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| <b>Item No.</b>                    | <b>Classification:</b><br>Open | <b>Date:</b><br>9 <sup>th</sup> September 2003   | <b>Meeting Name</b><br>EXECUTIVE |
| <b>Report Title</b>                |                                | Appropriation for planning purposes of the Council owned section of Potters Field former coach park site – Supplemental Report |                                  |
| <b>Ward(s) or groups affected:</b> |                                | Riverside  |                                  |
| <b>From:</b>                       |                                | Borough Solicitor & Secretary  |                                  |

## RECOMMENDATION

1. That the Executive: -
  - a) notes the content of the letter dated 2 September 2003 sent on behalf of Berkeley Homes Limited; and
  - b) takes account of the letter and the further advice contained in this report when considering the main item, concerning the proposed appropriation of the Council owned part of the former coach park at Potters Field.

## BACKGROUND

2. A draft of item 7 was sent to Berkeley Homes Limited (“Berkeley”) in advance of the finalisation of the report and the agenda, because of the interest which the company has in the adjoining site. The draft report was sent as a matter of courtesy and Berkeley have been afforded more than the 5 clear days notice of report which is required by law. A copy of the letter received from solicitors acting on behalf of Berkeley is attached at Appendix B to this report.
3. Officers comments on the letter and further advice on the matters raised is set out in this report. Advice has been sought and obtained from leading counsel both in respect of the original report and this supplemental report.
4. Berkeley and their representatives have been advised of the procedure for requesting a deputation to the Executive to enable them to present their concerns directly to members.
5. Members will note that the letter raises a number of points which can be summarised as follows: -
  - that the proposed course of action is misconceived, unlawful and raises Human Rights Act issues;
  - that the report fails to take account of the reasons for the withdrawal of the planning brief relating to the site;
  - that there is no rational basis for concluding that the land is not required to meet housing need;
  - that there is no demonstrable need for a cultural use on the site and the Council has no developed proposals for use of the site in this way; and

- that the report does not adequately address the impact of section 237 of the Town and Country Planning Act 1990 or the positive obligation on the Council to use its best endeavours to secure housing development on the site.

6. Each of these points is addressed below.

### **Lawfulness of the proposed course of action**

7. Members are advised that legislation confers powers on a local authority to appropriate land from one statutory purpose to another. The factors which should be taken into account are detailed in the main report on this item. A decision to appropriate this land to planning purposes based on the information available to members would therefore be within the Council's statutory powers and so not unlawful. There is nothing in the report or history of this matter to suggest bad faith on the part of officers or members.
8. In so far as Berkeley's rights under the Human Rights Act are concerned, these are protected by the fact that they have received advance notice of the proposal and been given the opportunity to comment on it. These comments have been reported to members and Berkeley have been advised of the procedure for requesting a deputation. In addition Berkeley have rights of compensation under the Town and Country Planning Act in the event that their rights are affected by any subsequent development on the site.

### **Housing Need**

9. The general position concerning housing need and the Council's current housing targets under the draft London Plan are set out in the main report. The target of 29,530 new homes by 2016 is based on a housing capacity study carried out in 1999, which is recognised as being flawed<sup>1</sup> and a new study is envisaged although this will not be available until 2006. The target figure of 29,530 therefore remains the current target.
10. A review of the number of housing units granted planning permission over the period 1998 – 2001 shows that an average of 1,430 units per year were granted planning permission over the period of 1998 – 2001. Extrapolating this figure across the 15-year housing target period of the draft London Plan gives a total of 21, 450 units.
11. These predictions do not take into account the major regeneration projects taking place in Southwark over this period, which will provide the following substantial residential provision.

|                     |            |
|---------------------|------------|
| Canada Water        | 2500 units |
| Bermondsey Spa      | 2000 units |
| Elephant and Castle | 4200 units |

12. The 8,700 units or homes that these Southwark regeneration initiatives will provide place the total amount of units to be granted planning permission within schemes of 10 units or more at 30,150, in excess of the current housing target.

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<sup>1</sup> See comments in the report of the Examination in Public on the draft London Plan, published in July 2003

13. In addition the Council has commissioned work from BDP architects to demonstrate the capacity of the Council's site to deliver housing units within the constraints imposed by the restrictive covenants affecting the site.
14. The Council's site is at present subject to a covenant requiring it to be used for residential use only consisting of 450 – 456 Habitable Rooms. Using a typical mix of 1, 2 & 3 bed units this would equate to 178 units.
15. If the density restrictions of the covenant are ignored the Council's site, which has an area of 0.61 hectares could potentially deliver 271 units, assuming a typical mix of 1,2 and 3 bed units and a density of 1,100 habitable rooms per hectare. Development at this density would be at the maximum density indicated in the draft Southwark Plan and would be in breach of the covenants affecting the site.
16. Taking this information into account members may conclude that the use of this particular site to meet housing need is not critical to meeting the current housing targets as it would deliver less than 1% of the target, even if developed to the maximum density.
17. Members will also be aware that the Council's land use planning function is concerned not merely with meeting housing need but requires the balancing of a number of competing demands in order to create sustainable development. These other demands include industry, employment, leisure, open space, education, tourism, conservation and the historic environment, social care and health care, highways and transport.
18. The main report underlines the particular characteristics and location of the site, especially its sensitive location adjacent to Tower Bridge and opposite the Tower of London World Heritage site.

