority. Under section 204 of the 2016 Act, the holder of the right is entitled to compensation if a loss is suffered as a result of the infringement.
13. This report seeks Cabinet approval to apply the overriding mechanism at the Elephant and Castle to enable the Scheme to proceed and in doing so mitigate the risk of the shopping centre site remaining closed and then unused for an extended period and to bring forward the many and considerable benefits of the Scheme.
14. This report is both long and technical in nature to address all the pertinent information to enable Cabinet to weigh up all the considerations it must in deciding whether to agree to the proposed recommendations.
15. This report will refer on a number of occasions to 'the developer'. As explained in paragraphs 12-14 of Agenda Item 23, EC is the developer and its subsidiary company which owns the long leasehold interest in the shopping centre is also promoting the development and is seeking to procure the demolition of the Shopping Centre. E3 is a company in the same group as EC and with the same ultimate shareholders and funders, the Triangle joint venture partners. E3 is acquiring the LCC Site from UAL.

*Further background information*

16. Paragraphs 4 - 6 of Agenda Item 24 set out for Cabinet details of: the constituent parts of the Scheme.
17. The important planning policy context is set out in detail at Appendix H of Agenda Item 24. Cabinet will note that it has been a long-held objective of the Council's planning policies to bring about the redevelopment of the Shopping Centre Site.

*The Benefits of the Scheme*

18. These are set out in detail in Appendix C of Agenda Item 23. Cabinet will note among other benefits the large number of new houses, including affordable homes, a new retail offer for Elephant and Castle, significant improvements to the public realm, a new home for LCC and the proposed new London Underground station, to replace the current Northern Line station.

*Property rights potentially interfered with by the Scheme*

19. In this case it is rights of light, and in some instances potential rights of light, over the Scheme site in favour of adjacent properties, which have been identified as the primary concern.
20. A right of light is enjoyed by one property against another. It can arise either through express grant of the rights or through long use i.e. by the light travelling to a window in a building for many years across a particular route. It is the latter category which is relevant here.

21. EC has appointed GIA, experts on rights of light, to undertake rights of light analysis. GIA has identified the Scheme may give rise to infringements of rights of light of approximately 260 property interests (freehold and leasehold) registered at the Land Registry. The developer's solicitors have undertaken further work, using the GIA work, looking in detail at titles available at the Land Registry and have concluded that the number of affected registered titles (freehold and leasehold) is around 200. Other unregistered interests in those properties may also exist and be affected thereby increasing the number of holders of such rights further. The affected properties are located all around the development site, both adjacent to the East Site and the West Site, and the large majority of them are residential properties. Affected properties are located in Walworth Road, Elephant & Castle (Newington Butts), Newington Causeway, New Kent Road, London Road, Oswin Street, Elliotts Row, Gaywood Street, St Georges Road, Dante Road, Princess Street and Brook Drive. In addition, some of the infringements are likely to be significant, i.e. they cannot be classed as minor or trivial in nature and so without the use of the overriding powers in section 203 of the 2016 Act the holders of those rights (or any one of them) could potentially seek and obtain an injunction to prevent the Scheme from proceeding.
22. The compulsory acquisition of land by way of the CPO (see Agenda Item 24) will engage section 203 of the 2016 Act in respect of the land included in the CPO. All known landowners potentially have rights of light which will be affected by the development of the CPO land will be notified of the making of the CPO, if it is made and will be identified in the land ownership schedule that forms part of the CPO. Of the overall number referred to above, there are approximately 95 registered property interests at the Land Registry that have been identified in this respect and again other unregistered land interests in those properties may also exist and be affected.
23. Land forming part of the LCC Site has a wide land title reservation giving many buildings in the neighbourhood the right to enter onto that land to lay and maintain access services (utilities) benefitting those properties. Whilst it is not anticipated that the Scheme will interfere with this right, there remains a low chance that some interference may occur. In the light of the very considerable investment in the Scheme, this risk, whilst low, is not one the developer is prepared to stand.
24. Likewise, elsewhere on the Scheme site, there are historic covenants that may be interfered with. In each case it has not been possible to ascertain which land has the benefit of these historic covenants. These include restrictions not to use part of the land "for sale of women's or children's clothes and for the sale of household furniture", a covenant from 1895 "not to build on a yard area" and on another parcel reference is made to unspecified covenants dating from 1884. In addition, one parcel's title refers to restrictions contained in "deeds and documents destroyed by enemy action", so the developer cannot ascertain what those restrictions are. In these cases the likelihood of the covenants being enforced is extremely remote.
25. The developer has requested that the Council utilises its available powers to override all property rights that may be interfered with by the Scheme, to enable the Scheme to proceed; otherwise the Scheme, particularly as a result of the risk from rights of light, cannot be implemented.

