



City of Westminster

Cabinet Member Report

Meeting or Decision Maker: Cabinet Member for Finance and Council Reform

Date: 05 October 2023

Classification: Part Exempt - Appendix B is exempt from publication under Schedule 12A, Paragraphs 2 and 3 of the Local Government Act 1972

Title: The Appropriation of land for planning purposes at 45 Kilburn Park Road

Wards Affected: Maida Vale

Policy Context: The proposed development will collectively help to contribute to the Fairer Westminster ambitions including fairer housing by providing 100% affordable scheme, fairer economy by enabling all our communities to share in the economic prosperity of the area, through protecting and enhancing the unique heritage of the neighbourhood.

Key Decision: Yes – added to the Forward Plan on 09 June 2023

Financial Summary: A fully affordable scheme with a total approved expenditure in the current HRA business plan of £53.254m with prior year spend of £3.973m. Land will be appropriated for Planning purposes within the General Fund, then appropriated to the HRA for Housing purposes. This will lead to transfer of assets between funds.

Report of: Debbie Jackson – Executive Director of Regeneration, Economy and Planning

1. Executive Summary

- 1.1. Carlton Dene Care Home is a General Fund asset held for the purposes of providing care home accommodation and is in the Maida Vale ward, at 45 Kilburn Park Rd, London NW6 5XD. Previous residents of Carlton Dene Care Home were offered new homes in 2020 within the new Beachcroft development in Maida Vale offering 84 bed care home or a suitable alternative of their choice. Peebles House currently sits within the HRA Fund held for purposes of providing general needs accommodation and previous residents were offered alternative accommodation of their choice. The redevelopment of Carlton Dene and Peebles house (the Site) received planning permission for 65 Extra Care homes and 22 general needs residential. These homes will provide 100% affordable homes at social rent.
- 1.2. This report seeks the approval to appropriate for planning purposes under section 122 of the Local Government Act 1972 the Council's property at Carlton Dene and Peebles House to facilitate the delivery of the scheme for which planning permission has been granted by the Council as local planning authority.
- 1.3. If the recommendations in this report are approved, the land appropriated for planning purposes will be accounted for in the general fund. The delivery of the project is predicated on the development being held for housing purposes, rather than for general fund purposes, therefore this report also seeks a delegated approval to a further appropriation of the land for housing purposes and transfer from the general fund to the Housing Revenue Account (HRA).

2. Recommendations

- 2.1. That the Cabinet Member for Finance and Council Reform following consultation with the Cabinet Member for Climate Action, Regeneration and Renters and the Cabinet Member for Housing Services approves the appropriation of the Council's land at 45 Kilburn Park Rd, London NW6 5XD shown edged red in the plan attached at Appendix A (the Site) for planning purposes pursuant to section 122 of the Local Government Act 1972 and subsequent use of the Council's powers under section 203 of the Housing and Planning Act 2016.
- 2.2. To delegate authority to the Executive Director for Regeneration, Economy and Planning:
 - 2.2.1. To appropriate the Council's land at the Site from planning purposes pursuant to section 232 of the Town and Country Planning Act 1990 to those purposes permitted under Section 17 of the Housing Act 1985 including the construction of homes;
 - 2.2.2. To deal with any necessary arrangements to record the appropriation of the land at the Site for purposes permitted under Section 17 of the Housing Act 1985 including the transfer of the land from the General Fund account to the Housing Revenue Account at the current red book value;

- 2.2.3. To deal with any necessary arrangements to record the appropriation of the Site for planning purposes;
- 2.2.4. To negotiate and enter into agreements by deed and payment of compensation for the release of third-party rights where this can be achieved on reasonable terms within a reasonable timescale; and
- 2.2.5. To take all necessary steps to settle claims for compensation under section 204 of the Housing and Planning Act 2016.

