



Cabinet Member Report

Attention of: Cabinet Member for Finance and Smart City

Date: 29 December 2021

Classification: General Release

Title: Appropriation of land for planning purposes at Luxborough Street, London, W1U

Wards Affected: Marylebone High Street Ward

City for All: The proposed developments will collectively help to contribute to Westminster’s City for All objectives. A City that Celebrates its Communities by supporting the development of a more inclusive community. A City of Opportunity by providing more homes of all types and tenures to create a vibrant community with improved opportunities through the range of housing provided in particular through the provision of affordable housing. A Healthier and Greener City through creating high quality homes and a healthier, greener environment that connects better to surrounding communities.

Key Decision: Yes

Financial Summary: The proposals result in additional expenditure and income within the General Fund. This is in line with the General Fund Business Plan Budget however the profiling of expenditure and receipts does have an impact on the General Fund resources by the end of the 40 year Business Plan period. In summary the work undertaken demonstrates that the development should proceed

Report of: Debbie Jackson, Executive Director of Growth, Planning and Housing

1. Executive Summary

- 1.1. This scheme consists of the redevelopment of the existing kick about space on Luxborough Street (the Site) to provide 14 affordable housing units as well as commercial D1 space on the ground floor, which is likely to be used as a nursery. It also includes landscaping improvement works to the gardens of Luxborough Tower.
- 1.2. The scheme will redevelop an underutilised site into a new housing development, helping to provide much needed affordable housing for Westminster.
- 1.3. In order to progress the scheme and avoid delays to the programme, this Report seeks the approval of the Cabinet Member of Finance and Smart City to appropriate for planning purposes under section 122 of the Local Government Act 1972 the Council's property at Luxborough Street in order to facilitate the delivery of the scheme for which planning permission has been granted by the Council as local planning authority.

2. Background

- 2.1. The Luxborough Street kick about site is located in the Marylebone High Street Ward on the western side of Luxborough Street, between Marylebone Road to the north and Paddington Street to the south. The site is a short walk to Marylebone High Street, a busy retail/commercial centre with a variety of local amenities. The site is bounded by Newcastle House to the south, Luxborough Tower to the north and the public open space of Paddington Street Gardens to the west. The existing kick about site was developed as part of Luxborough Tower in the early 1970s to provide outdoor play space for residents. The freehold of the site is owned by Westminster City Council and is included as amenity space in the leases of some of the Luxborough Tower residents.
- 2.2. Originally, the site was for the sole use of the Luxborough Tower residents however, there has been a history of it being used informally by the wider community. Although the site has been boarded up since 2013, it could be considered to have been 'open space' when used by the wider community in accordance with section 336(1) of the Town and Country Planning Act 1990 and section 20 of the Open Spaces Act 1906. An 'open space' notice was therefore published in the local newspaper for two consecutive weeks from the 15th October 2021. Details of any representations received are found in Appendix A.
- 2.3. The site is vacant and clear of any buildings.
- 2.4. In 2019, the Cabinet Member for Finance, Property and Regeneration approved the development of the Luxborough Street kick about site to provide a ground floor community use with 14 fully affordable residential units above in the form of intermediate rent.

- 2.5. An Outline Business Case (OBC) was approved by the Cabinet Member in November 2019.
- 2.6. Planning Permission was granted for the landscaping improvement works in Nov 2019 and for the redevelopment of the kick about space in October 2020.
- 2.7. Wates Ltd were appointed in October 2020 through a Pre-Construction Services Agreement which included the completion of the scheme design, additional surveys, services diversions and agreement of a fixed contract sum for the scheme.
- 2.8. The Full Business Case and Contract Sum for works has now been approved This envisages a start on site for the main works in October 2021.

