

Decision maker and date of Leadership Team meeting or (in the case of individual Lead Member or Executive Director decisions) the earliest date the decision will be taken	Leadership Team Date of report: 05 March 2021 Date of meeting: 17 March 2021 Forward Plan reference: 05773/20/K/AB	 THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA
Report title	APPROPRIATION OF LAND FOR PLANNING PURPOSES IN RELATION TO 175/177 KENSAL ROAD	
Reporting officer	Anna Benbow Director of Social Investment and Property	
Key decision	Yes	
Access to information classification	Public with confidential/exempt appendix Information relating to the financial or business affairs of any particular person (including the authority holding that information).	
Wards	Golborne Ward	

1. EXECUTIVE SUMMARY

- 1.1. This report seeks the Leadership Team's approval to appropriate for planning purposes under section 122 of the Local Government Act 1972 the Council's property at 175-177 Kensal Road, London, shown on the plan at Appendix 1 (the Site), to facilitate the delivery of new homes, community space, and retail space, for which planning permission has been granted by the Council as local planning authority.
- 1.2. Appropriation of the Site for planning purposes reduces risk to the delivery of the New Homes Programme. The appropriation of the Site will allow the Council to carry out the development even if it interferes with existing third-party rights, such as easement including rights to light. An affected third party who suffers a relevant loss would be entitled to claim statutory compensation, but they would not be entitled to damages or an injunction which might delay or prevent development.
- 1.3. The Council is the freeholder of the property which is held within the General Fund and is currently vacant.
- 1.4. Confidential/exempt information is contained in the exempt Part B Appendix as it details information relating to the financial or business affairs of any particular person (including the authority holding that information).

2. RECOMMENDATIONS

- 2.1. The Leadership Team is recommended to appropriate for planning purposes under section 122 of the Local Government Act 1972 the Council's property at 175 – 177 Kensal Road, London W10 for the purpose of securing the development of new homes, community space, and retail space in accordance with planning consent that has been granted by the local authority (and as amended by any subsequent variations) in order to facilitate redevelopment.
- 2.2. The Leadership Team is recommended to delegate authority to the Executive Director for Housing and Social Investment in consultation with the Deputy Leader of the Council and Lead Member for Grenfell Housing and Social Investment to authorise the payment of compensation to those parties who have an entitlement as a result of the recommended decision.

3. REASONS FOR DECISION

- 3.1. By exercising its appropriation powers, the Council will ensure that its development of the Site for new homes can proceed in accordance with the planning permission granted in November 2020. The new homes being provided on the Site are included within the Council's New Homes Programme, which aims to deliver much-needed affordable housing throughout the Borough, and other types of housing tenure, in accordance with the Council's Housing Strategy.
- 3.2. In officers' view there is a compelling case in the public interest to facilitate this development. Planning permission for the provision of new homes having been granted (and funding being available), there is a reasonable expectation that the scheme will proceed subject to the risk of any private law action which might delay or prevent development being mitigated. 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, community and retail facilities, and bringing the Site into active use, outweighs the private loss. As noted, compensation will be payable to those who suffer a relevant loss.
- 3.3. There is a pressing need for new homes within the Borough, particularly those of an affordable tenure. By exercising its appropriation powers, the Council will ensure that the development of new homes can proceed in accordance with the planning permission already granted and meets the scheduled completion date. Appropriation of the Site enables the Council to progress the delivery of Stage One of the Council's New Homes Programme, without delay, which along with three other sites will deliver a total of 97 new homes comprising 49 new homes for social rent, 22 new homes for intermediate rent, and 26 homes available at market rent. The further stages of the New Homes Programme will follow.

4. BACKGROUND

- 4.1 The current Council Plan established that the Council will provide more genuinely affordable housing within the Borough, including at least 300 new homes for social rent.

- 4.2 Through the strategic objectives of the Council's Housing Strategy, the Council has committed to increasing the supply of genuinely affordable housing, including building new social rent homes on Council owned land.
- 4.3 The Council's New Homes Programme aims to deliver on the objectives of the Council's Housing Strategy to increase supply of genuinely affordable homes, by providing 600 homes across the Borough, with a minimum of 50% being available at social rent. In order to fund the delivery, there will be a mixture of other tenure types delivered across the programme.
- 4.4 The Council's emerging Social investment Strategy identifies investment in new and existing Council homes as a workstream for delivering social investment through RBKC's property assets.
- 4.5 On 9th October 2019 Leadership gave approval to the Council to develop plans for new homes on 4 sites as part of the New Homes Programme, and as part of that to apply for planning permission. Planning consent was given at Planning Committee of 21st July 2020 – reference PP/20/00879. The planning decision notice was issued on 10 November 2020.
- 4.6 The proposed development allows for the provision of 37 new homes on site. These will be a mixture of 10 intermediate rent, and 27 social rent homes in accordance with the planning permission.
- 4.7 The proposed development contributes towards the delivery of the Council's New Homes programme, which intends to provide much needed social, affordable, and market rent homes. In doing so, the delivery of the proposed development and the overall programme contributes towards the improvement of economic, social, and environmental wellbeing of the Borough and the immediate locality.
- 4.8 The Site currently includes a disused former community facility which had previously been let on commercial lease terms, and a prefabricated single-storey building. The asset is held within the General Fund and the properties are presently vacant in anticipation of development.
- 4.9 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.
- 4.10 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.

