

7. MARTLETS SHOPPING CENTRE, BURGESS HILL – APPROPRIATION ETC.

REPORT OF: HEAD OF CORPORATE RESOURCES
Contact Officer: Christopher Coppens, Thuso Selelo
Email: christopher.coppens@midsussex.gov.uk Tel: 01444 477213
Wards Affected: Burgess Hill
Key Decision: Yes
Report to: Cabinet
Date of meeting 10 July 2017

PURPOSE OF REPORT

1. The purpose of this report is:
 - (a) to consider the appropriation of the land comprising the site of the Martlets Shopping Centre, Burgess Hill, West Sussex edged in red on the site plan (“**the Site Plan**”) and on the location plan attached to this report at, Appendix A, (“**the Centre**”) from its current planning purposes to planning purposes of implementing planning permission DM/15/3858 granted by the local planning authority on 14th March 2016 (“**the 2016 Planning Permission**”);
 - (b) to consider the exercise of statutory powers to override certain third party rights at the Centre detailed in this report for purpose of enabling the comprehensive redevelopment of the Centre in accordance with the 2016 Planning Permission; and
 - (c) if the Council are minded to approve (a) and (b) above to authorise the Solicitor and Head of Regulatory Services to complete the necessary legal documentation, in respect of the third party rights set out in this report, required to override those third party rights or where agreement has been reached to either extinguish those third party rights or transfer those third party rights to the Council’s land at Cyprus Road Car Park, Burgess Hill.

SUMMARY

2. The Council owns the freehold of the Centre, which is let on a long commercial lease to NewRiver Retail (GP3) Limited (“**NRR**”) who acquired the lease in 2010. On 8 September 2015 the Council’s Cabinet received a report on proposals from NRR to redevelop the Centre and resolved accept the offer and authorised officers to agree terms for the surrender of the existing lease and the grant of a new lease to NRR following completion of the redevelopment. On 14 March 2016, NRR obtained planning permission reference DM/15/3858 (“**the 2016 permission**”) for the redevelopment of the Centre. The redevelopment scheme as approved will provide additional retail and other town centre uses (including a new cinema, hotel, 142 residential apartments and a new library) as well as public realm improvements.
3. Implementing the 2016 permission involves the demolition of buildings including the multi-storey car park, Martlets Heights, Martlets Hall and existing commercial units. NRR have identified potential impediments to implementing the 2016 permission, specifically, a range of parking and access rights over the Centre that benefit neighbouring properties in Church Walk, which Council granted by deed in 1982.

4. There remains a risk that the rights may still be legally enforceable by the owners of the relevant properties Church Walk. NRR, which wishes to implement the 2016 permission, cannot accept this risk. NRR is therefore unable to proceed with the redevelopment scheme until the Rights (and any other rights which may be affected by the development) have been removed.
5. NRR has been engaged in discussions with the Council regarding the potential exercise of the Council's statutory powers aimed at appropriating the land identified in the Site Plan for the purposes of delivering the redevelopment scheme approved under the 2016 permission, and of overriding the Rights. Overriding the Rights would provide the certainty required by NRR to allow the redevelopment scheme to proceed.
6. The Council, in its capacity as freeholder and as the planning authority, is supportive of the redevelopment scheme given the benefits it would bring (as detailed below).
7. The redevelopment scheme is considered to constitute a sustainable form of development. The apartments, the hotel, cinema and retail units are considered in planning terms to provide a vibrant mix of uses which have the potential to regenerate the town centre. In particular the redevelopment will deliver a significant and substantial improvement to the offering currently available within the town centre. It will also represent an enhancement to the town centre's physical and visual environment and attracts further inward investment and the enlargement of the town.
8. The regeneration benefits to be gained from the redevelopment scheme are considered to be of greater value to the local residents than the retention of the land as identified in the Site Plan for the existing purpose. In short, the benefits provided by the redevelopment proposals are considered to outweigh the desirability of retaining the land for the purpose for which it is currently held.
9. The Council indicated that it would be prepared to consider appropriating the land using the powers available to it (as contained within Section 122 of the Local Government Act 1972) for the purpose of allowing the implementation of the redevelopment scheme approved under the 2016 permission. Appropriating the land in this context would mean transferring the allocation of the land from one purpose to another, namely from its current use to the purpose of delivering the redevelopment scheme.
10. The Council has also indicated that, in principle, it would be prepared to consider the appropriate exercise of statutory powers available to it under Section 203 of the Housing and Planning Act 2016 to override the Rights. However, as a precursor to exercising its statutory powers, the Council required that NRR undertake detailed title investigations, not only to seek to identify all of the holders of the Rights, but to seek to agree a settlement with them. To illustrate, efforts have been made with rights holders affected by the loss of the right to park a car. To encourage a settlement, an alternative car parking space in the vicinity has been offered in return for the surrender of the right. Letters issued to rights holders have explained the desire of the Council and NRR (as developer of the redevelopment scheme) to find a solution which works for everyone. The Council's statutory powers to enable the redevelopment scheme to proceed have also been explained. A financial contribution towards legal advice and fees has also been made as part of the settlement terms. Some rights holders have accepted the offers made to settle, others have refused but the majority have not responded. Efforts to reach settlements have continued.
11. The Council has had the benefit of legal advice provided by leading planning counsel in respect of the exercise of the statutory powers noted above.