3. Reasons for Decision

- 3.1. The former Carlton Dene care home and Peebles House buildings were no longer fit for purpose and no longer met the modern standards for a care facility. The care home was closed in 2020 and both the Carlton Dene and Peebles House dwellings have been demolished. Therefore, the site is no longer required for the purpose for which it is held by the Council. The proposed redevelopment will contribute to the Fairer Westminster ambitions in the following ways:
 - Fairer Economy: enhancing local employment opportunities i.e., the creation of construction jobs and apprenticeship opportunities.
 - Fairer Housing: Providing the Council with additional affordable housing. The project will regenerate a site comprising a total of 87 affordable homes providing social housing contributing to much needed housing in Westminster.
 - Fairer Environment: The development will provide associated facilities including cafe and hairdressers and landscaping, the building will be sustainable using renewable energy sources.
- 3.2. The proposed development will also contribute the well-being of the Council's area in the following ways:
 - Economic Wellbeing of the area demonstrated by engaging residents and local stakeholders in a comprehensive consultation process that has provided the community with the opportunity to have a stake in the scenarios being considered for the future of Carlton Dene redevelopment.
 - Social Wellbeing of the area by promoting opportunity and fairness providing more affordable homes to create a vibrant community through the creation of high-quality homes and landscaping.
 - Environmental Wellbeing of the area through the creation of a healthier, greener environment that connects better to surrounding communities. This scheme will enable all our communities to share in the economic prosperity of the area, through protecting and enhancing the unique heritage of the neighbourhood. This will ensure the site will fit well into the surrounding neighbourhood and remains a great place to live, work and visit both now and in the future.
- 3.3. To progress the scheme and avoid delays to the programme, officers are seeking Cabinet Member authority to be able to appropriate the Site and authorise the use of any necessary powers under section 203 Housing and Planning Act 2016 if required. By exercising its powers, the Council will

ensure that its development of the land proceeds in accordance with the planning permission already granted.

- 3.4. Appropriating the land for planning purposes would enable certain private third-party rights to be overridden, subject to payment of statutory compensation to those affected. This will help to ensure that development of the Site can proceed in accordance with the planning permission granted and meet the scheduled completion date.
- 3.5. There is a pressing need for new homes within Westminster, particularly those of an affordable tenure. The development will deliver much needed affordable housing, which will greatly contribute to improving the economic, social, and environmental well-being of the local area.
- 3.6. The Council has appointed advisers to actively investigate the effect that the Council's proposed development will have on neighbouring owners and has established that there are a limited number of parties which may have the benefit of rights over the Site including rights of light which may be affected by the new development.
- 3.7. The Council has written to each of the parties who have been identified as potentially affected by the development to some degree to commence negotiations for release of any such rights where appropriate. Of those who have responded, where relevant, discussions are being undertaken with each party based on accepted compensation principles. A list of the parties identified as potentially having rights which could be affected to some degree and the state of negotiations and levels of estimated maximum compensation can be found in the exempt Appendix B.
- 3.8. Negotiations for the release of rights by agreement are a time-consuming process and do not necessarily ensure that all adverse third-party rights (including unknown rights) which may burden a site, and which might inhibit development have been effectively addressed. To ensure that the delivery of the scheme is not prevented or delayed and can be achieved within a reasonable timescale, approval is sought to appropriate the Site for planning purposes. Negotiations will, however continue, with the identified third parties if the recommendations in this report are approved. The Council recognises that in respect of third-party rights of light which exist and to which an entitlement is proved, the Council will be liable to pay compensation (whether statutory or non-statutory) and will pursue a settlement strategy to ensure that any claimants receive adequate compensation.
- 3.9. Whilst investigations are continuing, it is highly unlikely that it would be possible to identify and extinguish all third-party rights which burden the land by private agreement before development is due to commence. It should be noted that the Council has received various objections to the scheme to date, the Council may never actually hear from some of the affected third parties, and some may refuse to co-operate on a reasonable basis and within a reasonable time. If the land is not appropriated before the development is commenced and any infringement of a third-party right occurs, the primary

remedy for the affected party would be to seek an injunction preventing the development. The court can award damages where it considers this an adequate remedy. The consequences of such proceedings for the Council, if successful, could be to prevent delivery of the development or even if unsuccessful, would risk causing delay.