- 4.11 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. In order to ensure that the delivery of the new homes 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.
- 4.12 The appropriation by the Council will allow the Council to interfere with any adverse rights, but give a right to compensation.

5. PROPOSAL AND ISSUES

- 5.1. Without a decision to appropriate the Site for planning purposes, any parties whose rights are infringed by the development may seek to prevent or delay the development by bringing a private law claim for damages or an injunction.
- 5.2. Once land is validly appropriated for planning purposes and since planning permission has already been granted, the Council will be empowered under section 203 Housing and Planning Act 2016 to override existing rights without the possibility of a private law challenge. Section 204 of the same Act ensures that any third party who suffers a reduction in the value of their land on account of their rights being infringed will be entitled to claim statutory compensation when development is carried out.
- 5.3. The Council has written to each of the potentially affected parties who have been identified to date to seek to negotiate releases in relation to rights where relevant based on accepted compensation principles. These negotiations can be time consuming, and remain ongoing. 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 Confidential Part B Appendix.
- 5.4. 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's Leadership Team is due to consider a report recommending that the Site be appropriated for planning purposes. A summary of responses to the site notice is included in the Confidential Part B Appendix.
- 5.5. If agreement for the release of rights is not reached with any party and sections 203 and 204 of the Housing and Planning Act come into play, the matter of compensation can be referred to the Upper Tribunal for determination.
- 5.6. Any rights of statutory undertakers which burden the Site cannot be overridden using section 203.

6. OPTIONS AND ANALYSIS

- 6.1. Option 1: Do nothing. If the Council decide not to appropriate the Site then there is the potential that any affected neighbouring owners could bring a private law claim for damages or an injunction which could stop the construction of the project or delay its delivery.

- 6.2. Option 2: Seek to ensure that all rights of neighbouring owners that might be affected by the development have been released by agreement prior to commencement of development. It is considered unlikely that this could be achieved within a reasonable timescale to enable the development to proceed. This option could still leave uncertainty as to whether all adverse third party rights, including any unknown rights, had been effectively addressed.
- 6.3. Option 3: Take the decision to appropriate the Site for planning purposes. By exercising appropriation powers, affected parties will still receive compensation but they will not be able to delay or stop the development. Negotiations with identified parties for release of their rights by agreement can nonetheless continue in the interim. This is the recommended option.

7. CONSULTATION AND COMMUNITY ENGAGEMENT

- 7.1. Consultation for new homes and other facilities on the Site took place from late February 2019 to January 2020. The consultation included three rounds of 'face to face' events showing the progress made on the design of the new homes and enabled comments and feedback from the local community. The feedback has been incorporated into the final proposals.
- 7.2. Following the consultation, a planning application for the new homes and community and retail space was made by the Council in February 2020. The scheme obtained 'solution to grant' planning permission in July 2020. The development will deliver flexible community space, and retail space, alongside 37 new affordable homes with secure residential communal and amenity areas.
- 7.3. The Council has appointed advisers to actively investigate the effect that the Council's development will have on neighbouring owners. The Council has written to all of the potentially affected parties who have been identified to seek to negotiate releases in relation to rights where appropriate. Of those who have responded, where relevant, discussions are being undertaken with each party based along accepted rights of light compensation principles.
- 7.4. The Tri-borough Director of Audit, Risk, Fraud and Insurance has been consulted on the procurement and comments that there are no procurement implications arising from this report.

8. HUMAN RESOURCES AND EQUALITIES IMPLICATIONS

- 8.1. There are no Human Resources implications that arise from this proposal.
- 8.2. The Equality Act 2010 ("referred to below as the "EqA 2010") created a single general public sector equality duty ("referred to below as "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:
 - 8.2.1. the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the section 149(1)(a) EqA 2010.

8.2.2. 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)

8.3. 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. Proper consideration must be given to the PSED and its requirements.

8.4. There are no perceived impacts on the Public Sector equality duty that arise from this proposal.

9. LEGAL IMPLICATIONS

9.1 The Director of Law has been consulted and comments as follows:-

STATUTORY POWER TO APPROPRIATE

9.2 The Council has power under s122 of the Local Government Act 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. Land which has been appropriated under s122 is expressed to be “subject to the rights of other persons in over or in respect of the land concerned”. However, if the land is appropriated for planning purposes, the statutory authority to override private third party rights under s203 of the Housing and Planning Act 2016 would apply, as explained under the separate heading below.

9.3 The new purpose for which the Kensal Road 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 s227 of the Town and Country Planning Act 1990 (and other powers).

