

Item No. 10.	Classification: Open	Date: 6 February 2023	Meeting Name: Cabinet
Report title:		Appropriation of the site known as FDS C at Aylesbury Estate	
Ward(s) or groups affected:		Faraday	
Cabinet Member:		Councillor Darren Merrill, Council Homes and Homelessness	

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

In August 2015 the council granted outline planning permission for a comprehensive redevelopment of the Aylesbury. This approval was for a phased redevelopment to provide a mixed use development of up to 2,745 homes. This outline planning permission created a frame work that will transform the Aylesbury estate thought the demolition of the existing poor quality housing to high quality mixed tenure housing. To date we have seen 1,516 new homes approved by planning with 581 council rented also a library a health centre and over 55 home's. We have come a long way to improve the area for all residents. And this area is part of that essential plan.

This document is a technical paper that gives the council Appropriation rights to the area of land known as FDS C. This is to ensure the smooth redevelopment of this land but does not remove the right to compensation for those affected by the appropriation.

RECOMMENDATIONS

That Cabinet:

1. Confirms that the land shown edged hatched and edged in black on the plan at Appendix A 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 works for which the appropriation at paragraph 1 is required the land shown hatched and edged in black 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.
3. Delegate to the director of planning and growth authority to:

- a. Agree detailed terms and conditions for the indemnity agreement to be provided by Notting Hill Genesis
- b. Pay compensation properly claimed where due to third parties arising from the interference of their rights in accordance with section 204 of the Housing and Planning Act 2016
- c. Defend or settle (as appropriate) any compensation claims referred to the Lands Chamber of the Upper Tribunal in respect of rights that are overridden due to the exercise of the council's powers.

BACKGROUND INFORMATION

4. The land in question comprises part of the land referred to as the First Development Site (FDS) on the Aylesbury estate and it is shown as the hatched area on the plan at Appendix A to this report. The council holds the freehold interest in the land within its Housing Revenue Account and it was previously predominantly used for housing.
5. This report recommends the council appropriates for planning purposes freehold land 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.
6. The report further recommends the land be appropriated back to housing on the basis that this ultimately will be its use once the development of the land is complete.
7. The council has used this statutory mechanism to secure the delivery of several of its housing development projects and has previously appropriated the land which is currently being development on the remainder of the FDS through reports to Cabinet on 24 July 2018 (FDS A) and 8 December 2020 (FDS B).
8. The council has previously used its powers of compulsory purchase to acquire any third party interests in the land. The site has been cleared of all previously existing buildings and development is underway on the early phases of the site. However, the risk of injunction to the next phase of development means that the council should consider the use of its statutory powers to ensure that the development proceeds.
9. The council is in a Development Partnership Agreement (DPA) with Notting Hill Genesis for the delivery of the regeneration of the Aylesbury Estate. Whilst the Council acquired FDS A and FDS B for the delivery of new council homes under the agreement, FDS C is to be solely taken forward by Notting Hill Genesis following the grant by the council of a long leasehold interest in the site.
10. The planning application process in general does not (and is not meant to) consider the private rights which may exist over one property in favour of another property and which may be enforced by one property owner against another. Such rights can take the form of (for example) a private right of way over one property in favour of another; a restrictive covenant preventing something being

done on a property to the benefit of another property; or a right of light across one property in favour of another property.

11. Where a property right is interfered with the person benefitting from the right can apply to the court for an injunction to prevent the interference. If the court deems it appropriate, the court can order action to be taken to remove that interference; or the court may award monetary damages instead. Beneficiaries of the rights do not need to make any application to court ahead of the work causing or potentially causing interference commencing. Indeed, they can if they want, wait until after completion of the work. This presents a significant risk to the council's development partner, Notting Hill Genesis.
12. In line with the process set out in the DPA, Notting Hill Genesis have therefore requested that the council utilise its available powers to override all property rights that may be interfered with by the scheme, to enable the scheme to proceed without interference.
13. Cabinet should also note that the Notting Hill Genesis have commissioned a Rights of Light Report to assess the potential effects of the development on any rights of light to some neighbouring properties outside the Estate and to those properties within the Estate that will be retained in the immediate future.