- 3.10. In balancing the benefits of the development and the concerns of those whose rights it is proposed to override, there is clear evidence that the public benefit, in the form of the provision of new homes to meet local needs outweighs the potential impacts on third party rights. The Council will continue with the negotiations after the Site has been appropriated, and compensation will be payable to those who suffer a relevant loss. The Council intends to only rely upon its entitlement to pay statutory compensation if negotiations are unsuccessful. Overall, it is considered that there is a compelling case in the public interest to facilitate this development and that appropriation of the land is necessary.
- 3.11. After appropriating for planning purposes the Council will need to further appropriate the land at the Site for its intended permanent purpose to provide 100% affordable housing at social rents. This report is therefore seeking delegated authority to further appropriate for the intended permanent use of the land.

4. Background, including Policy Context

- 4.1. The site of the former Carlton Dene Care home and Peebles House is located within Maida Vale Ward at 45 Kilburn Park Road London NW6 5XD. The site is bordered by Kilburn Park Road to the east and Carlton Vale to the south, it is within 5-minute walk from Kilburn Park Underground Station and within 10-minute walk from Maida Vale Underground Station and Kilburn High Road Overground Station. The boundary between Westminster City Council and LB Brent runs along Kilburn Park Road. The site does not sit within a conservation area; however, it is visible from the Maida Vale conservation area to the south and the South Kilburn conservation area to the north.
- 4.2. The Carlton Dene residential care home was built in the late 1960s at a very different scale to the previous Victorian terraces on the site and the surrounding large Victorian villas and St. Augustine's Church. After the Second World War, many Victorian houses were considered outdated for modern living. Subsequently, they were demolished and redeveloped to make way for tall/medium-sized blocks with flats and maisonettes instead of individual houses and large open green spaces. St Augustine's Church is a grade I listed building which sits to the north of the site and is of vast architectural significance to the area.
- 4.3. The proposal looks to replace Carlton Dene which is a 42-bedroom residential care home and Peebles House which consisted of 9 affordable homes into a new Extra Care building and an affordable housing scheme. The Extra Care building is 3-6 storeys providing 65 new homes and the residential 2-6 storey

building providing 22 affordable homes alongside associated landscaping, communal facilities, refuse storage, cycle, and undercroft car parking.

- 4.4. In July 2022, an Outline Business Case (OBC) was approved by the Cabinet Member. Planning Permission was granted for the development in March 2022. Demolition is currently in progress and Main Contractor procurement is currently being progressed, with a view to appoint a contractor early 2024.

5. Financial Implications

- 5.1. A portion of the land (Peebles House) currently sits in the HRA and another portion (the carehome) in the General Fund. The portion within the General Fund will be appropriated for planning purposes within the same fund. The portion in the HRA will be appropriated for planning purposes and transferred to the General Fund. A further appropriation will then take place via delegated authority, moving the whole parcel of land from the General Fund to the HRA for housing purposes.
- 5.2. Appropriate adjustments will be made to the financial statements to reflect these transfers.

6. Legal Implications

- 6.1 The Council has power under section 122 of the Local Government Act 1972 (LGA 1972) to appropriate land belonging to the Council which is no longer required for the purpose for which it was held immediately before the appropriation, provided that the new purpose is one for which the Council would be empowered to acquire land by agreement.
- 6.2 The new purpose for which the Site is required is for the redevelopment and improvement of the land in accordance with the planning permission granted. That is a purpose for which the Council has power to acquire land by agreement under section 227 of the Town and Country Planning Act 1990 (T&CPA 1990), if it thinks that the development or redevelopment will contribute to the achievement of the promotion or improvement of the economic, social and/or environmental wellbeing of its area.
- 6.3 Section 19 of the Housing Act 1985 (HA 1985) deals with appropriation of land held for the purposes of Part II of that Act (housing accommodation). It does not exclude the application of the appropriation power under section 122 of the LGA 1972 referred to above. However, under section 19(2) HA 85, a local housing authority holding land for the purposes of Part II of the HA 85, shall not, without the consent of the Secretary of State, appropriate any part of the land consisting of a house or part of a house for any other purpose. Paragraph 3.1 of this report confirms there are no dwellings on the land to be appropriated.
- 6.4 Appropriating land for planning purposes can engage section 203 of the Housing and Planning Act 2016 (HPA 2016) allowing the Council to override private third-party rights subject to payment of compensation under section