## **KEY ISSUES FOR CONSIDERATION**

*The legal and policy framework in respect of overriding property rights*

26. Cabinet is directed to Appendix D where the relevant legal and policy framework in respect of overriding property rights is set out in detail. It is important that Cabinet review carefully the relevant legal and policy tests in Appendix D which must be satisfied before the Council can utilise its powers to override rights.
27. Cabinet will note among other aspects: the key tests set out in sections 226(1)(a) and 226(1A) of the 1990 Act, including the need to satisfy the well-being test in section 226(1A) (paragraph 1 of Appendix D); the pre-conditions to the engagement of section 203 of the 2016 Act (paragraph 5 of Appendix D); the list of seven considerations that the Council should address in deciding whether to override rights, including whether it is necessary to interfere with the rights to allow the Scheme to proceed and whether there is a compelling case in the public interest for the interference with the rights (paragraph 8 of Appendix D); and the Council's June 2016 policy on the use of the overriding powers (paragraph 9 of Appendix D).
28. As to the June 2016 Council policy, as set out in detail in paragraphs 10-15 of Appendix D, in this case it is necessary for Cabinet to consider whether there should be a departure from two aspects of the policy, namely that the planning permission be free from challenge and that the powers should only be used when genuine negotiation with affected persons has failed. Cabinet will see from paragraphs 11 - 12 of Appendix D that there are very good reasons in this particular case for departing from those two aspects of the policy. As regards the planning permission being free from challenge, the Scheme is a particularly important scheme for the borough and should be brought forward as soon as possible and the Council also has the comfort that the High Court agreed with the Council on all grounds in the judicial review challenge. As regards prior negotiations, there are so many affected parties in this case that it is unreasonable to expect agreement to be reached with them all. To insist on the developer seeking to secure individual releases by agreement in this case will be to insist on a procedure that will almost certainly prove impracticable and fruitless.
29. The potential departure from principles (b) and (d) of the policy has been notified to property owners and occupiers in the locality that may be adversely affected and representations were invited from them. This was done by way of a covering letter with a detailed briefing note. Around 1,600 properties received this. Five responses were received within the response period. A summary of those responses is at Appendix E. It is not considered any of them contain sufficient reason not to proceed with the recommendations in this report. Two of them amount to requests for additional information that has been subsequently supplied. Two expressed broad support for the Scheme and the other one wants to see a redeveloped shopping centre that maintains its current height. As advised in the linked compulsory purchase report, the Scheme has to provide the quantity and height of development provided in the consent to deliver all the public benefits required.
30. Cabinet will also note (among other aspects) from Appendix D: that once land has been acquired by the Council for planning purposes it may be disposed of in accordance with the terms of section 233 of the 1990 Act; the need for the Council to consider the human rights of those affected, including Article 1 Protocol 1 Convention rights (peaceful enjoyment of possessions), Article 8 Convention rights (the right to respect for private and family life, the home and correspondence) and Article 6 Convention rights (in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing); and the

need for the Council to comply with the public sector equality duty (“PSED”) under section 149 of the Equality Act 2010.

*The machinery to override property rights*

31. The previous section and Appendix D set out the legal context. As one of the requirements for section 203 of the 2016 Act to be engaged is that the land must have been acquired by the local authority (in this case for planning purposes), the Council will need to acquire a legal interest in the LCC Site, the East Site and the Nib Site. In each case it is proposed to do this by way of the Council acquiring a leasehold interest in the Land. As explained below, the Council will then immediately grant an underlease back to the relevant party that granted the lease. Since the intention is to enable the provisions of sections 203-205 of the 2016 Act to apply to the land and not for the Council itself to undertake the development, the arrangements will enable the interest acquired by the Council to be surrendered without penalty. Thereafter when construction pursuant to the planning permission takes place and interferes with a property right such as a right of light, the beneficiary of that right will be able to claim compensation from the developer – but crucially they will not be able to seek an injunction to stop the construction of the building or to alter a building once completed.
32. To protect the Council’s financial position, the agreements for lease and underlease will contain a full indemnity for the Council in respect of any costs the Council may incur in the exercise of its statutory powers. These costs include, but are not limited to, the costs of any compensation payable to third parties. The agreements for lease will also contain suitable financial security for all such costs. Further details of the proposed agreements, leases and underleases follow and are set out below.

