



Report of: Executive Member for Housing and Development

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| Meeting of: | Date: | Ward: |
| Executive | 18 th March 2021 | St Peter's |

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SUBJECT: Appropriation of land on Windsor Street for planning purposes

1. Synopsis

- 1.1 This report seeks the Executive's agreement to authorise the Corporate Director of Resources to appropriate the council's property known as land at Windsor Street car park and garages, London N1 8QF ("the Land"), edged red on the plan attached (see Appendix 1) from housing to planning purposes under section 122 of the Local Government Act 1972 as the Land is no longer required for the purpose for which it is currently held.
- 1.2 The appropriation is necessary to facilitate the construction of a 11-bedroom (plus staff sleep-in unit) building to accommodate a supported living scheme on the Land. The proposal also includes communal kitchen/living/dining facilities, staff offices, laundry, plant room, and accessible bathroom facility. Associated landscaping including courtyard garden areas, refuse and cycle storage provision are also proposed. By appropriating the Land the council is reducing the risk of challenge to the scheme.
- 1.3 Planning permission P2017/3493/FUL was granted on 9 May 2018 (see Appendix 2). Further details of the scheme are set out in paragraph 3.4 - 3.6 below. The development must be commenced by 9 May 2021 or the planning permission will lapse.
- 1.4 The council is the freeholder of the Land which is held under part 2 of the Housing Act 1985 in the Housing Revenue Account.
- 1.5 Since 28 November 2018 the council through its Rights of Light consultants, calford seaden LLP, have been actively investigating the effect of the council's proposed development on adjoining owners and have established that there are adjoining properties that may have the benefit of Rights of Light or easements which will be affected by the new development. The council recognises the potential rights of third parties and will pay compensation where a legal basis for such payments is established.

2. Recommendations

- 2.1 To authorise the Corporate Director of Resources to appropriate the Land edged red on the plan at Appendix 1 from housing to planning purposes in accordance with section 122 Local Government Act 1972;
- 2.2 To authorise the Corporate Director of Resources, in consultation with the Acting Director of Law and Governance and Corporate Director of Housing to agree the settlement of Rights of Light and Rights of Way claims, where relevant, with owners and occupiers of the affected properties and any ancillary affected leases, together with any associated fees;
- 2.3 To note that the cost of the proposed settlement of Rights of Light and Rights of Way compensation payments, where relevant and associated fees those affected by this scheme will be met from the capital budget for the Windsor Street scheme.
- 2.4 To agree to delegate authority to the Corporate Director of Resources to appropriate the Land back to Housing from Planning should it be deemed necessary to do so.

3. Background

- 3.1 Islington's vision for housing as laid down in the Housing Strategy 2014 – 2019 is to make sure everyone in Islington has a place to live that is affordable, decent and secure. Secure and affordable housing is recognised as an enabler. Housing has an important role in shaping healthy places, preventing ill health, promoting independence, supporting residents into work and tackling child poverty. The council has a corporate objective to deliver 550 new council homes by 2022.
- 3.2 The Land is part of the Cumming Estate and the council owns the freehold of the Land. The Land was transferred to the council by the former GLC in 1981 under the provisions of the Greater London Council (Transfer of Land and Housing Accommodation) Order 1981. The site was occupied by a row of terraced Victorian housing and a long, narrow hall to the south western part of the site. This area suffered bomb damage resulting in the rerouting of the road and the building of Turnbull House and Gough House along with the garages that currently occupies the eastern part of the site. It is understood that the part of the site on which the hall was originally located provided play space presumably for the estate's residents until 1990 when it became a car park.
- 3.3 The Land is currently used as a car park and leased to local businesses. There are also 12 garages all of which are now vacant. The car park will be vacated before the construction works are due to start. Demolition of the garages was agreed as part of the planning permission (P2017/3493/FUL) given in May 2018. Where requested alternative garage provision and car parking spaces have been made for Islington Council tenants. There is no requirement to find alternative provision for the private businesses using the car park. As such, the site is not needed for its current use. The issue of whether the Land is required for housing purposes is considered in section 6 below.
- 3.4 The demolition of the garages will enable redevelopment of the Land and construction of a three storey (plus basement) building which will accommodate a supported living scheme consisting of 11 units (plus staff sleep-in unit), communal kitchen/living/dining facilities, staff offices, laundry, plant room, and accessible bathroom facility. Associated landscaping including courtyard garden areas, refuse and cycle storage for both residents and staff will also be provided. A feasibility study carried out on 3rd February demonstrates that this scheme provides the maximum number of units and makes the optimum use of the land to provide 100% social housing.
- 3.5 The key benefit of the development will be an improvement to the social well-being of its future residents: adults with learning disabilities, whose housing and support needs will be catered for in the new building. In recent years, Islington has consistently commissioned between 120 and 150 out of borough placements for adults with learning disabilities. Placements are made outside of the borough for a variety of reasons, however a primary driver is a lack of appropriate in-borough

accommodation to meet the care & support needs of individuals. Utilisation rates of our in-borough supported living and residential care services are consistently over 97%.

