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| Item No. 24. | Classification: Open | Date: 13 March 2018 | Meeting name: Cabinet |
| Report title: | | Air-rights above 2-68 and 70-136 Chilton Grove Surrey Quays | |
| Ward: | | Surrey Docks | |
| Cabinet Member: | | Councillor Mark Williams, Regeneration and New Homes | |

FOREWORD – COUNCILLOR MARK WILLIAMS, CABINET MEMBER FOR REGENERATION AND NEW HOMES

Our commitment to build 11,000 new council homes by 2043 is both bold and challenging. Achieving this will make an enormous positive difference to the local community. Southwark is predominantly a densely developed inner-city area and to provide these new homes we must make better use of our land. The recommendations in this report will help to de-risk the site in question. This in turn will give assurance to prospective builders and result in a lower tender cost for the proposed new development. Resources are scarce so it is vital we control cost to maximise the number of new homes we can provide.

The land in question is on Chilton Grove and will see new council homes built above the existing blocks, this has followed extensive consultation with local residents. This is an innovative approach to making the most of the council's land holdings to deliver much needed new council homes. The recommended appropriations will enable the construction of these homes to proceed without the risk of an injunction from a nearby landowner. However if a landowner is adversely affected as a result of the recommendations s/he will have the ability to claim compensation for the loss in value to their property as a result.

RECOMMENDATIONS

That Cabinet:

1. confirms that the air-rights above 2 - 68 and 70 - 136 Chilton Grove shown edged on the plan at Appendix A that are currently held for housing purposes are no longer required for that purpose and approve the appropriation of the rights 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 air-rights above the buildings edged on the plan at Appendix A will no longer be required for planning purposes and approve the appropriation of the rights 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. 2 - 68 and 70 - 136 Chilton Grove comprise a pair of 'L' shaped residential blocks four and six storey flats. They are situated close to the Borough boundary with Lewisham. They are shown edged on the plan at Appendix A. This is predominantly residential area.
4. On 25 February 2015 Council Assembly approved the current Council Plan. This sets out Fairer Future promises one of which is: *quality affordable homes*. Within this commitment is the policy to improve housing standards and build more homes of every kind. This promise was in fact reinforcing previous policy to directly provide additional housing to meet the need for affordable housing within the Borough.
5. In pursuit of this a number of sites throughout the borough have been identified as providing capacity for additional new homes. Once identified, the development of those sites is consulted upon with the local community, a planning application is made and if appropriate planning consent is granted for the proposed new homes. Thereafter, if there are any third party rights that present a risk to the development Cabinet has been asked on a number of occasions to appropriate the site to mitigate such risk. This report is another to enable the de-risking of a development that will provide new additional housing for social rent.
6. On 29 January 2018 planning consent was granted for the regeneration of the two blocks to provide the following:
 - refurbishment of existing 68 dwellings
 - a two storey extension above the blocks to add 44 new dwellings
 - parking provision and landscaping
7. The refurbishment work to the existing dwellings will include replacement windows, improved insulation, new cladding to facades and enclosure of stairwells to provide secure entrance lobbies. The make up of the new housing will be:
 - 10 x one bedroom dwellings
 - 26 x two bedroom dwellings
 - 8 x three bedroom dwellings
8. All the new housing units will be let at Council rent levels.
9. The contract for the regeneration will shortly be procured and it is intended for construction to commence later this year.

FACTORS FOR CONSIDERATION

10. In recognition that the proposed extension will increase the height of the existing blocks by two stories a lighting/sunlight report was part of the planning process obtained from a specialist surveyor and the conclusion in this is:

In daylight terms there are some transgressions from the BRE Guidelines, which could be considered material, the overall retained values should be considered good and commensurate with an urban

location. Furthermore, the ADF (average daylight factor) results demonstrate a high level of compliance for all rooms and any reductions would likely be considered unnoticeable. In relation to sunlight, there is a high level of compliance with the BRE (Building Research Establishment) Guidelines and any deviations from the target values are minor.