3. Recommendations

- 3.1. That the Cabinet Member for Finance and Smart City approves:
 - 3.1.1. To appropriate the land (edged red in the plan attached at Appendix A) for planning purposes pursuant to section 122 of the Local Government Act 1972 as it is no longer required for the purpose for which it is currently held, and the Council believes that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land pursuant to section 226(1)(a) of the Town and Country Planning Act 1990). The appropriation will subsequently allow the Council to use its powers under section 203 of the Housing and Planning Act 2016 in consultation with the Director of Law to override any easements and other rights of the affected neighbouring properties that are infringed upon.
 - 3.1.2. To delegate authority to the Executive Director for Growth Planning and Housing in consultation with the Director of Law:
 - 3.1.2.1 to deal with any necessary arrangements to record the appropriation of the Site for planning purposes including the transfer of the land from the Housing Revenue Account (HRA) to the General Fund account (GF) at the current red book value; and
 - 3.1.2.2 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; or
 - 3.1.3.3 to take all necessary steps to settle claims for compensation under section 204 of the Housing and Planning Act 2016.

4. Reasons for the Decision

- 4.1. The Council is satisfied that the scheme will contribute towards meeting the City for All objectives, in particular Greener and Cleaner, Vibrant Communities and Civic Leadership and Responsibility.

- 4.2. The Council's City for All objectives set a commitment to deliver 1,850 affordable homes by 2023.
- 4.3. The Site is no longer required for the purpose for which it is held by the Council, which is vacant land previously used as a kick about site as advised at paragraph 2.1 of this report. 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 whole, or any part, of the area (section 226(1)(a) and (1A), TCPA 1990) in the following ways:
- 4.3.1 ***Economic Well-Being of the area***
- 4.3.1.1 Enhancing local employment opportunities i.e. the creation of construction jobs and apprenticeship opportunities;
- 4.3.1.2 Providing the Council with additional affordable housing;
- 4.3.2.3 The project will regenerate a site comprising of 14 affordable housing units as well as a nursery (commercial D1 space) on the ground floor.
- 4.3.2 ***Social Well-Being of the area***
- 4.3.2.1 The new development will contribute to much needed housing in Westminster, where there is high demand for affordable housing. The nursery will also address the need of one in the area as advised by the local community through consultation.
- 4.3.3 ***Environmental Well-Being of the area***
- 4.3.3.1 The development will provide landscaping to the Luxborough Tower residents; and
- 4.3.3.2 The building will be sustainable using renewable energy sources.
- 4.4. In order to progress the scheme and avoid delays to the programme, the 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.
- 4.5. 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.
- 4.6. There is a pressing need for new homes within Westminster, particularly those of an affordable tenure. The development will deliver much needed affordable housing and a new D1 commercial space, which will greatly contribute to improving the economic, social and environmental well-being of the local area as described in section 4.3 above.

- 4.7. The development of the Site will create a right to light infringement. A Rights to Light assessment was undertaken during RIBA Stage 2, and it was identified that Rights of Light injuries are anticipated. A specialist Right of Light surveyor has therefore been instructed.
- 4.8. The Council has instructed the Rights of Light surveyor to also undertake due diligence on where negotiations were left with various residents on the 2014 scheme in addition to any new negotiations. 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.
- 4.9. The Council's Rights of Light consultant has issued letters to all the potentially affected parties inviting them to commence negotiations with the Council. Negotiations with the affected third parties have commenced, but will not be formalised and compensation will not be paid until the Cabinet Member provides the decision to do so in accordance with this report.
- 4.10. 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 in January 2022. It should be noted that the Council has received various strong 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.
- 4.11. 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 and a new commercial D1 space outweigh the private loss. 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.

5. Financial Implications

- 5.1. The report requests approval to appropriate for planning purposes land at the Luxborough site to facilitate the planned development. Both the full business case and main contract awards for the development have been approved by Cabinet Member together with the associated expenditure for the scheme. This includes provision for estimated compensation payments.

