

ELEPHANT AND CASTLE SHOPPING CENTRE INTERFERENCE WITH PROPERTY RIGHTS

APPENDIX F

WHETHER THE USE OF THE COUNCIL'S POWERS IS JUSTIFIED

1. Firstly, sections 226(1)(a) and 226(1A) of the 1990 Act are considered.
2. The utilisation of the Council's powers to override rights will facilitate the carrying out of development, re-development or improvement on, or in relation to the land. There is sufficient evidence that the Scheme is likely to proceed if these powers are utilised together with CPO powers as envisaged by agenda item 24. Notwithstanding that there will be some negative effects to those affected by the powers, as referred to in this report, and having taken those negative effects into account, it is considered the development, re-development or improvement is likely to contribute to the achievement of all of the well-being objects in section 226(1A) of the 1990 Act. The considerable economic, social and environmental benefits that are likely to arise from the Scheme are referred to in Appendix C of agenda Item 23. Accordingly the statutory tests in sections 226(1)(a) and 226(1A) are met.
3. *Consideration (1) - whether 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 the land?*
 - 3.1 Given the significant level of investment that is planned, EC has made it clear that it will not be able to construct the new buildings in the Scheme whilst there remains a risk of injunction as regards the rights of light in respect of any part of the Scheme site. This is a reasonable position for EC (or any developer) to take. EC also considers that funding and investment in the Scheme will be adversely affected, and improbable, whilst such a risk exists. Again, this is agreed. Whilst any infringement with the other rights referred to in this report is not clear, the fact remains that such rights exist and a large number of properties in the locality benefit from the title reservation which affects part of the LCC Site. The existence of that right and the number of rights holders in respect of it are again factors likely to adversely affect funding and investment in the Scheme.
 - 3.2 It is recognised in this particular case, without the use of the Council's powers under section 227, there is a very real and significant risk of an injunction being sought to prevent the Scheme from proceeding and the use of the Council's powers is the only way in which that risk can be removed in practice having regard to the numbers of claimants who will need to be negotiated with.
 - 3.3 The use of the powers to acquire by agreement under section 227 of the 1990 Act in respect of the LCC Site will remove the issue of rights of light injunction(s) over an integral and large part of the Scheme and will thereby facilitate the considerable benefits that development of that site will bring. It will also remove the concerns that exist in respect of the title reservation over part of the LCC Site. In addition, EC's representatives have confirmed in discussions that EC, reasonably, requires that certainty before it embarks on the first phase of developing the East Site.

- 3.4 The exercise of the powers over the LCC Site is integral to the Scheme as a whole, and will thereby facilitate the carrying out of the entire Scheme and the benefits it will bring. The entry into the leasehold acquisitions at this stage will bring certainty that this impediment is dealt with at the outset. The use of those powers in respect of the East Site and the Nib Site will give EC the comfort that rights of light will not prevent the delivery of those sites in the event that EC, in tandem with the Council, acquired all the necessary land interests in the Scheme site without recourse to implementing a confirmed CPO. The use of the powers in this instance is reasonable and necessary having regard to the need to ensure that all eventualities are covered to facilitate the Scheme.
- 3.5 EC's development team advise the developer's funders may defer the detailed design work for the construction of new buildings, costing many millions of pounds, until it has certainty that the injunction risk has been removed. This in turn will create further delay for UAL, pushing back the delivery of their new LCC premises and its fitting in with the academic year. There is a real risk that the Shopping Centre site, a prominent site in the borough, will be left unused for significantly longer than will otherwise be the case.
- 3.6 It is highly unlikely that the considerable benefits of the Scheme will be delivered while the risk of an injunction remains. The existence of the LCC title reservation is also a factor mitigating against the funding and investment in the Scheme. The proposed acquisitions of land for planning purposes will facilitate the implementation of the Scheme and the consequent and related public benefits it will bring. As long as the rights are overridden and the CPO is made and pursued as envisaged by this report, there is sufficient evidence of the likelihood of the Scheme proceeding (to justify a decision by the Council to acquire leasehold interests in the LCC Site, the East Site and the Nib Site for planning purposes, to engage section 203 of the 2016 Act).
4. *Consideration (2) the Scheme will contribute to the provision or improvement of the economic, social or environmental well-being of the area:*
- 4.1 The well-being objects in section 226(1A) of the 1990 Act are all considered to be met by way of the very significant benefits arising from the Scheme as outlined in the report for agenda Item 23. The benefits that will accrue from each part of the Scheme have been considered which will be covered by the acquisitions and these in themselves confer considerable benefits that will contribute to all of the well-being objects.
- 4.2 The public benefits of the Scheme are very significant and will outweigh the impacts on the rights of those parties who hold the rights, and any other adverse impacts arising from the Scheme and that the Scheme is in the public interest.
5. *Consideration (3) (whether rights exist which are capable of being overridden) -* this is met as rights of light and the other rights and covenants referred to in this report are capable of being overridden pursuant to section 203. The work which has been done indicates that there will be infringements of rights of light and potentially other rights and restrictions too.
6. *Consideration (4) (necessity of interference with the rights):*