9.4 Appropriation however requires more than a mere decision to hold land for a different purpose. Case law dictates that an authority cannot properly appropriate land for planning purposes where it is known that doing so would affect third party rights unless it considers that the resulting interference with those rights is "necessary". Appropriation is considered to be equivalent to compulsory purchase in the sense that the same degree of necessity applies.

9.5 In addition, the Human Rights Act 1998 requires an authority to act in accordance with the rights under the European Convention on Human Rights which are protected by that Act. Those rights include Article 1 of the First Protocol (right to peaceful enjoyment of possessions) and Article 8 (right to respect for private life, family and home). Those are important rights but they are not unqualified. The authority must strike a fair balance between the public interest and the individual's rights and consider whether the interference is "proportionate". In relation to Article 1, the existence of a right to compensation may be relevant.

- 9.6 In short, a local authority cannot lawfully appropriate land for planning purposes unless it considers that it has sufficient reason in the public interest to interfere with third party rights which would be overridden by section 203 of the Housing and Planning Act 2016 and that the interference is no more than is necessary to achieve its legitimate aim (in this case, redevelopment and the provision of new housing to meet local needs).
- 9.7 Case law also indicates that the Council must give specific consideration to the question of whether the "land is no longer required" for the statutory purposes for which it was held before the appropriation. The authority must seek to strike a balance between comparative local (public interest) needs for one use of the land as opposed to another. It is not necessary for the land to be surplus or unused, although in this case the property is currently vacant. This component of s122 enables the Council to prioritise relative needs. It follows that the Council is entitled to look at the current use of the property as well as the prospective use of the property. The Council can consider matters such as the current condition and use of the property and whether it makes sufficient use of the site, as against the benefits of enabling redevelopment to provide additional housing to meet local housing needs.
- 9.8 Planning permission has been granted and the site has therefore been secured for the proposed redevelopment

POWER TO INTERFERE WITH RIGHTS

- 9.9 Where the conditions of s203 of the Housing and Planning Act 2016 are met it authorises building works and subsequent use of the land even if they involve interference with certain third party rights and interests, but subject to payment of statutory compensation to any third party who benefits from such a legal right and suffers loss in the form of a reduction in the value of their land.
- 9.10 The types of rights and interests which can be overridden where s203 applies include easements such as rights to light or rights of way and contractual restrictions on the use of land.
- 9.11 The four conditions for the application of s203 as they apply in the present case are that:
- (a) there is planning permission for the development (i.e. the building works and use) that cause the infringement of third party rights (as noted above, such permission was granted in November 2020);
 - (b) the development is undertaken on land which has been appropriated for planning purposes;
 - (c) the Council could (at least in principle) acquire land compulsorily for the purposes of the development (the Council has relevant compulsory purchase enabling powers under planning and other legislation); and
 - (d) the purpose of the development is related to the purpose for which the Council appropriated the land (which should be apparent from this report).

- 9.12 Thus, once the land has been validly appropriated for planning purposes the Council would be empowered to override private third party rights which burden the land by virtue of s203. 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.
- 9.13 Under s204 of the Housing and Planning Act 2016, the person who carries out the development, in this case the Council, would be liable to pay the statutory compensation. That compensation is calculated in the same way as compensation for "injurious affection" under s7 and s10 of the Compulsory Purchase Act 1965. This normally involves a "before and after assessment" of what the third party's land was worth before and after the interference takes place.
- 9.14 Appropriation will allow the Council to commence development works, notwithstanding interference with the rights of third parties affected by the development.
- 9.15 If the land is not appropriated before the Council commences works it would potentially be interfering with certain neighbouring owners' rights such as rights to light or other easements or covenants (unless all such rights have been released by agreement). The primary remedy for such an interference is an injunction preventing the development. 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. The consequences of such proceedings for the Council, if successful, could be to prevent delivery of the new homes or even if unsuccessful, would risk causing delay to the development.

10. FINANCIAL, PROPERTY, IT AND ANY OTHER RESOURCES IMPLICATIONS

- 10.1. The maximum potential compensation payment relating to rights of light are set out in the confidential appendix. Any compensation payments agreed will be met from the capital budget provision for the New Homes Programme.

**Anna Benbow – Director of Social Investment and Property
Local Government Act 1972 (as amended) – Background papers used in the preparation of this report:**

NONE

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Mandatory clearance requirements for all Key and Executive Decision reports

Cleared by Finance (officer's initials)	LS
Cleared by Corporate Finance (officer's initials)	LS
Cleared by Director of Law (officer's initials)	SS
Cleared by Communications (officer's initials)	NT

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

**EXECUTIVE DECISION REGARDING
APPROPRIATION OF LAND FOR PLANNING PURPOSES IN RELATION TO
175/177 KENSAL ROAD
05773/20/K/AB**

APPENDIX 1

1 SITE PLAN: 175 – 177 KENSAL ROAD

