

Item No. 14.	Classification: Open	Date: 17 January 2023	Meeting Name: Cabinet
Report title:		Tustin Estate - Appropriation of Land for Planning Purposes	
Ward:		Old Kent Road	
Cabinet Member:		Councillor Darren Merrill, Council Homes and Homelessness	

FOREWORD - COUNCILLOR DARREN MERRILL, CABINET MEMBER FOR COUNCIL HOMES AND HOMELESSNESS

This is a technical document which gives the council the process to continue with the development of the much needed homes on the Tustin, this appropriation will allow the smooth running of the approved plans but does not remove the right to compensation to those that may be affected.

The new council homes will be let at council rents on lifetime council tenancies. After all of the replacement new homes reserved for current residents in the low rise blocks are filled, at least 50% of the new additional council homes will be reserved for residents in the Tustin Towers on the Estate who have an unmet housing need as set out in the council's local lettings policy; thus ensuring that local residents directly benefit from the new council homes and maintain their local social, childcare and family support networks

RECOMMENDATIONS

That Cabinet:

1. Confirms that the land shown outlined on the plan at Appendix A known as Phase 1 of the Tustin Estate that is currently held for housing purposes, is no longer required for those purposes and approves the appropriation of the land to planning purposes to facilitate the carrying out of the development proposals for the area in accordance with section 226 of the Town and Country Planning Act 1990 and section 122(1) of the Local Government Act 1972.
2. Confirms that following completion of the appropriation at paragraph 1 the land shown outlined on the plan at Appendix A will no longer be required for planning purposes, and approves the appropriation of the land to housing purposes in accordance with section 9 of the Housing Act 1985 and section 122(1) of the Local Government Act 1972.

BACKGROUND INFORMATION

3. Phase 1 of the Tustin Estate is situated in a predominantly residential area with a variety of retail and industrial businesses nearby on the Old Kent Road. The council holds the freehold interest in the land within its Housing Revenue Account.
4. This report recommends the council appropriates for planning purposes freehold land known as Phase 1 in its ownership. This will engage powers under section 203 of the Housing and Planning Act 2016 overriding third party rights in the land which are then converted to a claim for compensation.
5. The report further recommends the land be appropriated back to housing on the basis that this ultimately will be its use.
6. The council has used this statutory mechanism to secure several of its housing development projects.
7. Cabinet should also note that the council has commissioned a Rights of Light Analysis Report to assess the potential effects of the development on any rights of light to some neighbouring properties and businesses outside the Estate and to those properties within the Estate that will be retained. There are some restrictive covenants and rights of statutory providers on the Estate that would also be interfered with. The risk of injunction means that the council should consider the use of its statutory powers to ensure that the development proceeds.
8. The course of action is recommended on the basis it will facilitate delivery of a development with significant public benefit; in the form of a full planning application for Phase 1 comprising the demolition of Hillbeck Close, Ullswater House and garages at Manor Grove and the erection of four buildings at 2/3-storeys (D1 and D2), 5/9-storeys (C) and 7/13-storeys (G1) providing 167 homes (Class C3) with associated parking, public realm, open spaces, landscaping and ancillary infrastructure; and the refurbishment of properties at Manor Grove.
9. Phase 1 works therefore will affect residents of the Estate with the demolition of Hillbeck Close and Ullswater House and refurbishment of council homes at Manor Grove.
10. Demolition work commenced in September 2022 with a phased programme scheduled to run from September 2022 until early 2025.

Phase 1 Summary Plan

- Hillbeck Close residents move in summer 2022
- Demolition of Hillbeck Close and Ullswater House
- Construction of Plots C, D and G1 providing 167 new council rent and shared equity homes

- Refurbishment of council homes at Manor Grove
 - Construction of Hillbeck Close extension and public realm in Manor Grove
 - Bowness, Kentmere and Heversham residents move to new Phase 1 homes in 2025
11. The new council homes will be let at council rents on lifetime council tenancies. After all of the replacement new homes reserved for current residents in the low rise blocks are filled, at least 50% of the new additional council homes will be reserved for residents in the Tustin Towers on the Estate who have an unmet housing need as set out in the council's local lettings policy; thus ensuring that local residents directly benefit from the new council homes and maintain their local social, childcare and family support networks.

