

AIR-RIGHTS DAMORY HOUSE ROTHERHITHE*Appendix B*

Appropriation of the air-rights (shown edged on the plan) at Appendix A for purposes set out in s226 of the Town and Country Planning Act 1990 and to purposes set out in section 9 of the Housing Act 1985

Background to appropriation

1. Under section 122(1) of the Local Government Act 1972 the Council may appropriate land for any purpose for which it is authorised to acquire land (air – rights are land for this purpose) when the land is no longer required for the purposes for which it is held.
2. Under section 226(1)(a) and 227 of the Town and Country Planning Act 1990 the Council may acquire land if they think the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land. This includes development of the sort contemplated in the development and refurbishment of Damory House. The power in section 226(1)(a) is subject to subsection (1A) of section 226. This provides that the acquiring authority must not exercise the power unless it considers the proposed development, redevelopment or improvement is likely to contribute to achieving the promotion or improvement of the economic, social or environmental well-being of the area for which the acquiring authority has administrative responsibility. There are clear economic social and environmental and social benefits associated with the provision of new housing at Damory House namely providing people with quality accommodation that may result in better educational attainment and general well being, and employment opportunities from the construction works. Accordingly the Council may appropriate land for the purposes of the development proposals land that it already owns if that land is no longer required for the purposes for which it is held. The land shown on the plan at Appendix A is no longer required for its current purposes for the reasons set out below and is not needed in the public interest for those purposes. The land can therefore be appropriated from its current use. As the appropriation will facilitate the Damory House new housing development proposals it may be appropriated for planning purposes.
3. Where land has been appropriated for planning purposes Section 203 of the Housing and Planning Act 2016 (power to override easements and other rights) applies such that the erection, construction or carrying out or maintenance of any building or work on the land (by the council or a person deriving title from the council) is authorised if it is done in accordance with planning permission, notwithstanding that it interferes with certain private rights such as restrictive covenants and easements. The effect of triggering section 203 is that private rights are effectively overridden and converted into a claim for compensation pursuant to s 204. The level of compensation for interference with rights or breach of restrictive covenant is assessed on the basis of the loss in value of the claimant's land as a consequence of the interference or breach of covenant. An important consequence of the operation of Section 203 is that a claimant cannot secure an injunction, to prevent the development from going ahead - as indicated above; their remedy is a claim for compensation.
4. Prior to developing land it is usual practice to make prudent enquiries of what rights might exist over the land, this will involve inspecting the land to see if there are any obvious rights and checking land ownership information. However, some rights may not be apparent from inspection and historic ones may not always be recorded at the Land Registry. The application of the power to override rights contained in s203 therefore mitigates this risk.

5. The right to claim compensation for the depreciation in value caused by the loss of right is enforced against the owner of the land which in this case is the Council.

Rationale for appropriating the subject site to planning purposes

6. The air-rights above Damory House are currently not in a beneficial use. In pursuance of the adopted Council Plan and to address a need for new affordable housing, a two storey vertical extension can be added to Damory House. Planning consent has been secured for the scheme outlined in paragraph 7 of the main report. As there may be an impact on the rights of light to nearby residents from the consented scheme there is the risk one or more of them may apply to the court for an injunction. If an injunction is granted, the scheme will not be able to proceed. In any event, the risk of an application for an injunction is such that it will defer prospective builders from bidding to construct the new housing or result in a substantial risk contingency that undermines the viability of construction. In these circumstances it is appropriate to utilise the powers of section 203 to overcome this risk and enable the much needed new homes to be built.
7. As indicated above, the air-rights are now required to be held for planning purposes to facilitate the redevelopment proposals associated with the planning permission for new housing. When land has been appropriated for section 203 purposes it will continue to benefit from its over-riding provisions even when the land is no longer held for planning purposes.
8. The air-rights identified at Appendix A are no longer required to be held for housing purposes. As indicated above, they are now required to be held for planning purposes to facilitate the construction of the new housing associated with the planning permission.

Rationale for appropriating the subject site to back to housing purposes

9. Once the air-rights are appropriated for planning purposes they should be appropriated back to housing purposes as the new housing will be held for this purpose and the cleansing effect of s203 means that it can be developed in confidence that the works won't be at risk of an application for an injunction to frustrate the development.
10. Section 9(1)(a) of the Housing Act 1985 provides a local housing authority may provide housing accommodation by erecting houses on land acquired. It is therefore apt that following the s203 appropriation the land is in accordance with section 122(1) of the Local Government Act 1972 appropriated for purposes within section 9 (1) (a) of the Housing Act 1985.
11. The appropriation of the air-rights whilst denying the beneficiaries of any third party rights over the land the ability to frustrate the regeneration of the land will not take away their ability to claim for compensation in respect of any diminution in the value of their land as a result of their rights being overridden.