### **Planning Brief Context**

19. It is not correct to assert that the planning brief for the site and adjoining land was withdrawn because of the speculative nature of the proposed cultural use of the site. The brief was withdrawn on the limited ground that members of the Planning Committee had not considered the extent to which the existence of the covenants affecting the site rendered the aspirations of the brief merely speculative and not likely to come to fruition within a reasonable time-scale. The report to the Planning Committee specifically advises that the brief should be withdrawn to enable an assessment of the potential impact of the restrictive covenant on the achievement of the objectives set out in the brief.<sup>2</sup>

### **Cultural Use**

20. The absence of a detailed and fully worked up scheme for developing the site, whether for arts or cultural use or for some other use does not prevent the Council from determining that the site is no longer required for the purposes for which it is currently held and that it should be held for planning purposes under the Town and Country Planning Acts in order to secure an appropriate form of development on this unique site.

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<sup>2</sup> See report to Planning Committee on 30 June 2003

21. As advised in the main report, the site was specifically acquired under section 120(1) (b) of the Local Government Act 1972 and not under housing powers.

### **Operation of section 237 of the Town and Country Planning Act 1990**

22. The main report identifies the extent and consequences of the operation section 237 of the 1990 Act. Officers have considered the relevant case-law concerning the effect of section 237 and reviewed the wording of paragraph 31 of the main report. The practical effect of section 237 of the 1990 Act is as set out in paragraph 31, but from a technical legal viewpoint it is not the case that a restrictive or positive covenant is overridden in the sense that it ceases to have any effect. Section 237 does not have the effect of removing covenants and other rights in their entirety but of restricting the rights of affected parties to prevent development in accordance with planning permission by seeking an injunction or damages and substituting a right to compensation in appropriate circumstances.

### **The Positive Covenant**

23. Leading counsel has confirmed that section 237 of the 1990 Act applies in the case of both restrictive and positive covenants and rights.
24. Members will be aware that the Council has, in any event, taken steps to secure the development of the site in accordance with the positive obligation. Alsop & Störmer, architects, were instructed to prepare a scheme for development of the Council's site for housing purposes and an application for planning permission for the resulting scheme, sometimes known as the "Worm on Stilts" was made in May 1994. This application was called-in by the Secretary of State: a decision was deferred pending a decision on the Royal Opera House application and to date no decision on the proposed residential development has been issued.
25. In paragraph 13 of this supplemental report members are advised of the steps which have been taken since the Council acquired the site to explore the feasibility of residential development on the site.

### **Conclusion**

26. In considering the recommendation in the main report that the Council owned part of the former coach park at Potters Field should be appropriated and held for planning purposes, members should have regard to information in the main report, the comments of the adjoining land-owner and the further information and advice contained in this supplemental report.
27. On the basis of all the information currently available members may reasonably conclude that the land is no longer required for the purposes for which it is currently held and that it may be appropriated to planning purposes.

### **Reasons for lateness and urgency**

28. The letter from Berkeley was not received until after the deadline for the normal despatch of the agenda. Since receiving the letter officers have received further advice from leading counsel and have prepared this supplemental report: it was not possible to do this at an earlier stage.

29. The supplemental report is urgent so that members can reach a decision about the proposed appropriation with the benefit of the latest advice and information.

| <b>Background Papers</b>   | <b>Held At</b> | <b>Contact</b> |
|--|----------------|----------------|
| <i>No additional background papers have been used in the preparation of this report</i><br><br><i>Please see main report for list of background papers</i> |                |                |

## APPENDIX A

### Audit Trail

|   |   |                          |
|---|---|--------------------------|
| <b>Lead Officer</b>   | <i>Paul Evans, Strategic Director of Regeneration<br/>Deborah Holmes, Borough Solicitor and Secretary</i> |                          |
| <b>Report Author</b>  | <i>Lyn Meadows, Assistant Borough Solicitor – 020 7525 7406</i>   |                          |
| <b>Version</b>  | <i>Final</i>  |                          |
| <b>Dated</b>  | <i>5 September 2003</i>   |                          |
| <b>Key Decision?</b>  | <i>Yes</i>  |                          |
| <b>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / EXECUTIVE MEMBER</b> |   |                          |
| <b>Officer Title</b>  | <b>Comments Sought</b>  | <b>Comments included</b> |
| Borough Solicitor & Secretary   | Yes   | Yes                      |
| Chief Finance Officer   | No  | No                       |
| <i>List other Officers here</i>   |   |                          |
| <b>Executive Member</b>   | No  | No                       |
| <b>Date final report sent to Constitutional Support Services</b>          | 5 September 2003  |                          |

**APPENDIX B**

**LETTER FROM MASONS, SOLICITORS, ON BEHALF OF BERKELEY HOMES  
LIMITED**