The Scheme

14. The currently consented scheme for the redevelopment of the wider FDS (updated to reflect the recent amendments to the scheme) will deliver a total of 902 new homes (of which a number will be dedicated to residents with extra care needs and those with learning difficulties), a community facility and commercial. The wider FDS development is being brought forward under three construction contracts. The first two construction packages are currently on site and the council is delivering 581 new council homes and a new community facility. Taken together, FDS A, B and C deliver 66% affordable housing by habitable room.
15. FDS C, which this paper relates to, will deliver 88sqm of commercial floorspace as well as a further 321 new homes across a range of tenures and managed by Notting Hill Genesis.

Tenure	Unit Numbers	Habitable Rooms
Social Rent	56	271
Shared Ownership	75	223
Private	190	494

16. Whilst the new social rented homes will be managed by Notting Hill Genesis the council will have 100% nomination rights into these properties.

KEY ISSUES FOR CONSIDERATION

17. If the recommendations in this report are approved by cabinet, the key impact will be that third party owners benefitting from rights in the surrounding neighbourhood 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.

18. Appendix B sets out further details of the rationale behind the recommendations in this report. Cabinet should note that:
 - a. The council owns the site and it is now fully vacant.
 - b. Demolition of all the existing buildings on the site have been completed
 - c. The development of the site has full planning consent (reference number 17/AP/3885).
 - d. The developer, Notting Hill Genesis has recently sought amendments to the extant consent, through a variation to Condition 2 (Approved Plans) and Condition 43 (Quantum of Development). These amendments (reference number 22/AP/1063) were approved by Planning Committee on 19 December 2022 subject to conditions, referral to the Mayor of London and the applicant entering into an appropriate legal agreement by no later than 31 January 2023.
 - e. 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.
 - e. That any third parties whose rights are interfered with will be entitled to compensation.
19. The course of action recommended is therefore proportionate and justified to secure proper planning of the area.
20. The Rights of Light Report identifies a potential impact on rights of light on some properties in St Matthews House and Aycliffe House, both of which neighbour the site. If the site 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.
21. Loss of daylight where a right to light exists 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. However, 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.
22. Under the terms of the DPA and to protect the council from costs arising from any claims or the cost of fees, a legally binding indemnity agreement will be entered into between Notting Hill Genesis and the council whereby the council will be fully indemnified for any compensation or fees payable as a result of the appropriation. In addition the council's reasonable fees in dealing with any claims

will also be reimbursed.

Appropriations

23. 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 enjoyed over the land can be overridden. The beneficiaries of such rights may however claim compensation (equal to the loss in value of their property caused by losing the right) but cannot seek an injunction to delay or terminate the development.
24. This gives the council and its development partner the certainty that having commenced construction works a person with the benefit of an unregistered (with the Land Registry) right over land (such as a right to light) cannot apply to the court to have the development stopped. This is a very important tool in enabling development to proceed on urban sites.
25. Another approach for the council would be to not appropriate, and for the developer to take out insurance against the cost of claims. This approach would not address 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. However, this would not be acceptable to the council's partner and be contrary to the terms of the DPA.
26. 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.
27. 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. This compensation is based on 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.
28. In this case it is recommended that the land edged red 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 appropriated to housing purposes as to hold the land for planning purposes will not be consistent with the ultimate use of the land.

Community and equalities (including socio-economic) impact statement

29. Section 149 of the Equality Act 2010 lays out the Public Sector Equality Duty (PSED) which requires public bodies when taking decisions, to have due regard to the need to:
- a) Eliminate discrimination, harassment, victimisation or other prohibited conduct
 - b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it
 - c) Foster good relations between those who share a relevant characteristic and those that 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's development partner will be able to proceed with the construction of the development comprising 321 new homes. An Equalities Impact Analysis for the project has previously been undertaken and officers will continue to review the impact on groups of people with protected characteristics. It is not thought likely that the appropriation will have any disproportionate effect on any group sharing a protected characteristic.