- 3.6 The Learning Disabilities service consistently need to place people outside of the borough, which is not good practice, as it separates people from their communities and reduces the commissioner's ability to maintain oversight on quality and cost of services. On average 30-35 young people with learning disabilities transition into adulthood each year. The complexity of need is increasing year on year, which further increases demand on accommodation-based placements.
- 3.7 Windsor Street has been designed specifically to cater to the needs of people with learning disabilities and will provide suitable accommodation to this client group. Ensuring people are placed in appropriate environments can reduce the support they need to live safely and as independently as possible, avoiding the need to provide additional support to mitigate needs arising from unsuitable accommodation.
- 3.8 In terms of people waiting for a move onto supported living accommodation the most recent figure from the Learning Disabilities Accommodation Plan 2017-2020 states that there were 69 individuals awaiting for this kind of accommodation. The Windsor Street scheme will bring important public benefits as it will reduce costs of out of borough, unsuitable placements for this client group, allow the residents to receive support from their families and services in their local borough, reduce the numbers waiting for this kind of housing and provide an opportunity for these residents to be supported to live and participate in the wider local community.
- 3.9 Having a purpose built provision in an accessible location in the heart of a largely residential community will ensure that we can offer bespoke accommodation to maximise residents' independence and quality of life while ensuring that they can access on-site support that the facility provides.
- 3.10 The proposed development will comprise a four-bedroom cluster flat at ground floor level and seven self-contained one-bedroom units at first and second floor levels two of which will be wheelchair accessible with the remaining units being wheelchair adaptable. The building will include space for support staff required on site at all times, thus including a separate staff 'sleep-in' facility.
- 3.11 All the residents will also have access to flexible communal spaces that could accommodate a range of activities as well as an external amenity space where a sensory garden is proposed.
- 3.12 The development will also deliver environmental improvements by providing a sustainable form of development aiming to achieve an 'Excellent' BREEAM rating. The building was designed to minimise carbon emissions as much as possible and a carbon offset contribution will also be paid to offset outstanding emissions. To increase the biodiversity element of the ground-level garden an extensive green roof on top of the single storey element of the building is proposed.
- 3.13 A Rights of Light Report was commissioned and set out the likely compensation that will have to be paid to the affected owners as a consequence of the development infringing on the adjoining owners' existing Rights of Light.
- 3.14 There is a door in the rear boundary wall of 14 Packington Street adjoining the Land. To date, the owner has not been able to evidence prescriptive rights and this door will be blocked once the development starts.

4. Proposal and Issues

- 4.1 Without the exercise of appropriation, parties who are affected by the diminution of their Rights of Light or Rights of Way have the ability to bring injunction proceedings to prevent the development. Recent court cases have shown that where there is an actionable nuisance, the affected party is prima facie entitled to an injunction to prohibit the nuisance and it is for the defendant to show why an injunction should not be granted. This could potentially halt the project altogether in a worst case scenario and even if the council succeeded in showing that an injunction was not

appropriate, and damages were given instead, it would result in a delay to the delivery of the development as well as likely additional costs to the council. There would be an unacceptable risk to the council in proceeding with a building project at a time when it was uncertain whether injunction proceedings would be brought or would be successful. As noted above, the current planning permission requires the development to be commenced by 9 May 2021, and before commencement there are various conditions that need to be discharged. Securing the discharge of conditions would involve the council in abortive expenditure if it could not ultimately carry out the development.

- 4.2 Once the Land is appropriated for planning purposes and since planning permission for the development has already been granted, the Council will be empowered under section 203 Housing and Planning Act 2016 to override existing rights and extinguish adjoining owners' rights, provided that the conditions of those provisions are fulfilled, without the risk of the building work being halted by an injunction to restrain an infringement of those rights. The rights would be overridden and converted into a right to statutory compensation.
- 4.3 Pursuant to section 203, all Rights of Light or Way claims will be resolved by payment of statutory compensation to the affected parties.
- 4.4 The Council's representative has attempted to make contact with all affected parties and has commenced negotiations with those owners who have already appointed their Right of Light surveyors and/or solicitors. So far one offer has been accepted.
- 4.5 If agreement is not reached with any party the matter can be referred to the Upper Tribunal for determination.