6. Legal Implications

6.1. *Statutory power to appropriate*

6.2. The Council has power under section 122 of the Local Government Act 1972 (LGA 1972) to appropriate land belonging to the Council that is no longer required for the purpose for which it was held immediately before the appropriation (section 122(1), provided that the new purpose is one for which the Council would be authorised to acquire land by agreement. However, in reaching this decision the Council must consider the public need within the area for existing use.

6.3. Appropriation requires more than a mere decision to hold land for a different purpose. Case law dictates that an authority cannot properly appropriate land to planning purposes unless it considers that the resulting interference with third party rights is necessary. Appropriation is akin to a compulsory purchase, so the same degree of necessity applies. Article 1 of the First Protocol to the Human Rights Act 1998 also requires an authority to consider whether the new purpose justifies interference with the rights affected. Therefore, a local authority cannot properly appropriate land to planning purposes unless it considers that it has good reason to interfere with third party rights, which would be overridden by sections 203 - 205 of the Housing and Planning Act 2016.

6.4. Section 226 of the Town and Country Planning Act 1990 (TCPA 1990) authorises a local authority to acquire compulsorily any land in their area for planning purposes. This acquisition can take place in one of the following two circumstances if the local authority thinks:

a) the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land (section 226(1)(a), TCPA 1990);
or;

b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated (section 226(1)(b), TCPA 1990);

But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is 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 (section 226(1) (1A), TCPA 1990).

6.5. It is important to therefore note that a decision to appropriate land for planning purposes under section 226(1) of the TCPA 1990 must indicate which of the two alternative purposes is being exercised (paragraph 68, section 1, Tier 2 of DCLG: Guidance on compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion (29 October 2015) (CPPCDRG)). It is important to follow the rules set out by the

CPPCDRG, as the considerations a local authority applies for an appropriation of land is akin to those when compulsorily purchasing land.

- 6.6. The Council must be satisfied that the land is no longer required for the statutory purposes for which it was originally held before the appropriation. This “surplus to requirements” component of section 122 of the 1972 Act enables the Council to prioritise relative needs. It allows the Council to look at the current use of the property as well as the prospective use of the property. For example, the Council can consider matters such as whether the buildings (if any) conform to current environmental and space standards, whether there are physical defects that impede the use together with the costs of remedying such defects, as well as whether the buildings make sufficient use of the site and the need to secure an enhanced form of redevelopment.
- 6.7. It is important to note the basis on which compensation will be calculated for the proposed injurious affection (injury to affected properties) caused by the development. Under section 204 of the Housing and Planning Act 2016 third party rights will be overridden and compensation paid on the basis of the scheme carried out, not on the purpose for which the land is held. It will be the new developed scheme that will be the cause of the injurious affection to the third party. The developed scheme, comprising both a residential and commercial use, will therefore be the new purpose for which the land is held.
- 6.8. There is no statutory requirement to advertise or consult on a proposal or decision to appropriate land under the general power contained in section 122 of the LGA 1972, unless the appropriation relates to ‘special categories’ of land, as referred to again further on in this report. It is important, however, that the Council adopts a “conscious deliberative process” to the appropriation of land, to ensure that the statutory powers under which the land was held and the appropriation made is clear at all times.
- 6.9. ***Power to interfere with rights***
- 6.10. 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 of the 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. It is clear that the development of the Site is related to the purposes of the appropriation recommended in this report.
- 6.11. Provided all the conditions for the application of section 203 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 to an injunction once the land has been appropriated.

- 6.12. The types of rights that can be overridden under section 203 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.
- 6.13. 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.
- 6.14. 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.
- 6.15. 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.
- 6.16. The Council must act in accordance with the rights under the European Convention on Human Rights, and as advised in paragraph 6.4 above, this includes 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 sections 3 and 4 of this report it is considered that it is necessary to appropriate the land at Luxborough Street for planning purposes and that there is a compelling case in the public interest to support the decision to do so.
- 6.17. Compensation under section 204 of the HPA 2016 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.
- 6.18. Appropriation will allow the Council to commence development works, notwithstanding the interference with the rights of third parties affected by the development. Therefore, if appropriation has not taken place when the Council commences works it would potentially be infringing those affected parties' rights to light. The remedy for such an infringement is an injunction. It is an equitable remedy and is within the court's discretion to grant. The court can award damages where it considers this an adequate remedy. If the adjoining owners choose to institute proceedings for an actionable injury the court might also

grant an injunction pending the court's decision on whether there has been an infringement of their rights or not. The consequences of this for the Council will be to set back commencement of the development and delivery of the scheme.