KEY ISSUES FOR CONSIDERATION

12. If the recommendations in this report are approved by Cabinet, the key impact will be that some third party owners benefitting from rights in the surrounding neighbourhood, and on the Tustin Estate that are interfered with by the development, will no longer be able to apply to court for an injunction to stop the development. These owners will instead have the right to claim compensation if their rights are interfered with by the development.
13. Appendix B sets out further details of the rationale behind the recommendations in this report. Cabinet should note that:
- a. The council owns the freehold of the land and it is now fully vacant.
 - b. The development of the land has full planning consent (reference number 22/AP/1221).
 - c. That the development behind the intention to appropriate for planning purposes will improve the economic, social and environmental well-being of the area.
 - d. That the appropriation will enable the development to proceed without interference from affected parties.
14. The course of action recommended is therefore proportionate and justified to secure proper planning of the area.
15. The report identifies a potential impact on rights of light on some properties in parts of Ormside Street, Old Kent Road, Manor Grove, Canterbury Industrial Estate and Ilderton Road. If the land is appropriated, owners, lessees or occupiers of any affected properties will be entitled to bring rights of light claims, but would not be able to obtain an injunction which could delay and even prevent the development from taking place.
16. Loss of daylight is subject to a legal test and compensation is assessed by way of established practice. Compensation is payable to residents (whether

by agreement by negotiation, or compulsion under s203 of the Housing and Planning Act 2016) who have their rights to light interfered with - but it is incumbent upon all affected parties to prove to what extent their rights have been interfered with, and the level of compensation that may be attainable in the circumstances. Affected parties have the fees of their professional adviser paid by the council.

Appropriation Notice

17. The land which is subject to appropriation for planning purposes shown outlined on the plan at Appendix A is land and buildings at Ullswater House and Hillbeck Close, 2092.5m² in extent at Land and Garages at Manor Grove and 3799m² in extent at Land and Car Parking at Ilderton Road, Tustin Estate, Old Kent Road, London SE15 part of which is open space.
18. Before the council can appropriate land part of which is open space it must advertise its intention to do so by way of a public notice for two consecutive weeks in a local newspaper and it must consider any representations made as a result of the intention to appropriate. Public notices advertising the council's intention to appropriate the land appeared on the 10th and 17th November 2022 in editions of Southwark News.
19. The deadline for receipt of representations or objections was 4:00pm on the 1 December 2022.
20. Cabinet should note that the council did not receive any representations or objections by this date.

Appropriations

21. The appropriation of land refers to the process whereby a council alters the purpose for which it holds land. Where land has been appropriated for planning purposes third party rights can be overridden. The beneficiaries of such rights can still claim compensation but cannot seek an injunction to delay or stop the development.
22. This gives the council the certainty that having commenced construction works a person with the benefit of a registered and unregistered right over land (there is no comprehensive register of third party rights) cannot apply to the court to have the development stopped. This is a very important tool in enabling development to proceed on urban sites.
23. Another approach for the council would be to either not appropriate the site or accept the risk of delay from injunction, or not appropriate and take out insurance against the cost of claims. Neither approach addresses the central issue of the risk of delay whilst an application to injunct is considered by a court – nor the risk an injunction might be successful and the development stopped.

24. Appropriation is considered to give a greater degree of certainty and is considered proportionate. The chief impact of this approach is that the owners of third party rights lose their ability to stop the development by injunction, but they retain the right to compensation.
25. The compensation a person affected by interference of a right may be entitled to, is based on the value of their properties before the right has been interfered with versus the value of the property with the interfered right; the diminution in value of the affected property. If agreement between the parties is not possible it will be determined by the Upper Tribunal (Lands Chamber). The onus is upon the claimant to prove a loss in value, and compensation only becomes payable once there is an actual interference with a right.
26. In this case it is recommended that the land outlined on the plan at Appendix A be appropriated from housing purposes to planning purposes. This will mitigate the risk of legal action to frustrate the scheme being delayed or completed. Thereafter it is recommended the land is appropriated to housing purposes as this is the most appropriate basis on which to hold the site.