5. Implications

Financial implications

- 5.1 A feasibility assessment has determined that, if the development remained subject to third party rights, the supported accommodation development would be significantly compromised in terms of the number of properties that could be provided. However, the financial risk involved of embarking on the current proposed scheme whilst facing the possibility that the scheme could be halted by injunction proceedings could be considerable.
- 5.2 Alternatively, if the site were sold (with the third party rights in place) under S.106 terms there would be no planning requirement to deliver any social housing given the size of the development potential. As such appropriating "the land" from housing to planning purposes overrides the third party rights and as such removes the risk of injunction proceedings.
- 5.3 For the purposes of the appropriation the Council's acting Head of Property Services has in accordance with the HRA Limits on Indebtedness Determination 2012 – Annex A, provided a certified value of nil in respect of "the land", this value arises because the cost of developing the site exceeds the capital value of the completed development.
- 5.4 Given that "the land" value is nil there will be no impact on either the HRA or General Fund's capital financing requirement. In addition the appropriation will result in the transfer of asset from the HRA to General Fund however it is anticipated that the impact in relation to depreciation charges will be negligible.
- 5.5 Finally it should be noted that the appropriation also converts the third party rights into a right to statutory compensation, the cost of which is estimated to be in the region of £30k & has been accommodated within the budget provision assigned to this scheme.

Legal Implications

Statutory Power to appropriate

- 5.1 This report seeks Executive approval to appropriate, under section 122 of the Local Government Act 1972 (LGA), land belonging to the council which is held for housing purposes but used as car parking spaces and garages and which for the reasons outlined above is no longer required for the purpose for which it is currently held. It is now required for planning purposes namely the construction of 11 supported living units with associated amenity space in accordance with the planning permission already granted.
- 5.2 The appropriation does not require the Secretary of State's consent as there are no houses situated on the Land to be appropriated (section 19 Housing Act 1985).
- 5.3 Any reference to appropriation for planning purposes is, by virtue of the provisions in section 246 of the Town and Country Planning Act 1990 (TCPA), regarded as a reference to appropriation for the purposes for which land can compulsorily be acquired under section 226 TCPA.
- 5.4 By virtue of the provisions in s226(1A) TCPA a local authority must not exercise the power granted under s226(1)(a) unless the development, redevelopment or improvement on or in relation to the land is likely, they think, to contribute to the achievement, the promotion or improvement of any one or more of the following objectives - the economic, the social and/or the environmental well-being of the area. The council also needs to be satisfied, for the purposes of section 203 of the Housing & Planning Act 2016, that it could acquire the Land compulsorily for the purposes of the building project of undertaking the development. This is considered in the next section.
- 5.5 The council must also be satisfied that the land is no longer required for the statutory purposes for which it was originally held immediately before the appropriation. In considering this requirement, the council may prioritise relative needs. The council currently holds the Land for housing purposes but the Land in its current condition is incapable of providing any housing accommodation. There is an unmet need for the provision of supported housing accommodation and there is a clear public benefit in carrying out a development that will contribute to meeting that need. The council would be empowered to carry out the development using its housing powers, whilst continuing to hold the land for housing purposes, but that development process would be put at risk and could be or at the very least delayed by any one of the adjoining owners bringing proceedings for an injunction to prevent the development. The overriding of the rights of those owners (which are converted to a right to statutory compensation) under section 203 of the Housing & Planning Act 2016 is only possible if the Land has been appropriated for planning purposes. That mechanism is not available if the council continues to hold the Land for housing purposes. The cost of the development is in the order of £5,077,852.95. It would be an unacceptable financial risk to the council to embark on a building project of that scale in circumstances where it could be halted by injunction proceedings. Thus, if the council were to continue to hold the Land for housing purposes, it could not prudently undertake the development of the Land to provide housing accommodation in accordance with the approved scheme, because of the uncertainty and risk of the development being delayed by legal action. In that context, continuing to hold the Land for housing purposes does not help to achieve the primary housing purpose of providing housing accommodation, whereas an appropriation to planning purposes would facilitate the achievement of the development. It follows that the council is entitled to consider the current use of the land as well as its prospective use, the need for that prospective use, and, on this project, what the land can deliver and the risks that exist which could prevent its delivery. The council should consider all relevant matters (disregarding irrelevant ones) including whether sufficient use is currently made of the land and the need to secure an enhanced form of redevelopment. In the circumstances of this case it is reasonable to conclude that the Land is no longer required to be held for housing purposes and that it would more effectively be able to deliver housing accommodation if it was appropriated to planning purposes. The planning purpose is to facilitate the council in carrying out the development in accordance with the planning permission.