*LCC Site*

33. There is a proposed agreement between UAL and E3 (a group company of EC) for E3 to purchase the LCC Site. That agreement has not yet exchanged, though the developer is confident it will be shortly. Once it has, the developer or its related company will have control of that site. Accordingly, it is not proposed to include it in the CPO area. However, the LCC Site is an important part of the Scheme and there are third party rights which exist over it (such as rights of light) that will otherwise be an impediment to the development and delivery of the Scheme. For this reason, the developer has requested the Council to enter into a contractual arrangement whereby it acquires a leasehold interest in the LCC Site under section 227 of the 1990 Act for the purpose of facilitating the development, redevelopment or improvement of the land. The Council will then immediately grant an underlease to UAL under section 233 of that Act. The intention of the arrangement is to enable third party rights over the LCC Site to be overridden under sections 203-205 of the 2016 Act. If it was not possible to use the overriding powers to deal with the property rights that affect the LCC Site, the LCC Site would have been included in the CPO to “cleanse” the title to the land.
34. Given the importance of the LCC Site to the Scheme and UAL will be the main commercial occupier of the East Site, the agreements for lease to be entered into by the Council will contain a pre-condition to the entry into the leases (and underleases) contemplated by this report that the Director of Regeneration has received evidence of the contracts being in place for the sale of the LCC Site to E3 and the relocation of LCC to the East Site. This is reflected in the recommendations to Cabinet.

35. The agreement for lease in respect of the LCC Site will provide that within three years of its completion EC and/or E3 can call upon the Council to take a lease of the LCC Site from the freeholder UAL and then immediately grant an underlease back to UAL so that UAL retains occupational control of the land. The lease will be for a duration of 5 years and the underlease for the same duration less three days. The rent payable under the lease will be £1 per annum, if demanded, as the rent will be in the underlease. The underlease will require UAL, as tenant, to observe at least the same tenant obligations as are imposed in the lease. The underlease will contain mutual provisions whereby at any point after the date of the underlease either the landlord (the Council) or the tenant (UAL) can if they wish call for the lease to be surrendered. Following a very short notice period, both the lease between UAL and the Council and the underlease between the Council and UAL will fall then away. On account of these provisions the lease and underlease only have a nominal market rental value and represent best consideration within the context of both s233 of the 1990 Act and s123 of the Local Government Act 1972.
36. The Council will therefore acquire a legal interest in the LCC Site but the arrangements will result in neither any financial detriment nor financial benefit as a result.

*East Site and the Nib Site*

37. Notwithstanding that the East Site and the Nib Site will be covered by the CPO, that if implemented will override third party rights over that land, EC has requested that the Council enters into an agreement for a leasehold acquisition of those sites under section 227 of the 1990 Act as proposed for the LCC site. This will assist EC if, for example, a confirmed CPO is not implemented. Although as matters currently stand a CPO is required, it is possible that EC may acquire all outstanding land interests by agreement, thereby removing the need to exercise CPO acquisition powers. EC has requested that the Council enter into this arrangement at an early stage, to give it certainty at the outset that this issue has been dealt with. In order for the overriding powers of s203 of the 2016 Act to be engaged in respect of that land, the Council will need to acquire an interest in it.
38. EC owns the large majority of the freehold land in the East Site which is needed to build the Scheme. The Nib Site and a larger stretch of land around the perimeter of the Shopping Centre which forms part of the East Site are owned by Transport for London ("TfL"). The developer is in negotiation with TfL to acquire those parcels from TfL, as parts of the proposed Scheme buildings will be located on them.
39. It may be that TfL will quickly transfer those pieces of land to the developer as part of their proposed contractual arrangements. In which case EC could grant a lease to the Council itself of those areas. However, it may be that the transfer by TfL to the developer happens a little later.
40. Similarly, EC is seeking to agree matters with LUL, which owns relatively small parts of the East Site (most notably the current Tube station) to facilitate the Scheme.
41. The East and Nib Site agreement for lease will therefore allow for EC to call on the Council to enter into one or more lease and underlease transactions with EC or at EC's request any relevant third party owner who agrees to enter into those arrangements with the Council (such as TfL or LUL) as appropriate.