Rationale for Recommendations

27. The recommendation is required for two reasons:
 - a. To mitigate against the construction of new council housing being frustrated or delayed by legal injunction.
 - b. To deliver a current council Delivery Plan commitment.

Community Impact Statement

28. The council Delivery Plan (see weblink at the end of this report) was launched in September 2022 and sets out the council's priorities and commitments to residents of Southwark until 2026. The recommendations herein further the commitment to deliver more quality, affordable homes and major improvements on the Tustin Estate.
29. The Equality Act 2010 requires the council in the exercise of its functions to have due regard to the need to:
 - a. eliminate discrimination;
 - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
30. Relevant protected characteristics for the purposes of the Equality Act are:

- Age
 - Civil partnership
 - Disability
 - Gender reassignment
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex and sexual orientation.
31. In considering the recommendations herein the Cabinet must have due regard to the possible effects on any groups sharing a protected characteristic in order to discharge its public sector equality duty. This is an ongoing obligation.
32. If the recommendations set out are approved, the council will be able to proceed with the construction of the development comprising 167 quality, affordable homes. An Equalities Analysis for the project has been undertaken and we will continue to review the impact on groups of people with protected characteristics.

Health Impact Statement

33. It is widely recognised poor quality housing has an adverse impact on the health of residents. Such effects may manifest in mental and/or physical health terms.
34. Whilst it is not yet known who will be accommodated in the new homes, they will ultimately allow existing residents from the Estate to be rehoused as secure tenants or shared equity, shared ownership or equity loan options via a dedicated Tustin Estate Local Lettings Policy, and to move into superior accommodation that should be beneficial to their health with a corresponding reduction in health service demands.

Climate Change Implications

35. The Screening Opinion (Environmental Impact Assessment) for the development concluded the proposed development is unlikely to give rise to any significant environmental effects that would require the submission of an Environmental Statement.
36. The construction phase will generate some waste and measures to limit dust and impacts on air quality, which will be managed through a construction management plan and environmental protection procedures.
37. To offset the impact of the new construction, the council following commissioning of energy, flooding and overheating reports (available under planning documentation - see weblink at end of this report), has designed the new buildings to mitigate as far as reasonably possible the adverse climate change implications arising from the proposed construction. For

instance, the new scheme will be connected to the District Heating Network and the unilateral agreement states the scheme cannot be occupied until the development is connected to the District Heating Network or the carbon Green Fund Contribution has been paid to the council in full.

38. There are no identified impacts arising from appropriation.

Financial Implications

39. The construction of the new homes and their associated works will have a significant cost and an approved budget exists for this. The budget will need to make provision for any compensation claims for diminution in value that may arise as a consequence of the interference with any rights.
40. Where land is appropriated from the Housing Revenue Account to the general fund, there is a transfer of debt between the accounts. When land is appropriated from general fund to the housing revenue account this debt transfer is reversed. As both appropriations will take place on the same day there will be no net transfer of debt and there are, therefore, no financial implications arising directly from the recommendations made in this report.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Governance

41. The report recommends the appropriation of council owned land for planning purposes, and thereafter, the appropriation of that land for housing purposes.
42. A council holds land and property for a variety of statutory purposes in order to perform its functions. A council is authorised by virtue of section 122 of the Local Government Act 1972 ("the 1972 Act") to appropriate land within its ownership for any purpose for which it is authorised to acquire land by agreement, where it is no longer required for the purpose for which it is held immediately before the appropriation.
43. The land must already belong to the council. Paragraph 3 of the report confirms that the land to be appropriated is in the council's freehold ownership.
44. The land must be no longer required for the purpose for which it is currently held. The report confirms at paragraph 15 of Appendix B that the land is no longer required for housing purposes.
45. The purpose for which the council is appropriating the land must be authorised by statute. It is proposed that the land is held for planning purposes. This is a purpose which is authorised by statute. Section 246 of the Town and Country Planning Act 1990 ("TCPA 1990") defines such purposes as, inter alia, those for which can be acquired under ss226 or 227 of that Act. Section 227 provides that a council may acquire land by

agreement for any purposes for which it is authorised to acquire land compulsorily by s226 TCPA 1990.