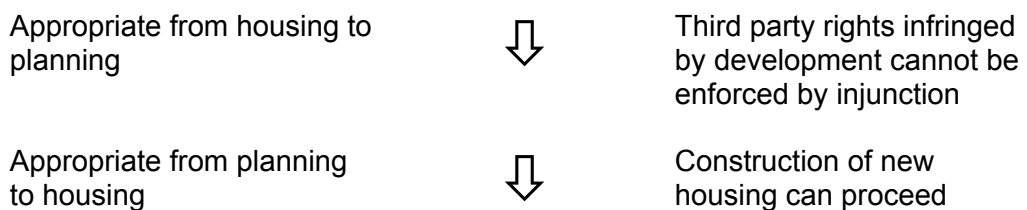
11. The report notes there will be a material impact in lighting terms to some neighbouring properties but the Planning report concludes *in the majority of instances, the transgressions would be relatively minor with the daylight and sunlight levels retained commensurate with an urban location. Overall, the proposal would not reduce daylight and sunlight levels to neighbouring properties to significantly harmful and unacceptable levels.* Whilst the adverse impact to lighting of neighbouring properties did not result in refusal of the planning application they are a risk in being able to build the scheme. This is because affected persons may apply to the court for an injunction to stop construction proceeding. This may stop prospective builders from tendering for the contract or cause bids to be substantially inflated to reflect the risk of there being an application for an injunction and the delay and uncertainty that may cause including frustrating the development scheme
12. The determined planning application has taken into account daylighting and sunlighting issues. As part of the planning process around three hundred and fifty occupiers in the locality were directly consulted and eight public responses were received (2.2%). Some respondents expressed concern about the daylight/sunlighting impact of the scheme. Other notified concerns included increased occupant impact, design out of keeping with neighbourhood, desire for retail on the ground floor of blocks, adverse impacts caused by construction works and revised height of building. Some responses also were in support particularly for the refurbishment of the existing dwellings.

Appropriations

13. 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. This will give the Council 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. As mentioned, the beneficiary of any such right is entitled to financial compensation for the loss of the right. The Council could either insure against such compensation claims but this will be costly or accept the risk of an injunction that may be fatal to development or result in perhaps significant unquantifiable costs.
14. The compensation persons affected by the loss of light may be entitled to is based on the value of their properties before the right has been infringed versus the value of the property after infringement has taken place; it therefore follows that there is no right of claim until the right has been adversely affected. If a compensation claim is made and agreement between the parties is not possible it will be determined by the Upper Tribunal (Lands Chamber).

15. Cabinet has resolved to appropriate a number of sites in similar circumstances. There is however a significant difference in this case because 2 – 68 and 70 – 136 Chilton Grove is not a vacant site and residents are and will remain in occupation throughout the work. S19(2) of the Housing Act 1985 provides *where a local housing authority have acquired or appropriated land for the purposes of this Part, they shall not, without the consent of the Secretary of State, appropriate any part of the land consisting of a house (flat or maisonette is a house for this purpose) or part of a house for any other purpose*. The Secretary of State has given some general consents subject to conditions including the houses are vacant (which is not the case here). This potentially creates a difficulty namely that to appropriate the subject blocks to planning purposes can only be done with the explicit consent of the Secretary of State.
16. As the right of light injunction risk only occurs because of the proposed additional two floors to the block where there is currently open air the blocks and the airspace above can be treated separately for Council holding purposes. This is no different to other buildings held for more than one purpose e.g ground floor retail may be held for investment purposes and flats above for housing purposes. Therefore to enable the project to be de-risked the air-rights existing above 2 – 68 and 70 – 136 Chilton Grove are being treated differently to the buildings in situ the status of which is unaffected by the report and its recommendations.
17. In this case it is recommended that the air-rights above the blocks (edged red on the plan) be appropriated from housing purposes to planning purposes and thereafter back to housing purposes as to hold the air-rights for planning purposes will be contrary to the long term use and need for vertical extension.
18. The rationale for the appropriations of the land shown at Appendix A is set out at Appendix B and Cabinet is recommended to approve the appropriations.
19. The appropriation stages is summarised below:

Air-rights currently held for housing



Rationale for recommendations

20.
 - a) To mitigate against the construction of new social housing being frustrated or delayed by injunctions
 - b) To de-risk the construction project so as to encourage the maximum number of bidders and achieve a lower construction
 - c) Taking forward Fairer Future promise of *quality affordable homes*

Community impact statement

21. The Council Plan was the subject of extensive community consultation that gave rise to the Fairer Future promise of *quality affordable homes*. The recommendations herein will enable the construction of seventeen new homes to proceed. New homes will improve the quality of life for their residents. Implementation of the recommendations may however have a minor adverse lighting impact on some nearby occupiers and some disturbance whilst construction work takes place.
22. 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.
23. 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.
24. In carrying out appropriation the Cabinet must have due regard to the possible effects of such appropriation on any groups sharing a protected characteristic in order to discharge its public sector equality duty.
25. Based on the information available it is not believed that there are any particular groups sharing a protected characteristic that will be adversely impacted by the proposals.