42. The Council will therefore enter into an agreement with EC to acquire a leasehold interest (or interests) in the East Site and the Nib Site to grant an underlease (or underleases) of the same land back to EC or such third party owner as appropriate. The lease will be acquired for the same planning purpose as mentioned above. The arrangements as to lease and underlease duration, premiums, rent and mutual ability to break the lease and underlease will be the same as outlined for the LCC Site.

*Both Sites*

43. Once the land interests in the sites have been acquired by the Council under section 227 of the 1990 Act, at any time after the date of the underlease if the Council (or its relevant counterparty) wishes they can effectively be surrendered back to UAL (LCC Site) or EC or the relevant third party owner as appropriate (East Site and the Nib Site) with the benefit of the section 203 powers.

**COMMUNITY IMPACT STATEMENT**

*Human rights implications*

44. The overriding of property rights recommended in this report will interfere with Article 1 First Protocol Convention Rights. In the context of rights of light the interference will be significant for some of the properties affected i.e. the infringement will be substantial enough that the relevant rights holder can seek an injunction to prevent the Scheme from infringing their rights. The infringement (if any) with the other rights that affect the Scheme site are not considered to be substantial: there is no known occasion of any party seeking to exercise rights under the LCC Site title reservation and it is doubtful they will need to do so in the future. The historical covenants affecting the Scheme site benefit land which cannot be identified, so the prospect of any party being able to successfully claim them is extremely remote. Article 1 of the First Protocol allows for interference with rights if it is in the public interest and in accordance with the law. So the use of planning powers as contemplated by this report is lawful in Article 1 terms provided that the Council strikes a fair balance between the public interest and the private rights protected by Article 1. It is also relevant that compensation (for diminution in value) is available to persons affected by the proposed overriding of rights. By way of the considerable benefits that will arise from the Scheme, as referred to in Appendix C of Agenda Item 23, it is considered there are compelling benefits in the public interest which, when weighed against the private rights of individuals, justify the interference with Article 1 rights in this case.
45. The overriding of rights held by adjacent properties will also interfere with Article 8 rights. Interference with the rights of light may have an adverse effect in Article 8 terms on home and family life, Article 8 does, though, allow for interference if it is proportionate and in the public interest. In terms of rights of light it is considered that the impact will not be so great as to result in an interference with Article 8 rights but if there is an interference it will be proportionate and justified. It is not considered that interference with the other rights referred to in this report will give rise to any significant infringements. It is considered that the public benefits of the Scheme, as referred to above, taken together with the compensation which is available in respect of the overriding of rights, mean that the interference with rights in this case is proportionate and in the public interest.

46. As regards Article 6 Convention Rights, disputes as to compensation can be referred for hearing by the Lands Chamber of the Upper Tribunal. For these reasons, Article 6 is complied with.
47. Regard has been had to whether there is any infringement of Articles 9 (freedom of thought, conscience and religion), 11 (freedom of peaceful assembly and association) or 14 (freedom from discrimination) of the Convention; in each case it is considered that there is no infringement.

*Public Sector Equality Duty*

48. In considering the recommendations herein Cabinet must have due regard to the possible effects of them on any groups sharing a protected characteristic in order to discharge its PSED. This is an ongoing obligation.
49. The decision before the Cabinet is whether to exercise its power under the 2016 Act to override property rights to enable a consented planning scheme to be implemented. This is discussed in greater detail in Appendix F to this report
50. Careful consideration has been given to the application of the PSED to this issue and whether the overriding of property rights will be consistent with the PSED and its goals. There are a wide range of residential property types, and some commercial properties, are among those which benefit or potentially benefit from the rights that will be overridden. The Scheme will infringe those rights. It is not considered that infringement of these property rights will affect members of any protected characteristics group differently from the rest of the general population. There are no types of accommodation which will be particularly accommodating of people with protected characteristics, such as e.g. elderly care homes or houses for partially sighted persons. There is no reason to think that the infringement of rights will have a disproportionate impact on any protected characteristics group including age or disability. Whilst some of the rights will be held by some people with protected characteristics it is not considered this effect will be disproportionate on such persons or that there will be any discrimination or inequality of impact. As is set out elsewhere in the report, compensation is payable to persons whose rights have been affected. In making its decision the Cabinet must weigh up the benefits that will arise from the recommendations against the adverse impacts.