204 HPA 2016, provided certain other conditions are met. The application of section 203 of the HPA 2016 is subject to the following additional conditions:

- Planning permission must have been obtained for the building and/or use of the land that causes the infringement of third-party rights. Such permission has been granted.
- The Council could (at least in principle) acquire the land compulsorily for the relevant building work and/or use. The Council has such power under section 226 of the T&CPA 1990.
- The building work and/or use is for purposes related to the purposes for which the land was appropriated. The development of the Site is related to the purposes of the appropriation recommended in this report.

- 6.5 Provided all the conditions for the application of s203 are met it is irrelevant who carries out the development. The affected third party would be entitled to statutory compensation when development takes place, but they would not be entitled to obtain damages or an injunction.
- 6.6 The kinds of rights that can be overridden under s203 comprise:
- a. a “relevant right or interest” i.e., “any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land (including any natural right to support)” and
 - b. a restriction as to the user of land arising by virtue of a contract.
- 6.7 The first category above would include easements and other rights which burden the development site and benefit other land. The second category would include restrictive covenants.
- 6.8 Certain third-party rights cannot be overridden under s203, in particular “protected rights” of statutory undertakers and electronic communication code network operators and certain rights, interests and restrictions which benefit the National Trust. In addition, rights and interests which benefit the Crown and its land, or rights enjoyed by the public, could not be overridden under section 203.
- 6.9 Where it is known that appropriation for planning purposes would affect third party rights the Council must consider that it has sufficient reason in the public interest to interfere with third party rights and that the interference is no more than is necessary.
- 6.10 The Council must act in accordance with the rights under the European Convention on Human Rights including Article 1 of the First Protocol (right to peaceful enjoyment of possessions) and Article 8 (right to respect for private life, family and home). The Council must strike a fair balance between the public interest and the individual's rights and consider whether the interference is "proportionate". In view of the factors described in section 3 of this report it is considered that it is necessary to appropriate the land at the Site for planning purposes and that there is a compelling case in the public interest to support the decision to do so.

- 6.11 Unless an agreement for the release of rights has been reached with an affected party, sections 203 and 204 HPA 2016 will come into play when the development is carried out. Under section 204 the person who causes the interference with third party's right is liable to pay the compensation. This is normally the person who carries out the development or in default of that person making payment, the Council (with a right of recovery from the developer). Compensation under s204 is calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965. It is generally based on the reduction in the value of the claimant's land (rather than any "ransom value") and is sometimes calculated on a "before and after" assessment of what their land was worth before and after the infringement. If there is a dispute about the amount of compensation which is due, the matter can be referred to the Upper Tribunal for determination.
- 6.12 Having overridden third party rights (under section 203 of the HPA 2016), section 232(1) and (6) of the Town and Country Planning Act 1990 permits the Council to further appropriate land held for planning purposes for any purpose for which an enactment permits the Council to acquire land.
- 6.13 The Council would be entitled to further appropriate the Site relying on section 17 of the Housing Act 1985 (HA 85) which empowers the Council to acquire land for the purposes of the construction of homes whether to use such land itself to accommodate people or grant an interest to third parties including a Council subsidiary.
- 6.14 The Equality Act 2010 (EqA 2010) created a single general public sector equality duty (PSED) under section 149 of that Act. The PSED applies to public authorities exercising public functions. The PSED requires public authorities to have "due regard" to:
- The need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the section 149(1)(a) EqA 2010.
 - The need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it (section 149(1)(b) EqA 2010)
- 6.15 The duty on public authorities to have "due regard" to the PSED in section 149(1) of the EqA 2010 is more than simply a requirement to have general regard. It is a continuing duty to which all decision-makers must have regard. Proper consideration must be given to the PSED and its requirements. An Equalities Impact Assessment in respect of the proposed development has been carried out and the key findings are summarised at section 8 of this report.

