

ELEPHANT AND CASTLE SHOPPING CENTRE INTERFERENCE WITH PROPERTY RIGHTS

APPENDIX D

THE LEGAL AND POLICY FRAMEWORK IN RESPECT OF OVERRIDING PROPERTY RIGHTS

1. Section 226(1)(a) of the 1990 Act gives the Council power to acquire compulsorily any land in its area if the Council thinks that the acquisition will "facilitate the carrying out of development/re-development, or improvement on, or in relation to, the land". In exercising this power the Council must have regard to Section 226(1A) of the 1990 Act and must not exercise the power unless it thinks that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects:
 - 1.1 The promotion of improvement of the economic well-being of the area;
 - 1.2 The promotion or improvement of the social well-being of the area;
 - 1.3 The promotion or improvement of the environmental well-being of the area.
2. Section 227 of the 1990 Act gives the Council the power to acquire by agreement any land which it requires for any purpose for which it may be authorised to acquire land under section 226. The Council can therefore acquire land interests by agreement under section 227 if it is satisfied that the tests in sections 226(1)(a) and 226(1A) are met.
3. Acquisitions of land under section 226 or 227 engage the provisions of sections 203-205 of the 2016 Act.
4. Section 203 of the 2016 Act enables building or maintenance work to proceed in accordance with a planning permission even though in doing so rights over the development site which benefit adjacent properties (such as easements, restrictive covenants or rights of light) may be interfered with.
5. The pre-conditions to the engagement of section 203 are:
 - 5.1 there is planning consent for the building or maintenance work,
 - 5.2 the land on which the work takes place has at any time on or after 13 July 2016 become vested in or acquired by the local authority, or been appropriated to planning purposes,
 - 5.3 the authority could acquire the land compulsorily for the purposes of the work and
 - 5.4 the work is for purposes related to the purpose for which the land was vested, acquired or appropriated.
6. Where property rights are overridden in this way, beneficiaries are entitled to compensation based on comparing the value of their property on the assessment day assuming no interference has taken place with its value after the interference. Compensation is the difference in value, if any, after the comparison (diminution in value). The compensation is only due when an interference of rights takes place. When this happens the claim for compensation is against the person that interfered

with the rights but under section 204 the local authority that implements the overriding provisions is liable if the infringer does not pay that compensation.

7. This is a powerful tool in enabling developments as it means that third party holders of the rights cannot prevent the development proceeding (by way of an injunction) - their right to obtain an injunction is translated into a right to compensation only. It also provides certainty for a developer in estimating the basis upon which any compensation is due, as the compensation will be based on a loss in value basis of the property which has the benefit of the right, rather than on any other basis which might fall to be negotiated i.e. it stops the developer being held to ransom or having to pay a share of the development profits.
8. From a legal perspective, the following aspects should be considered by Cabinet in whether to use acquisitions under section 227, to engage section 203 of the 2016 Act to override rights in respect of the Scheme:
 - (a) Whether the land should be acquired for planning purposes - e.g. does the Council think that the use of the powers will facilitate the carrying out of development, redevelopment or improvement on or in relation to land?

As part of this, Cabinet should consider whether planning permission has been granted or if not, whether this is likely to be forthcoming, and what are the prospects of the Scheme proceeding?
 - (b) Whether it thinks the Scheme will contribute to the achievement of one or more of the objects set out in section 226(1A) of the 1990 Act: the promotion or improvement of the economic well-being of the area; the promotion or improvement of the social well-being of the area; or the promotion or improvement of the environmental well-being of the area.
 - (c) Whether third party rights capable of being overridden by section 203 of the 2016 Act exist and whether they will be interfered with by the Scheme.
 - (d) Whether interference with those rights is necessary to achieve the benefits of the Scheme, e.g. could the Scheme realistically be adjusted to avoid interference with the rights? Will agreement to release those rights be likely to be achievable if planning powers were not used? And is overriding the rights necessary to allow the Scheme to proceed?
 - (e) Whether there is a compelling case in the public interest for the interference with the rights.
 - (f) Will there be interference with rights protected under the Human Rights Act 1998 and under the European Convention on Human Rights? Is the public interest to be achieved proportionate to, and does it justify, the infringement of the rights through the operation of section 203? Human rights are discussed further below.
 - (g) Will the exercise of the powers be consistent with the public sector equality duty ("PSED") under section 149 of the Equality Act 2010? The PSED is discussed further below.
9. Also material as regards the use of the Council's powers to acquire by agreement under section 227 of the 1990 Act to engage section 203 of the 2016 Act, in June 2016 Cabinet adopted a policy on the use of the forerunner to sections 203-205 of

the 2016 Act, section 237 of the 1990 Act. Although section 237 has since been repealed, sections 203-205 are similar in terms, so much of the information and commentary in the June 2016 Cabinet report is still relevant. That report set out principles the Council will have regard to in considering applications to utilise its powers to override third party rights. These are:

- (a) Each application to be determined on its own merits but the criteria will guide both applicants and the Council.
 - (b) There should be a planning consent that is immune from challenge.
 - (c) Is there a reasonable alternative way of developing the site to achieve the outputs of the consented scheme whilst interfering with third party rights? If there is, the Council will normally expect that option to be followed.
 - (d) The exercise of these powers should be a last resort when genuine negotiation with affected persons has failed.
 - (e)-(g) The Council to be indemnified against all costs arising as a result of the exercise of its powers, including all professional fees and any compensation to third parties.
 - (h) There must be no breach of the Council's duty to act in accordance with section 233 of the 1990 Act, i.e. any disposal must be at the best consideration that can reasonably be obtained.
 - (i) The Council must be satisfied that in exercising section 227 powers there is no breach of the PSED.
 - (j) Proportionality - 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 of the ability to seek through the courts an order to stop that development?
10. In this case Cabinet must consider whether to depart from principles (b) and (d) of the policy:
- (b) *Whilst there is planning consent for the Scheme, it has been the subject of a judicial review that was dismissed but an application was made for leave to appeal that decision. The High Court refused the application for leave to appeal on all grounds but this may be the subject of a further application for leave to appeal to the Court of Appeal. This means the planning consent is not immune from challenge.*
 - (d) *The developer has not endeavoured to negotiate agreements with persons that will be affected by the overriding of rights.*
11. As regards principle (b) of the policy, it is considered appropriate to depart from that aspect of the policy and to ask Cabinet to use its powers to override rights in this instance notwithstanding the ongoing proceedings in respect of the planning permission, in order to mitigate risk and delay to the Scheme. The Scheme is an especially important scheme for the borough which should proceed as soon as possible in the public interest. The Council also has the assurance that the High Court found in its favour on all grounds. One of the reasons for the policy position was to ensure that there was sufficient certainty around any redevelopment scheme

to enable the number and nature of potentially affected rights to be ascertained. As planning permission has been granted (albeit subject to ongoing proceedings) there is that certainty. It is important to note that a decision by the Cabinet to exercise powers to override third party rights does not have any detrimental effects to those third parties unless and until rights are interfered with as a result of development taking place in accordance with planning permission. At the time the works are done, there will need to be planning permission.

12. As regards principle (d) of the policy there are so many people affected by the proposed overriding of rights that it will be unreasonable to expect agreement to be reached with them all. Delay will also defer completion of the new LCC premises and its delivery fitting in with the academic year. Without the Council's intervention, each rights holder will need to release their rights to enable the Scheme to proceed. 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. Having regard to the very considerable public benefits of the Scheme it is considered that there is good reason for the Council departing from principle (d) of its policy in this particular case.
13. As noted in the main body of this report, 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. This was sent to around 1,600 properties.
14. Recipients of the letter were given a period of three weeks within which to make representations and discussion of them is in the main body of the report. A summary of the responses is at Appendix E.
15. All the responses received to the potential variation in policy have been given careful consideration and it is concluded none of them contain sufficient reasons not to proceed with the recommendations.
16. Once land has been acquired by the Council for planning purposes under section 226 or 227 of the 1990 Act, the land may then be disposed of to a third party pursuant to section 233 of the 1990 Act. Section 233(1) permits the Council to dispose of the land to such persons, in such manner and subject to such conditions as appear to the Council to be expedient in order to:
 - (a) 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 (whether by the Council or by any other person), or
 - (b) secure the erection, construction or carrying out on it of any buildings or works appearing to the Council to be needed for the proper planning of its area.

In this case it is section 233(1)(a) that is relevant.

17. The consideration received by the Council for such disposals must be "the best consideration that can reasonably be obtained", unless the Secretary of State's consent is obtained to the contrary or unless the disposal is the grant of a lease of seven years or less or the assignment of a lease with seven years or less unexpired at the date of assignment. In judging what consideration can be achieved, account must be taken of the expediency as referred to in section 233(1).

18. The Council is required to exercise its powers of disposal under section 233 in a manner which, so far as practicable, secures that relevant occupiers of that land are provided with a suitable opportunity to obtain accommodation (section 233(5)). Relevant occupiers for these purposes means residents and those carrying on business on the land who wish to obtain accommodation on such land and are willing to comply with any requirements of the authority as to the development and use of such land (section 233(6)). A suitable opportunity for accommodation means, in relation to any person, an opportunity to obtain accommodation on the land in question which is suitable to his reasonable requirements, on terms settled with due regard to the price at which any such land has been acquired from him (section 233(7)).
19. As regards human rights, the Human Rights Act 1998 incorporates into domestic law the European Convention on Human Rights. Article 1 Protocol 1 Convention rights have to be considered: every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This does not impair, however, the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. In respect of this right under Article 1 of the Protocol, a fair balance must be struck between the public interest and private rights.
20. Article Convention 8 rights also apply and are engaged i.e. everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Any interference with this right must be proportionate. Article 8 covers family life and private social life enjoyed at a place of work or in professional, business or commercial activities. If children could be affected, then the best interest of the child shall be a primary consideration.
21. Article 6 Convention rights are also relevant: in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
22. Cabinet should also consider whether any of the following Convention rights are engaged: Article 9 (freedom of thought, conscience and religion); Article 11 (freedom of peaceful assembly and association); and Article 14 (freedom from discrimination).
23. Section 149 of the Equality Act 2010 imposes a general equality duty on public sector authorities ("the 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.

24. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard to the need to:
- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
25. For the purpose of the PSED the following are "protected characteristics":
- Age
 - Civil partnership
 - Disability
 - Gender reassignment
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex and sexual orientation.
26. Case law has distilled a number of principles as regards the PSED. "Due regard" in the context of the PSED means the regard that is appropriate in all the particular circumstances, including the importance of the areas of life of the members of the protected group that are affected and the extent of the effects and such countervailing factors as are relevant to the function which the decision maker is performing. The PSED is not a duty to take specific steps - indeed the courts have warned against micro management of the PSED process - nor is it a duty to achieve results. It is a duty to have regard to the need to achieve the various objectives referred to above.