

APPENDIX 3 – USE OF SECTION 203

The Council's statutory powers:

1. Powers to override rights over land acquired or appropriated for planning purposes were previously provided in section 237 of the Town and Country Planning Act 1990 ("1990 Act"). These have more recently been replaced by provisions in section 203 of the Housing and Planning Act 2016.
2. Under Section 203 the Council has powers that would allow the Development to proceed, notwithstanding that it would interfere with the rights to light of neighbouring affected properties.
3. Under Section 204 there is a liability to pay compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by Section 203. The compensation is calculated on the same basis as compensation payable under 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.
4. Section 226 of the 1990 Act provides that a local authority (subject to the authorisation of the Secretary of State) has the power to acquire compulsorily any land in their area, if it considers that this will facilitate the carrying out of a development, redevelopment, or improvement on or in relation to the land; or is required for a purpose which is necessary to achieve in the interests of the proper planning of an area.
5. Under Section 226(1A) of the 1990 Act, a local authority may not acquire land compulsorily, for the purpose facilitating the carrying out of development, unless they consider that the development is likely to contribute to the achievement of one or more of the following objectives:
 - 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.
6. Section 227 of the 1990 Act provides that the Council may acquire by agreement any land which it requires for any purpose for which it may be authorised to acquire land under Section 226 of the 1990 Act.
7. Section 246 of the 1990 Act provides, in this case, that reference to the acquisition of land for planning purposes is a reference to the acquisition of it under section 226 or 227 of the 1990 Act.

8. The Council will need to be satisfied that there is a compelling case in the public interest for the engagement of the appropriation powers and that their use is proportionate and justified, notwithstanding the interference with the private rights of the landowners affected.

Section 203 Housing and Planning Act 2016

9. Section 203 of the 2016 Act applies where the Council acquires or appropriates land for planning purposes so that easements and third-party rights (including rights of light) may be overridden pursuant to those provisions by development of that land (provided it is carried out in accordance with planning permission).
10. Section 203 operates to translate the right of an owner of an affected property or interest from an injunctable right to an entitlement to compensation only. The compensation is assessed against compulsory purchase compensation principles based on the diminution of the value of the affected property because of the interference with the right.
11. The protection provided by Section 203 applies both to the Council, were it to undertake the Development, and to any third-party deriving title to the Site from the Council.
12. For Section 203 of the 2016 Act to be utilised and come into effect, the development must receive a planning permission and the Council must hold an appropriate interest in the land, the freehold in this case. Additionally, under section 227 of the 1990 Act, the council may acquire land by agreement for planning purposes where that acquisition is for a purpose for which the land could be compulsorily acquired. To do so the Council would need to be satisfied that the circumstances set out in Section 226(1A) of the 1990 Act are met – in summary, that acquiring the Site would facilitate the carrying out of the Development and that the Development in question would contribute to the economic, social, or environmental well-being of the area.
13. It is the opinion of Officers that, for the reasons set out in this report, the Site, if it wasn't owned by the Council, could be acquired compulsorily under Section 226 to facilitate carrying out of the Development assuming such development was to be granted an implementable planning permission, and that such Development would advance all three objectives identified at section 226(1A).
14. Subject to satisfying the relevant requirements, the appropriation may allow provisions of Section 203 of the 2016 Act to be engaged. But for this to happen, it is necessary to consider whether the facilitation of the Development would justify an interference with the rights of third parties. In making that decision regard should be had to the advice and guidance contained in the current DLUHC Guidance on Compulsory Purchase (October 2015). Fundamentally, the decision to engage Section 203 should only be made where it is necessary, there is a compelling case in the public interest and the Council should be certain that the use of these powers being exercised justify interfering with the

human rights of those whose human rights would be affected. Particular consideration should be given to the provisions of Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights.