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 or Southwark more widely to be housed in modern, high quality new homes that should be beneficial to their health with a corresponding reduction in health service demands.

Climate change implications

35. 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.

36. However, there are no identified impacts arising directly from appropriation and therefore this report.

Legal implications

37. The legal implications of using appropriation powers as proposed in this report are set out in the concurrent report of the director of law and governance.

Resource implications

38. Implementation of the recommendations in this report will require some staff time and resources. This will come from the sustainable growth and legal teams. Where rights are interfered resulting in a loss in value to the affected property, the owner is entitled to compensation for that loss. The council's development partner is indemnifying the council against any payments of compensation arising, but staff resources may be required should any claims arise.

Financial implications

39. 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. There are therefore, no financial implications arising directly from the recommendations made in this report.
40. The council's development partner is to indemnify the council against all compensation payable as a result of the appropriation. In the circumstances there are therefore no financial implications for the council arising from the recommendations in this report.

Consultation

41. There has been extensive consultation on the overall regeneration programme for the Aylesbury estate, which has been set out in detail within previous reports. This includes extensive consultation on the formation of the Area Action Plan, non-statutory and statutory consultation undertaken on the outline masterplan and detailed FDS planning applications.
42. As part of the land in question was not developed and was therefore open space, the council will need to comply with s122 (2A) requiring the proposed appropriation to be advertised. The council's intention to appropriate land has been advertised for two consecutive weeks in the local press. The details of any representations received will be reported back to cabinet.
43. There is however no statutory requirement to consult prior to acquiring land under s227 TCPA 1990 nor to the use of powers under s203 HPA 2016.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Governance

44. The report recommends the appropriation of council owned land for planning purposes, and thereafter, the appropriation of that land for housing purposes.
45. 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.
46. The land must already belong to the council. Paragraph 4 of the report confirms that the land to be appropriated is in the council’s freehold ownership.
47. The land must be no longer required for the purpose for which it is currently held. The report confirms at paragraph at paragraph 15 of Appendix B that the land is no longer required for housing purposes.
48. 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.
49. 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 enable Notting Hill Genesis to build new homes on the land pursuant to the DPA, of which 56 are homes for social rent, and 75 are intermediate, is capable of falling within all three categories.
50. Section 203 of the Housing and Planning Act 2016 (“the 2016 Act”) 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).”

51. 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.
52. 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.
53. 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.
54. The report recommends that authority is delegated to the director of planning and growth to agree the terms of the indemnity agreement. This will ensure that the council is indemnified against any compensation that might be payable by the council pursuant to s204 and 205 of the 2016 Act.

Strategic Director of Finance and Governance (H&M 22/127)

55. The strategic director of finance and governance notes the recommendation to appropriate land as described in order to facilitate the development of new housing and commercial space on the Aylesbury Estate. This land appropriation is proposed to occur in such a way that it will have a neutral financial impact. The development will be taken forward by Notting Hill Genesis under a long leasehold interest granted by the council. As outlines in the report, there are no financial implications arising from the recommendations made in the report.

BACKGROUND DOCUMENTS

Background Papers	Held At
Council Plan 2018/9 – 2021/22	http://moderngov.southwark.gov.uk/documents/s78763/Report%20Council%20Plan.pdf
FDS A appropriation report	https://moderngov.southwark.gov.uk/ieDecisionDetails.aspx?AllId=50196
FDS B appropriation report	https://moderngov.southwark.gov.uk/ieDecisionDetails.aspx?Id=7226

APPENDICES

No	Title
Appendix A	Aylesbury Estate FDS C appropriation plan
Appendix B	Rationale for appropriations of the land

AUDIT TRAIL

Cabinet Member	Councillor Darren Merrill, Council Homes and Homelessness	
Lead Officer	Steve Platts, Director of Planning and Growth	
Report Author	Marcus Mayne, Principal Surveyor	
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CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
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Director of Law and Governance	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	Yes
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