- 6.1 In terms of rights of light EC has made it clear that it is not possible to amend the Scheme in such a manner so that no infringements of rights occur.
 - 6.2 The only way of ensuring no interference with the rights of light will be to limit the Scheme to the heights and massing of the existing buildings on the site, which will not deliver the quantity of much needed housing and other uses that the Council wishes to see on the site.
 - 6.3 Such a "cutback" will essentially result in an entirely new development. EC has been clear that it will not proceed with such a smaller, compromised design, as it will not be worth its while financially to do so.
 - 6.4 Even if a financially attractive alternative scheme did exist which did not infringe any rights of light which EC or another developer was willing to proceed with (which is very unlikely), such a scheme will require a totally new, full planning application to be submitted for the whole application site, creating further risks and delays for the delivery of the public benefits associated with the Scheme. Such a scheme will also not deliver the benefits sought by the development plan policy for the site.
 - 6.5 Given the number of parties who will need to be negotiated with it will not be practicable or realistic for releases to be negotiated in any sort of reasonable timeframe, or realistic to expect that in this particular case at all. This is true of both the rights of light and the LCC title reservation. Also, it will only take one of the interested parties to either not sign a release or not to engage and the entire Scheme will be frustrated. In respect of some of the historical rights and covenants affecting the Scheme site, the properties with the benefit of those rights cannot be identified, so the developer is unable to negotiate with the relevant parties in those respects. The use of section 203 to override the rights is the only way for the development to be able to proceed in practice and certainly in any reasonable time frame and at a cost which can be reasonably estimated. In these particular circumstances, it is reasonable not to require the developer to undertake such negotiations.
7. *Consideration (5) (compelling case in the public interest)*
 - 7.1 This is dealt with above. There is a compelling case in the public interest for the overriding of rights on the basis of the very significant benefits that will accrue from the Scheme.
 8. *Consideration (6) (human rights)*
 - 8.1 Human rights are discussed in their own section in the main body of the report.
 - 8.2 In determining the level of permissible interference with the enjoyment of the rights, the courts have held that any interference must strike a fair balance between the public benefits associated with development and the protection of the rights of individuals. There must be reasonable proportionality between the means employed and the aim pursued. The availability of an effective remedy and compensation to affected persons is relevant in assessing whether a fair balance has been struck.

- 8.3 Cabinet must therefore balance the impacts on human rights of the affected adjacent property owners against the overall benefits to the community which the Scheme will bring and consider whether the interference is necessary and proportionate.
- 8.4 The public benefits that will stem from the Scheme are set out in Appendix C of agenda Item 23.
- 8.5 The right of affected owners to claim compensation for the infringement of their rights is relevant to an assessment of the proportionality of the infringement. Whilst the level of compensation will not be on a ransom or development profits basis, it is nevertheless at the level which Parliament has specified as appropriate.
- 8.6 For the reasons given above, in this particular case it is not considered a realistic or practicable option for releases of the rights to be secured in any sort of reasonable timeframe and that the only realistic option to remove the risk of injunction in this case is to use the Council's powers to override rights.
9. *Consideration (7) (PSED)* is considered to be met for the reasons set out in the main body of the report.
10. As regards the principles set out in the June 2016 Cabinet policy for intervention under section 227 of the 1990 Act to enable development to proceed as referred to earlier in this report:
- (a) *Each application to the Council to be determined on its own merits but the criteria will guide applicants and the Council* - as the policy makes clear each case is to be determined on its merits. The benefits of the Scheme and the particular circumstances of this case, do warrant departing from some aspects of the policy, as explained in this report.
 - (b) *Planning consent should exist and be free of challenge* - this point has not been met yet but is discussed in Appendix D and the main body of this report. Although ideally the planning permission should already be immune from further challenge, this is not a legal requirement and the importance of the Scheme and the benefits it brings justifies the Council in seeking to facilitate it now, so that valuable time is not lost. The Scheme is an especially important scheme for the borough which should proceed as soon as possible in the public interest. To the extent that entering into the proposed arrangements is a departure from principle (b) of the June 2016 policy, it is considered the circumstances justify such a departure.
 - (c) *Is there a reasonable alternative mechanism for bringing about the development without interfering with the rights?* In this particular case, no - see the conclusion on consideration (4) above.
 - (d) *Use as a last resort - Have negotiations taken place with the relevant rights holders to release the rights by agreement?* No, but see the conclusion on consideration (4) above. .

- (e)-(g) *Indemnity* - the Council will only proceed when it has received a full indemnity in each case. This principle will therefore be satisfied.
- (h) *No breach of section 233 duty to dispose of land at the best consideration that can be reasonably be obtained* - For the reasons set out in paragraph 35 of the report The Council will achieve the best consideration that can reasonably be obtained in respect of the underleases (including any break rights therein).
- (i) *Public Sector Equalities Duty* - the application of this duty is discussed in the main body of the report and has been complied with.
- (j) *Proportionality* - this is dealt with in the context of human rights and is met.

11. Accordingly, the principles of the June 2016 policy are either met or the particular circumstances of this case justify a departure from certain principles of the policy.