46. The purposes for which a council can acquire land pursuant to s226 TCPA 1990 include purposes “which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.” S226 also authorises the acquisition of land “... if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land.” In the case of either s226 or s227 the acquiring authority must be satisfied that whatever development proposals it has for the land in question these are likely to “contribute to the achievement of any one or more of the following objects – (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area.” The council’s plan to build new homes on the land, of which 157 are council homes for rent and 10 are shared equity, is capable of falling within all three categories.
47. Section 203 of the Housing and Planning Act 2016 came into force on 13 July 2016. This section contains a power to override easements and other rights, and it replaces s237 TCPA.

S203 says:

“(1) A person may carry out building or maintenance work to which this subsection applies even if it involves

(a) interfering with a relevant right or interest...

(2) Subsection (1) applies to building or maintenance work where –

(a) there is planning consent for the building or maintenance work,

(b) the work is carried out on land that has at any time on or after the day on which this section comes into force

(i) become vested in or acquired by a specified authority or

(ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990 [*i.e. for purposes for which an authority can acquire land under ss226 and 227*]

(c) the authority could acquire the land compulsorily for the purposes of the building or maintenance work, and

(d) the building or maintenance work is for purposes related to the purposes for which the land was vested, acquired or appropriated as mentioned in paragraph (b).”

48. What this means is that where land has been appropriated for planning purposes building work may be carried out on land even if this interferes with rights or interests if there is planning consent for the building work; and the work must be for purposes related to the purposes for which the land was appropriated, in this case planning purposes. By s204 those third party rights are converted into an entitlement to compensation to be calculated in accordance with ss7 and 10 of the Compulsory Purchase Act 1965.
49. This report confirms that the work being done on the land will be done in accordance with planning permission. Once the land has been appropriated and s203 triggered, that work will be authorised even where it interferes with third party rights.
50. Following the appropriation of the land for planning purposes it is recommended that the land is appropriated for housing purposes, as the land is to be used for the provision of new housing. At that point the land will no longer be required for planning purposes and will be appropriated for housing purposes.

Strategic Director of Finance and Governance (H&M 22/115)

51. The Strategic Director of Finance and Governance notes the recommendation to appropriate land as described in order to facilitate the development of new council homes and environmental improvements on the Tustin Estate. This land appropriation is proposed to occur in such a way that it will have a neutral financial impact. This scheme forms part of the council’s new homes direct delivery programme and any associated costs will be contained with the Housing Investment Programme. Further details in the closed report.

BACKGROUND DOCUMENTS

Background Papers	Weblink
council Delivery Plan 2022 - 2026	https://moderngov.southwark.gov.uk/documents/s108711/Appendix%201%20Council%20Delivery%20Plan.pdf
Planning documentation – available at link by inserting application number 22/AP/1221.	https://planning.southwark.gov.uk/online-applications/search.do?action=simple&searchType=Application

APPENDICES

Appendix	Title
Appendix A	Phase 1 - Appropriation Plan at Tustin Estate
Appendix B	Appropriation of Phase 1 Land at Tustin Estate, SE15

AUDIT TRAIL

Cabinet Member	Councillor Darren Merrill, Council Homes and Homelessness	
Lead Officer	Althea Loderick, Chief Executive	
Report Author	Marcus Mayne, Principal Surveyor, Sustainable Growth	
Version	Final	
Dated	5 January 2023	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments included
Director of Law and Governance	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	
Date final report sent to Constitutional Team	5 January 2023	