15. The explanatory note relating to the 2016 Act is helpful in indicating the underlying objective of the provisions. Regarding section 203 powers it provides guidance that the requirement (section 203(2)(c)) that the authority 'could' acquire the land compulsorily for the purposes of the building work was intended only to require that the authority had the relevant enabling powers, not that on the facts of the case a compulsory purchase order would be confirmed for the compulsory acquisition of the land.
16. Following the appropriation of the Site for 'planning purposes' and the engagement of Section 203, if it is intended to appropriate the Site to the Housing and Revenue Account sometime in the future, such appropriation will need to be carried out under Section 232 of the Town and Country Planning Act 1990, as Section 232(6) excludes the use of Section 122(1) of the Local Government Act 1972, where appropriation relates to land held for planning purposes.
17. Section 232(1) of the Town and Country Planning Act 1990 provides:

"232 (1)Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may appropriate the land for any purpose for which they are or may be authorised in any capacity to acquire land by virtue of or under any enactment not contained in this Part or in Chapter V of Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990" .
18. Appropriation to the Housing and Revenue Account is specifically dealt with in section 19(1) of the Housing Act 1985 (the 1985 Act):

"A local housing authority may appropriate for the purposes of this Part [dealing with the provision of housing accommodation] any land for the time being vested in them or at their disposal and the authority have the same powers in relation to land so appropriated as they have in relation to land acquired for the purposes of this part".

Use of Section 203 – Considerations

19. The effect of Section 203 is to allow beneficial regeneration to take place without the risk of injunction being granted to prevent the development from being carried out. However, it is recognised that this can involve the interference with human rights – in particular, the right to peaceful enjoyment of possession and the right to respect for private and family life and home.
20. Considering this, Officers will consider best practice and the approach adopted by this local authority and other local authorities to help any decision on the use

of statutory powers to override easements and rights in that case was appropriate, reasonable, and necessary.

21. These considerations are set out below:

a. Consideration 1: The use of statutory powers is required in that:

- I. The infringements cannot reasonably be avoided;
- II. The easements to be interfered with cannot reasonably be released by agreement with affected owners;
- III. The Development is prejudiced due to the risk of injunction and adequate attempts have been made to remove the injunction risks.

b. Consideration 2: The use of statutory powers will facilitate the carrying out of the Development;

c. Consideration 3: The Development will contribute to the promotion and improvement of the economic, social, or environmental well-being of the area and therefore be in the public interest;

d. Consideration 4: The benefits of the Development could not be achieved without giving rise to the infringements of the identified rights;

e. Consideration 5: Is it in the public interest that the Development is carried out?

f. Consideration 6: Is the public interest to be achieved proportionate to the private rights being infringed by the action of Section 203?

Criteria for application of a successful Section 203

22. The following criteria apply in relation to the application of Section 203 powers:

Considerations 1 and 2:

23. The development of the Site, in line with a granted planning permission, would result in infringement of, or interference in, one or more rights or interests as defined in Section 205(1) of the 2016 Act or breach of a restriction or covenant on or affecting the land which cannot be reasonably released or resolved. Voluntary agreements with those whose rights are affected must be sought and the council must seek such agreements, however, without certainty of extinguishment of such rights within reasonable time, the Development might not proceed.

24. The engagement of Section 203, at the appropriate time, will facilitate the Development which may not proceed without the engagement of Section 203. Without this the Development will be at risk of claims for injunctive relief from rights holders relating to actual or anticipated interference with easement rights or covenants.

25. Lengthy legal proceedings initiated by any affected party may severely affect the viability and deliverability of the Development as a whole specially as part of the funding for the Development is time critical.

Considerations 3 to 6:

26. The successful application of Section 203 requires the establishment of a compelling public interest, which in the case of this Development will bring about a material improvement of the social, environmental and economic wellbeing of the area while at the same time mitigating the impact of the additional homes on surrounding streets through the development being car-free zone. Not developing the Site would be a waste of opportunity to redevelop White City Central with new housing and reprovision of community facilities.
27. Importantly, officers would need to consider and balance the significant public benefit to be gained from the Development against the interference with the private rights of the landowners affected by the use of the delegated powers. Conclusion on the use of Section 203 would need to be proportionate and justified demonstrating a public benefit that significantly outweighs potential interference in an individual's rights including human rights and in particular Articles 1 and 8 of the ECHR. Affected landowners will need to be compensated properly and on a timely basis, in line with statutory guidance.