Power to Interfere with Rights

- 5.6 Reliance on section 203 of the Housing and Planning Act 2016 to override the rights of adjoining owners and any other property rights or claims on an appropriation of land for planning purposes is dependent upon the requirements of section 226 Town and Country Planning Act 1990 having been satisfied. This means that the council must be satisfied that there is a compelling case in the public interest for the appropriation of the land and the use of the appropriation power is proportionate in that the public benefits to be achieved outweigh any infringement of human rights (Article 8 and Article 1 Protocol 1 European Convention on Human Rights).
- 5.7 Negotiations with the Dominant Owners of those properties affected by the redevelopment have been taking place for some time and reasonable attempts to reach voluntary agreement have been made as set out in this report. However, in order to ensure that the Windsor Street redevelopment can proceed within the agreed timescale and cost it is necessary for the council to appropriate the site for planning purposes. It would not be prudent for the council to embark on a development of this scale and cost whilst exposed to the risk that the development could be delayed by litigation brought by the Dominant Owners. This will not preclude the continuation of negotiations with the Dominant Owners and it is anticipated that non-statutory based compensation packages will be agreed with most, if not all of them in due course.
- 5.8 If the council were to commence the development works without appropriating the land from housing to planning purposes, it would potentially be infringing those affected Dominant Owners' 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 but prima facie the owners would be entitled to an injunction to stop the infringement and it would be for the council to show why they should not be granted one. An injunction could not only halt the works, it could require the council to demolish works carried out which infringed the owners' rights. 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 as well as incurring additional cost and potential legal costs relating to any existing contract for construction work.

Environmental Implications and contribution to achieving a net zero carbon Islington by 2030

- 5.9 Matters related to Right to Light are detailed in the body of the report. Environmental factors associated with the development have been considered through the statutory planning process.

6. Resident Impact Assessment

- 6.1 The council must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment and victimisation, and to advance equality of opportunity, and foster good relations, between those who share a relevant protected characteristic and those who do not share it (section 149 Equality Act 2010). The council has a duty to have due regard to the need to remove or minimise disadvantages, take steps to meet needs, in particular steps to take account of disabled persons' disabilities, and encourage people to participate in public life. The council must have due regard to the need to tackle prejudice and promote understanding.
- 6.2 The RIA has been published and a copy of the RIA is attached in Appendix 3 of this report.
- 6.3 Due to the necessity for the council to comply with its obligations under Article 8 of the Human Rights Act 1998 where the council appropriates land for planning purposes, the council has also informed the Dominant Owners of each of the affected property owner in writing of the council's intention to appropriate and its effect on their rights of light. An early discussion with one of the residents regarding appropriation suggested they believed that the land could not belong to Housing as there was no actual housing currently on the land. However the site belongs to the Cummings Estate which is housing land.

- 6.4 Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8 would be engaged as a result of interference with rights to light to a private residence. Article 8(2) allows for interference which is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others". Article 1 of the First Protocol also protects rights to property but allows for an interference on a similar basis.
- 6.5 There must therefore be a balancing exercise between the public interest and the individual's rights whereby any interference in the individual's rights must be necessary and proportionate.
- 6.6 Planning permission has been granted for the development of the Land and the public benefits arising from the development, and thus the public interest, are set out earlier in this report. Furthermore, notwithstanding the overriding of their 'rights to light', statutory compensation will still be available to those who are affected. On this basis it is considered that the public interest in facilitating the development of the Land outweighs the rights of the individuals to peaceful enjoyment of their possessions and to their homes and property rights and that the proposed use of s.203 powers results in a proportionate infringement.

7. Conclusion and reasons for the decision

- 7.1 By exercising its appropriation powers, the council will ensure that the development of the Land proceeds in accordance with the planning permission already granted.

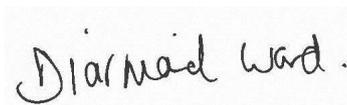
Appendices

- Appendix 1 – Site plan
- Appendix 2 - Copy of planning permission P2017/3493/FUL
- Appendix 3 - Resident Impact Assessment

Background papers:

- None

Final report clearance:



8 March 2021

Signed by: Executive Member for Housing & Development

Date:

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