- 6.19. It should be noted that section 32(2) of the Housing Act 1985 requires that there should be no disposal of land held for certain purposes by a local authority within the local authority's Housing Revenue Account (HRA) without the consent of the Secretary of State. However, the Secretary of State has issued a number of general consents known as the General Housing Consents 2013 ("the General Consents") in order to facilitate the disposal of property vested in the HRA by local authorities if those disposals fall within the criteria set out in the General Consents. Therefore, if the disposal of property held in the HRA does not fall within the criteria set out in the General Consents, then the specific consent of the Secretary of State will be required for the particular disposal that is being considered before the disposal can proceed.
- 6.20. Paragraph A3.2 of the General Consents allows a local authority to dispose of 'vacant land' without the need for the Secretary of State's consent. Further to that it states at paragraph 8 of the Commentary to the General Consents that the disposal can be for any price determined by the local authority. Paragraph 2.1 above confirms that there are no buildings on the land and so it is considered vacant land. The consent of the Secretary of State will not be required.
- 6.21. The definition of 'appropriation' is considered to be a disposal by virtue of section 19 of the Housing Act 1985 (HA 1985), which permits a local housing authority to 'appropriate' any land for the time being vested in them or at their 'disposal'. Section 19 deals with appropriation of land held for the purposes of Part II of the 1985 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 1985, a local housing authority holding land for the purposes of Part II of the HA 1985, 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. As advised at paragraph 7.24 above and confirmed at paragraph 2.3 of this report, there are no dwellings on the land.
- 6.22. ***Open Space***
- 6.23. Further to the above and specifically with regards to 'special categories of land', a local authority can appropriate land consisting or forming part of land considered 'open space' under section 122(2A) of the LGA 1972. 'Open space' is defined in section 336(1) of the TCPA 1990 as any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground. It is also defined as such in section 20 of the Open Spaces Act 1906.
- 6.24. However, before appropriating open space land, a local authority must (in accordance with (Section 122(2A), LGA 1972):
- Advertise its intention to appropriate open space land for two consecutive weeks in a newspaper circulating in the local area.

- Consider any objections to the proposed appropriation – such objections must be considered, but it does not mean that they will prevent the scheme from proceeding.
- 6.25. If a local authority appropriates open space land under section 122(2A) of the LGA 1972, it is released from any trust for the enjoyment of the public imposed by section 164 of the Public Health Act 1875 or section 10 of the Open Spaces Act 1906 (section 122(2B), LGA 1972).
- 6.26. 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)

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. Staffing Implications

- 7.1. This project has been and will continue to be managed and delivered by the Development team in Growth, Planning and Housing and the Development department will be delivering the scheme through the Delivery team. Sufficient capacity exists within this team to deliver this project.

8. Consultation

- 8.1. Ahead of site investigation works starting on site a letter sent out to local residents in January 2020 introducing Wates the contractor and highlighting initial on site activities.
- 8.2. Regular meetings are now taking place with Luxborough Tower Residents Association and offers to meet with Newcastle House Management company have also been made.
- 8.3. The Council is working with Wates to develop a Communications Plan. It is intended that there will be regular meetings with local residents and regular newsletters published.

- 8.4. A Ward Councillor Cllr briefing note was issued on 11th November 2021 setting out the Recommendations referred to in this Paper and no comments have been received.
- 8.5. 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.
- 8.6. An Equalities Impact Assessment carried out to cover the proposed development revealed no impacts on the public sector equality duty arising from this proposal.