*Whether the use of the Council's powers is justified*

51. This question involves testing the proposed use of the powers against the legal and policy guidance framework set out in Appendix D. Cabinet is referred to Appendix F where that exercise has been undertaken in detail.
52. Cabinet will note among other aspects from Appendix F that it is considered that: the tests set out in sections 226(1)(a) and 226(A) of the 1990 Act are satisfied; overriding the rights will facilitate the carrying out of the Scheme and the benefits it will bring; those benefits are very significant and outweigh the impacts on the rights of those parties who hold the rights; it is necessary to interfere with the rights in this particular case for a number of reasons as set out in paragraph 6 of Appendix F; there is a compelling case in the public interest to override the rights on the basis of the very significant benefits that will accrue from the Scheme; there are very good reasons for departing from principles (b) and (d) of the Council's 2016 policy on the use of overriding powers in this particular case; and

the principles of the June 2016 policy are either met or the particular circumstances of this case justify a departure from principles (b) and (d).

## **RESOURCE IMPLICATIONS**

53. Implementation of the recommendations in this report, will require significant staff resources. These will come from Regeneration, Legal and Communications. Where rights are interfered with and result in a loss in value to the affected property the owner is entitled to compensation for that loss. Liability for compensation rests in the first instance with the developer but if for some reason payment is not made then the owner can claim compensation from the Council. Implementation of the recommendations is conditional on EC indemnifying the Council in full against any costs including compensation payments arising. Therefore, there will be no negative cost implications but the process will result in staff resources being diverted from normal duties as necessary. This will create some challenges that will be managed.

## **SUPPLEMENTARY ADVICE FROM OTHER OFFICERS**

### **Director of Legal Services**

54. The purpose of this report is to recommend the acquisition and disposal of land such that the provisions of s203 of the 2016 Act will be engaged. These provisions, in summary, enable the overriding of third party rights such that development can be carried out even if it interferes with the rights of others (s203(1)).
55. Section 203 applies to building work where (a) there is planning consent for the work; (b) the work is carried out on land that has become vested in or acquired by a specified authority. Although as stated in the report the planning consent is currently the subject of legal proceedings, there will need to be planning consent in place when work is carried out which interferes with third party rights if s203 is to be engaged.
56. The work must be carried out on land that has been acquired by a specified authority. It is necessary for the Council (the specified authority) to acquire an interest in the land in order that s203 will be engaged. The Council may acquire an interest in the East Site by the use of its compulsory purchase powers under s226 of the 1990 Act, which is the subject of a separate report before Cabinet. However, it is possible that this may not be required. It is considered appropriate for the Council to acquire a short leasehold interest in the East Site and Nib Site from EC or the relevant third party owner who may agree to such arrangements such as TfL or LUL. The Council will also acquire a short leasehold interest in the LCC Site from UAL. These leasehold interests will be acquired for planning purposes pursuant to s227 of the 1990 Act. The leases will be granted for a term of 5 years at a rent of £1 per annum (if demanded). The underleases will be granted for the same rent, so there will be no adverse financial consequences for the Council. Suitable security for any liabilities the Council may incur, will be procured in favour of the Council in addition to the indemnity offered by the developer, and the terms of the recommendation allow delegated authority in this respect.
57. Once the leases are granted the Council will immediately grant an underlease of the same land back to the relevant counterparty, so that they will retain occupational control over it. The underleases will be for a term of 5 years less

three days. They will be granted pursuant to s233(1)(a) of the 1990 Act which empowers local authorities to dispose of land which has been acquired by them for planning purposes. Land so acquired can be disposed of to such person, in such manner and subject to such conditions as appear to the authority to be expedient in order to secure the best use of that or other land and any buildings or works which have been , or are to be, erected, constructed or carried out on it. As the under-leases will be for a term of less than seven years the requirements of s233 (3) requiring the disposal to be for the best consideration that can reasonably be obtained will not apply.