The Nature of the Third-Party Rights Affecting the Land

28. A third-party right is a right enjoyed by a third party over land owned by another party, one type of such third-party right, being a right of light. A right of light is a long-established legal right which can be acquired by a property by having access to, and use of, light crossing another property, for 20 years or more, after which the right is "*deemed absolute and indefeasible... unless it... was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing*"¹. It is anticipated that the Development will infringe the rights of light of a number of neighbouring properties in varying degrees of magnitude.
29. Any interference with a property's right of light may be prevented by an injunction granted by the Courts. Typically, developers will seek to avoid this risk by reaching private settlements with those whose properties are affected so as to release rights of light and permit interference with the rights, subject to payment of compensation. If an agreement cannot be reached, affected parties might be able to delay or prevent a development from proceeding by threatening, or seeking, an injunction.
30. Appropriation of land for planning purposes translates the right of an owner of an affected property or interest from once enforceable by an injunctable right to an entitlement to compensation only. The compensation is assessed against compulsory purchase compensation principles based on the diminution of the value of the affected property because of the interference with the right of light.

¹ The Prescription Act 1832, section 3; Claim to the use of light enjoyed for 20 years

Legal power available to the Council to procure appropriate insurance

31. The Council's actions are susceptible to third party challenge, and as described above the Council may seek to insure against any costs and liabilities arising from a challenge, if one were to be made, so as to indemnify and limit the Council in respect of all costs and liabilities arising from and linked to appropriation for planning purposes of this site.
32. The Council has the power to enter into any Deeds of Indemnity or insurance required under a range of powers which include:
 - Section 111 Local Government Act 1972 - which gives powers to local authorities to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions; and
 - Section 1 Localism Act 2011 - which contains the local authority's general power of competence and states that a local authority has power to do anything that individuals generally may do.
33. The Council should also be mindful of its best value duties in Section 3 of the Local Government Act 1999 which states a best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

Affected Third Parties

34. The exact number of affected parties and extent of effect may only be ascertained on the granting of an implementable planning decision. And in any case, a variation of the design of the Development that may potentially mitigate impact on third parties would be considered so long as such variation would not result in a significantly and materially different development that diminishes or eliminate the public benefits arising from this proposed Development.
35. On identification of degree and extent of impact on third parties, the council will seek voluntary settlements by agreement. However, it is anticipated that in most instances the level of interference may be negligible and not noticeable and, in some instances, may have a noticeable positive impact.

EQUALITY IMPLICATIONS

36. In deciding to proceed with the acquisition of the Site for planning purposes the council must pay due regard to its Public Sector Equality Duty (PSED), as set out in section 149 of the Equality Act 2010 (the "2010 Act"). Further information regarding how the PSED should be discharged is set out at Appendix 3.
37. While currently there are no anticipated direct negative implications (at this stage) for persons with protected characteristics, under the Equality Act 2010,

by the approval of recommendations outlined in this report, any future decision on the appropriation for planning purposes would need to carefully consider potential impact.

RISK MANAGEMENT IMPLICATIONS

38. There may well be compelling reasons for the council to engage Section 203 and enable the Development to proceed: significant benefits that would be realised locally, at a time when the national economy has been severely affected following the pandemic. The Development may also bring about improvement of the social, environmental and economic wellbeing of the area whilst at the same time meeting the acute housing needs of the borough.
39. However, risks and mitigations associated with the potential use of powers to appropriate the Site for planning purposes would need to be considered at the point the use of the delegation is being considered. This is because the use of these powers is dependent on the development to be facilitated receiving a planning permission.
40. Accordingly, risks and mitigations may only be considered once the Development has received an implantable planning decision and the extent and nature of the impact of the development has been ascertained.

David Hughes, Director of Audit, Fraud, Risk and Insurance, April 2023