7. Carbon Impact

- 7.1 The scheme needs to comply with the Zero Carbon Homes requirement, as defined by the current London Plan. The remaining regulated carbon emissions associated with the site's residential element are therefore offset

through a carbon offsetting contribution. Further details have been submitted to the Planning Authority as part of the Energy and Sustainability Statement.

8. Equalities Impact

- 8.1 The Council is required to act in accordance with the Public Sector Equality Duty under the Equality Act 2010 and have due regard to this duty when carrying out its functions, which includes making new decisions. An Equalities Impact Assessment carried out to cover the proposed development revealed no impacts on the public sector equality duty arising from this proposal. A copy of the Equalities Impact Assessment is included at Appendix C.

9. Consultation

- 9.1 The consultation period for the appropriation at Carlton Dene redevelopment ran from June 2023 to July 2023 and consisted of site notices on the hoarding notifying residents of the intent to appropriate as well as approaching residents whose properties' Rights of Light will be impacted by the new development.
- 9.2 A Ward Councillor briefing note was issued on 26 June 2023 setting out the recommendations referred to in this paper and no comments have been received.
- 9.3 The Council's Rights of Light surveyor has written to each of the parties who have been identified as potentially affected by the development to some degree to commence negotiations for release of any such rights where appropriate. Of those who respond, where relevant, discussions will be undertaken with each party based on accepted compensation principles. A list of the parties identified as potentially having rights which could be affected to some degree and the state of negotiations and levels of estimated maximum compensation can be found in the exempt Appendix B.
- 9.4 A site notice has been erected on the Site which has given the opportunity for any party that believes they may have an impacted right (including right to light) to make representations. The site notice also advised that the Council is due to consider a report recommending that the Site be appropriated for planning purposes. The Council has not received any responses to the site notice.

**If you have any queries about this Report or wish to inspect any
of the Background Papers, please contact:
Farah Hassan, Development Manager**

APPENDICES

Appendix A - Land to be appropriated – Red Line Boundary

Appendix B - Right of Light Implications (Exempt from publication)

Appendix C - Equality Impact Assessment

For completion by the **Cabinet Member for Finance and Council Reform**
Declaration of Interest

I have no interest to declare in respect of this report

Signed:  Date: 05 October 2023

NAME: **Councillor David Boothroyd**

State nature of interest if any:

(N.B: If you have an interest, you should seek advice as to whether it is appropriate to make a decision in relation to this matter)

For the reasons set out above, I agree the recommendation(s) in the report entitled **The Appropriation of land for planning purposes at 45 Kilburn Park Road** and reject any alternative options which are referred to but not recommended.

Signed: 

Cabinet Member for Finance and Council Reform

Date: 05 October 2023

If you have any additional comment which you would want actioned in connection with your decision you should discuss this with the report author and then set out your comment below before the report and this pro-forma is returned to the Secretariat for processing.

Additional comment:

If you do not wish to approve the recommendations, or wish to make an alternative decision, it is important that you consult the report author, the Director of Law, City Treasurer and, if there are resources implications, the Director of People Services (or their representatives) so that (1) you can be made aware of any further relevant considerations that you should take into account before making the decision and (2) your reasons for the decision can be properly identified and recorded, as required by law.

Note to Cabinet Member: Your decision will now be published and copied to the Members of the relevant Policy & Scrutiny Committee. If the decision falls within the criteria for call-in, it will not be implemented until five working days have elapsed from publication to allow the Policy and Scrutiny Committee to decide whether it wishes to call the matter in.