

BANKSIDE YARDS
ACQUISITION FOR PLANNING PURPOSES

APPENDIX E

THE LEGAL AND POLICY FRAMEWORK IN RESPECT OF OVERRIDING PROPERTY RIGHTS

1. Section 226(1)(a) of the Town and Country Planning Act 1990 (TCPA 1990) 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 TCPA 1990 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 or 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 TCPA 1990 gives the Council the power to acquire by agreement any land that it requires for any purpose for which it may be authorised to acquire land under section 226. So the Council can 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 Housing and Planning Act 2016 (HPA 2016).
4. Section 203 of the HPA 2016 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 a specified authority (such as the LB of Southwark) or been appropriated for planning purposes;

- 5.3 the authority could acquire the land compulsorily for the purposes of the building or maintenance 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. It is for this reason that an indemnity agreement would be in place with the developer in advance of any exercise of powers.
7. This is a powerful tool in enabling developments to proceed 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 by fixing loss in value of the property that has the benefit of the right, as the basis of valuation, 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 HPA 2016 to override rights in respect of the Scheme:
 - (1) Whether the land should be acquired for planning purposes – i.e. 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.
 - (2) Whether it thinks the Scheme will contribute to the achievement of one or more of the objectives set out in section 226(1A) of the TPCA 1990: the promotion or improvement of the economic, social or environmental well-being of the area.
 - (3) Whether third party rights capable of being overridden by section 203 of the HPA 2016 exist and whether they would be interfered with by the Scheme.
 - (4) Whether interference with those rights is necessary to achieve the benefits of the Scheme, i.e. could the Scheme realistically be adjusted to avoid interference with the rights? Would agreement to release

those rights be likely to be achievable if planning powers were not used? In addition, is overriding the rights necessary to allow the Scheme to proceed?

- (5) Whether there is a compelling case in the public interest for the interference with the rights.
- (6) Would 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.
- (7) Would 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 TCPA 1990 to engage section 203 of the HPA 2016, in June 2016 Cabinet adopted a policy on the use of the forerunner to sections 203-205 of the HPA 2016, section 237 of the TCPA 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 and the adopted policy remains applicable to the consideration of the use of section 203. The policy sets out principles the Council would 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) A planning consent that is immune from challenge should be in place.
- (c) Is there a reasonable alternative way of developing the site to achieve the outputs of the consented scheme without 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 compensations to third parties.
- (h) There must be no breach of the Council's duty to act in accordance with section 233 of the TCPA 1990, 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 principle (d) of the policy:
- (d) *Bona-fide negotiations must have taken place with the parties that will have their rights overridden with a view to those rights being released by agreement. Where those negotiations failed because of unrealistic demands by the beneficiaries of those rights and as a consequence the proposed scheme cannot proceed the Council will contemplate use of section 227 powers.*
11. As regards principle (d) of the policy, the Developer's rights to lights surveyors have attempted to negotiate with those entitled to rights which would be interfered with in a material way. In all cases where there has been a substantive response the surveyors have taken appropriate steps to pursue bona fide negotiations.
12. Negotiations with the neighbours likely to be most affected have been running since late 2017, and whilst agreement has been reached with a number of the affected owners, negotiations with others have stalled, and there have been threats of Court proceedings from three affected owners. The Cabinet are asked to note that bona fide negotiations have taken place with all those who are likely to suffer the most significant impacts; criterion (d) of the policy is satisfied to that extent. Insofar as negotiations with owners of other interests, including unknown owners or interests, have not taken place, or that there is a failure to reach a conclusion for reasons other than unrealistic demands or delay by the beneficiaries or those rights, a departure from the policy is justified as it would not be reasonable to seek to identify every interest that may be affected as a result of engaging the provisions of section 203, and as there are legitimate reasons why the negotiations have not been concluded.
13. Without the Council's intervention, right holders will each have to release their right to enable the Scheme to proceed. To insist on the developer securing 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.
14. As noted in the main body of this report, the potential departure from principle (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 sent to 638 addresses.

15. Recipients of the letter were given a period of two weeks, later extended to five weeks, within which to make representations, which are discussed in the main body of the report. A summary of the responses is at Appendix F.
16. 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 of this report.
17. Once land has been acquired by the Council for planning purposes under section 226 or 227 of the TCPA 1990, the land may then be disposed of to a third party pursuant to section 233 of the TCPA 1990. 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.

18. 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 permit otherwise, 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).
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 their possessions. No one shall be deprived of their 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 their private and family life, their home and 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. Members 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, 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; and
 - 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.