Financial Implications

26. The refurbishment of the existing and construction of the new homes 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 construction of the new homes. The budget will

be reviewed when the procurement process mentioned at paragraph 9 has been completed.

27. Where land (including air-rights) 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.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Democracy

28. The report recommends the appropriation of the air rights above the council-owned land at 2-68 and 70-136 Chilton Grove for planning purposes, and thereafter, the appropriation of that part of the land for housing purposes. Cabinet has been asked on a number of previous occasions to appropriate other sites identified for the development of housing by the Council in order to minimise the risks from those with interests in land in the vicinity.
29. 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 is no longer required for the purpose for which it is held immediately before the appropriation.
30. The property must already belong to the Council which is the case with Chilton Grove.
31. The property must be no longer required for the purpose for which it is currently held. The report confirms at paragraph 6 of Appendix B that the air rights are no longer required for housing purposes.
32. 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.
33. 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 all are council homes for rent, is capable of falling within all three categories.

34. 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).”

35. Consequently, since the air rights are being 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. Paragraph 11 of Appendix B confirms that this appropriation does not take away any rights to compensation.

36. 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.

37. 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 back for housing purposes.

Strategic Director of Finance and Governance

38. The recommendation is to appropriate air-rights as described in order to facilitate regeneration and the building of new homes at Chilton Grove. This land appropriation is proposed to occur in such a way that it will have a neutral

financial impact. However, a budget for the compensation and new homes proposed will need to be considered as part of the future capital programme budget setting process.

Strategic Director of Housing and Modernisation

39. This report ensures that the proposed new housing above 2 – 68 and 70 – 136 Chilton Grove can progress with the avoidance of legal challenge. The light issues from the scheme have been considered and the scheme meets planning policy approval. Extensive consultation with local residents, together with a commitment to make 50% of the new social rented homes available to local residents in housing need leads the way in which social housing can be developed in inner cities. The scheme is a contribution to the Council's pledge to have a commitment to build 1,500 new homes by 2018.

BACKGROUND DOCUMENTS

| Background Papers | Held At | Contact |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|----------------------------------|
| Council Assembly report of 25 February 2015 adopting Council Plan | Southwark Council Regeneration Division Fifth Floor, Hub 1 160 Tooley Street London SE1 2QH | Patrick McGreal 020 7525 5626 |
| Link (please copy and paste into your browser): http://modern.gov.southwark.gov.uk/documents/s52059/Report%20Council%20Plan%202014-18.pdf | | |
| 29 January 2018 planning determination and associated documents | Southwark Council Regeneration Division Fifth Floor, Hub 1 160 Tooley Street London SE1 2QH | Patrick McGreal 020 7525 5626 |
| Link: http://planbuild.southwark.gov.uk/documents/?casereference=16/AP/3056&system=DC | | |

APPENDICES

| No. | Title |
|------------|-------------------------------------------|
| Appendix A | Plan of 2 – 68 and 70 – 136 Chilton Grove |
| Appendix B | Rationale for appropriations of the land |

AUDIT TRAIL

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|----------------------------------------------------------|------------------------------------------------------|--------------------------|
| Cabinet Member | Councillor Mark Williams, Regeneration and New Homes | |
| Lead Officer | Eleanor Kelly, Chief Executive | |
| Report Author | Patrick McGreal, Regeneration North | |
| Version | Final | |
| Dated | 21 February 2018 | |
| Key Decision? | No | |
| CONSULTATION WITH OTHER OFFICERS / CABINET MEMBER | | |
| Officer Title | Comments Sought | Comments included |
| Director of Law and Democracy | Yes | Yes |
| Strategic Director of Finance and Governance | Yes | Yes |
| Strategic Director of Housing and Modernisation | Yes | Yes |
| Cabinet Member | Yes | Yes |
| Date final report sent to Constitutional Team | | 1 March 2018 |