58. Nevertheless, the Council has a duty to act reasonably and in the best interests of its ratepayers and it has considered the position on the basis that the Council will seek the best consideration that can reasonably be obtained in the context of the underlease. The requirements of section 233(1)(a) of the 1990 Act as they apply to each arrangement have been considered and the terms of the proposed agreements are expedient to secure the best use of the land. The terms are expedient to secure the carrying out of the Scheme which is the best use of the land. As regards the proposed underleases and to the extent that any break option therein amounts to a disposal by the Council for the purposes of section 233, although section 233(3) does not apply because of the fact that the leases are for less than 7 years, the Council will still seek the best consideration that can reasonably be obtained. In the context of the expedient terms referred to in section 233(1)(a) in each case the consideration obtained is the best that can reasonably be obtained. Again, the question of best consideration needs to be judged in the context of the totality of the arrangements for the land interests in those sites. The Council is only able to acquire a leasehold interest at £1 per annum in the first place on the basis that it will thereafter dispose of an interest by way of the underlease. As regards the requirements of section 233(5) to, so far as practicable, secure that relevant occupiers are provided with a reasonable opportunity to obtain accommodation on the land, LCC is the only occupier of the LCC Site and is obviously a contracting party to the LCC Site lease and underlease with the Council and is content with the arrangement, and will continue to occupy until such time as the new campus building on the East Site is ready. As regards the East Site and Nib Site, it is not practicable, for the Council to secure more accommodation on site than is provided for pursuant to the relocation strategy.
59. Neither the leases nor the underleases will benefit from the security of tenure provisions of the Landlord and Tenant Act 1954.
60. The underleases will contain provisions whereby either the landlord (the Council) or the tenant (UAL in respect of the LCC Site, EC (or TfL or LUL, as appropriate) in respect of the East and Nib Sites) can terminate them at any time after the date of the underlease by calling for them to be surrendered. Following a very short notice period the land will then revert back to the freeholder (either UAL or EC etc.) but with the benefit of the powers to override third party interests contained in section 203 of the 2016 Act. Those powers do not require that the building work which involves interfering with third party rights or interests is carried out by or on behalf of the local authority but there must be planning permission for the work.
61. The Council has legal powers in section 227 of the 1990 Act to enable the Council to acquire a legal interest in the sites so that the provisions of s203 of the 2016 Act are engaged. There are legal powers in section 233 of the 1990 Act to enable the Council to dispose of that land by way of a short underlease back to

the respective freeholder. There is no requirement in the 2016 Act for the land to be held by the Council for any particular period of time, so the provisions enabling the land interests to be terminated are lawful.

62. Section 204 of the 2016 Act provides that a person (in this case the developer) is liable to pay compensation for any interference with a relevant right or interest authorised by s203. However if the developer fails to pay, that liability is enforceable against the authority pursuant to s204(3). For that reason the Council will insist upon receiving a full indemnity from the developer (and related financial security) in the agreements referred to in recommendations 1 and 2 in respect of all its costs including, but not limited to, compensation payable to affected third parties.
63. Cabinet should note that under section 66(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990, in the exercise of its powers of disposal under section 233 of the 1990 Act, a local authority shall have regard to the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings. The Metropolitan Tabernacle is a listed building and some minor works to that building are required and have received listed building consent. The Faraday memorial is also a listed building and is close to the Scheme site, though no works are planned to it. There is no breach of this statutory duty by reason of the proposals set out in this or any of the linked reports on the agenda.
64. Normally a decision relating to the acquisition of land of a value of less than £100,000 will be delegated to the appropriate chief officer rather than decided by Cabinet, by virtue of part 3C of the Council's constitution. Similarly the disposal of land of a value less than £750,000 will be delegated in the same way. However, since the purpose of the acquisitions and disposals recommended by this report is to engage the powers contained in section 203 of the 2016 Act, which has potential implications for a large number of people whose rights might be affected, it is appropriate that these decisions are taken by Cabinet. In addition, the decision requires a departure from the Council's 2016 policy on the use of section 227 of the 1990 Act (and what is now section 203 of the 2016 Act) to override rights and that departure is a matter for Cabinet. For the reasons set out in the report, this departure from policy is considered necessary and appropriate.
65. The Council has received advice from leading counsel in the use of its powers under the 1990 Act with particular regard to the departure from the Council's policy on the use of these powers, as set out in this report and at Appendix D. Further specialist legal advice will be sought if necessary as the matter progresses.

