

BANKSIDE YARDS
ACQUISITION FOR PLANNING PURPOSES

APPENDIX H

WHETHER THE USE OF THE COUNCIL'S POWERS WOULD BE JUSTIFIED

1. Firstly, sections 226(1)(a) and 226(1A) of the TCPA 1990 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. Notwithstanding that there would 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 objectives in section 226(1A) of the TCPA 1990. The considerable economic, social and environmental benefits that are likely to arise from the Scheme are referred to in Appendix D. 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* 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 the land?
 - 3.1 Given the significant level of investment that is planned, the Developer has made it clear that it will not be able to continue with the Scheme beyond the first phase 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 the Developer (or any developer) to take.
 - 3.2 It is recognised in this particular case, without the use of the Council's powers, there is a very real and significant risk of an injunction being sought to prevent the Scheme from proceeding. Further, having regard to the number of claimants with whom it will be necessary to negotiate, the use of the Council's powers is in practice the only way in which that risk can be removed.
 - 3.3 It is highly unlikely that the full benefits of the Scheme will be delivered while the risk of an injunction continues. The proposed acquisitions of land for planning purposes would facilitate the implementation of the Scheme and the consequent and related public benefits it would bring. As long as the rights are overridden, there is sufficient evidence of the likelihood of the Scheme proceeding to justify a decision by the Council to acquire interests in the LHL Site, the SHL Site and the Airspace Land 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 objectives 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 Appendix D. The benefits that would accrue from each part of the Scheme have been considered. The Scheme will deliver considerable benefits that will contribute to all of the well-being objectives.
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 that has been done by GIA and ongoing negotiations evidences that there would be infringements of the rights of light. The scheme may impact on other rights and restrictions too.*
6. *Consideration (4) (necessity of interference with the rights):*
 - 6.1 In terms of rights of light, the Developer has made it clear that with the threat of injunction hanging over the project, it will not be possible to proceed with the development beyond the current building under construction. This is a reasonable position.
 - 6.2 The only way of ensuring no interference with the rights of light will be to reduce significantly the height and massing of the Scheme, which will not deliver the full range of benefits associated with the consented scheme.
 - 6.3 Even if a financially attractive alternative scheme could be agreed upon, such a scheme will require a totally new, full planning application to be submitted for the whole application site. This will create further risks and considerable delays for the delivery of the public benefits associated with the Scheme. Such a scheme will also be unlikely to deliver the scale of development envisaged in the development plan policy for the site and the quantum of public benefits, including the contribution towards affordable housing, would be significantly reduced. For those reasons there is no reasonable alternative way of developing the site to achieve the outputs of the consented scheme without interfering with third party rights.
 - 6.4 Whether continuing with the consented Scheme or pursuing a reduced design, ultimately rights of light releases will be needed. Given the number of parties involved, and the history of negotiations to date, it will not be practicable or realistic to negotiate releases in any sort of reasonable timeframe. In addition, it would only take one of the interested parties to either not sign a release or not to engage and the entire Scheme would be jeopardised. The use of section 203 to override the rights is the only way for the development to be able to proceed in any reasonable time scale, and at a cost that can be reasonably estimated. In these particular circumstances, it is reasonable not to require the Developer to undertake (and reach the conclusion of) such negotiations with each and every person that may have rights.
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 would 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 would stem from the Scheme are set out in Appendix D.
- 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 would not be on a ransom or development profits basis, it would nevertheless be at the level which Parliament has specified as appropriate, being the diminution of the value of the relevant property.
- 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. 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 TCPA 1990 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 been met. There is a full planning consent, which is beyond challenge, for the Scheme and construction of the initial phase is well under way. The Scheme consists of a number of different permissions, but this strategy for redevelopment of the large site is well known to the Council. As is quite usual for a development of this scale, further amendments are currently being considered, which if granted would amend the Scheme further. The legislation allows for this flexibility.
- (c) *Is there a reasonable alternative mechanism for bringing about the development without interfering with the rights?* In this particular case, no - see consideration (4) above.
- (d) *Use as a last resort - Have negotiations taken place with the relevant rights holders to release the rights by agreement?* Bona fide negotiations have taken place with all holders of material rights, but they have not all reached conclusion. See the final paragraph of consideration (4) above. Insofar as there has been no negotiation with some people entitled to rights which will be affected, those circumstances arise as it is not possible or reasonable to identify every interest affected and/or to engage with all owners of those rights. 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 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.
- (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 41 of the report the Council will satisfy best consideration requirements.
- (i) *Public Sector Equalities Duty* - the application of this duty is discussed in the main body of the report and has been met.
- (j) *Proportionality* - this is dealt with in the context of human rights and is met.

11. Accordingly, either the principles of the June 2016 policy paper are met, or the particular circumstances of this case justifies a departure (in the case of limb (d) of the policy).