#### **Strategic Director of Finance and Governance (FC 19/036)**

66. This report is requesting agreement from Cabinet for the acquisition and disposal of land as detailed in the report to facilitate and progress the comprehensive redevelopment of the Elephant and Castle Shopping centre. Full details are contained within the body of the report.
66. The Strategic Director of Finance and Governance notes that the recommendations are subject to suitable indemnity agreements to ensure the developer will underwrite in full the Council's costs and liabilities associated with the proposed recommendations. The terms of the indemnity agreement will be examined in detail and will only, be finalised once all due consideration is given to the VAT implications to ensure the Council's interests are best protected.

67. Staffing and any other costs connected with this report to be contained within existing departmental revenue budgets.

## CONCLUSIONS

68. The regeneration of the town centre by way of the Scheme is a crucial component in meeting the Council's long held policy aims for the Opportunity Area.
69. The Council now has the opportunity to facilitate the Scheme and thereby fulfil its aims for the Opportunity Area by using its planning powers.
70. The overriding of property rights will interfere with the human rights of those affected. These rights have carefully been considered and have taken into account the significant public benefits arise from the Scheme and compensation may be payable to anyone whose rights are overridden. It is considered the interference with rights is necessary, justified and proportionate and that there is a compelling case in the public interest for the Council to utilise its powers to facilitate the Scheme; and that such a case is consistent with the legal considerations set out in this report, including the PSED and the Human Rights Act.

## BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Shopping Centre Site, Elephant and Castle, 26, 28, 30 and 32 New Kent Road, Arches 6 and 7 Elephant Road, and London College of Communications Site Planning Report	160 Tooley Street, London SE1 2QH	Victoria Lewis 02075 255410
<a href="http://moderngov.southwark.gov.uk/documents/s76025/ITEM%201%20-%20REPORT%2016AP4458.pdf">http://moderngov.southwark.gov.uk/documents/s76025/ITEM%201%20-%20REPORT%2016AP4458.pdf</a>		
Listed building consent report 16/AP/4525	160 Tooley Street, London SE1 2QH	Victoria Lewis 02075 255410
<a href="http://moderngov.southwark.gov.uk/documents/s76029/ITEM%202%20-%20REPORT%2016AP4525.pdf">http://moderngov.southwark.gov.uk/documents/s76029/ITEM%202%20-%20REPORT%2016AP4525.pdf</a>		
Decision of High Court: <i>Jerry Flynn and The London Borough of Southwark and Elephant And Castle Properties Co. Limited.</i>	160 Tooley Street, London SE1 2QH	Patrick McGreal 02075 255626
<a href="https://www.bailii.org/ew/cases/EWHC/Admin/2019/3575.html">https://www.bailii.org/ew/cases/EWHC/Admin/2019/3575.html</a>		
Policy for Considering Intervention under the Town and Country Planning Act 1990 to Enable Redevelopment to Proceed.	160 Tooley Street, London SE1 2QH	Patrick McGreal 02075 255626
<a href="http://moderngov.southwark.gov.uk/documents/s62024/Report%20Town%20Country%20Planning%20Act.pdf">http://moderngov.southwark.gov.uk/documents/s62024/Report%20Town%20Country%20Planning%20Act.pdf</a>		

## APPENDICES

No.	Title
Appendix A	Plan of the LCC Site
Appendix B	Plan of the East Site
Appendix C	Plan of the Nib Site
Appendix D	The legal and policy framework in respect of overriding property rights
Appendix E	Summary of responses to letter concerning potential departure from Council policy on overriding rights
Appendix F	Whether the use of the Council's powers is justified

## AUDIT TRAIL

<b>Cabinet Member</b>	Councillor Johnson Situ, Growth, Development and Planning	
<b>Lead Officer</b>	Kevin Fenton; Strategic Director Place and Wellbeing	
<b>Report Author</b>	Patrick McGreal, Regeneration North	
<b>Version</b>	Final	
<b>Dated</b>	11 March 2020	
<b>Key Decision?</b>	Yes	
<b>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER</b>		
<b>Officer Title</b>	<b>Comments Sought</b>	<b>Comments Included</b>
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
<b>Cabinet Member</b>	Yes	Yes
<b>Date final report sent to Constitutional Team</b>	11 March 2020	