12. It is considered that the requirements to justify the use of appropriation powers to change the purpose for which the land is held have been met. In addition, the conditions applicable to relying on the provisions in Section 203 of the Housing and Planning Act 2016 to override the Rights are satisfied.

RECOMMENDATION

13. ***Subject to NewRiver (GP3) Limited indemnifying the Council from and against all legal, surveyors' and other costs, claims, liability and consideration (including costs and compensation payments arising from the exercise of the statutory powers outlined in this report) Cabinet are recommended to:***
- (a) appropriate land comprising the Martlets Shopping Centre, Burgess Hill, West Sussex, shown edged in red on the Site Plan annexed hereto at Appendix A, and currently held by the Council for planning purposes to planning purposes of implementing the redevelopment scheme approved by the local planning authority on 14 March 2016 under planning permission DM/15/3858 or any subsequent planning permission for a similar development scheme in respect of the Martlets Shopping Centre pursuant to the Council's powers under Section 122 of the Local Government Act 1972 with immediate effect;***
 - (b) if required, in order to facilitate the implementation of the development scheme mentioned in recommendation (a) above, be minded to recommend to Council the exercise the Council's powers of compulsory purchase over the land comprising the Martlets Shopping Centre, Burgess Hill, West Sussex, shown edged in red on the Site Plan annexed hereto at Appendix A, under the powers contained in Section 226 of the Town and Country Planning Act 1990, and having regard to the Secretary of State's policy in "Compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion: Guidance" issued by the Department for Communities and Local Government dated October 2015 as outlined in paragraphs 62 and 65 of this report;***
 - (c) if required, in order to facilitate the implementation of the development scheme mentioned in recommendation (a) above, be minded to exercise the Council's powers to override the existing third party rights identified in this report under the powers contained Section 203 of the Housing and Planning Act 2016 through the appropriation of the land comprising the Martlets Shopping Centre, Burgess Hill, West Sussex; and***
 - (d) authorise the Solicitor and Head of Regulatory Services and the Head of Corporate Resources to complete all necessary legal documentation to facilitate the implementation of the development scheme mentioned in recommendation (a) above and the grant of necessary rights over those parts of the Council's Cyprus Road Car Park, Burgess Hill, hatched in blue on the attached plan at Appendix D on terms acceptable to the Solicitor and Head of Regulatory Services and the Head of Corporate Resources.***

BACKGROUND

14. During the 1950's Central Government encouraged urban district councils to develop and adopt town plans for their areas with a view to stimulating a post war economic revival. In the late 1950's, the Council's predecessor, the Burgess Hill Urban District Council adopted the Burgess Hill and District Town Plan, which plan included a central development area for the comprehensive development of the town centre, known as the Burgess Hill CDA.
15. At the meeting of the Burgess Hill UDC's General Purposes Committee held on 1 November 1959, the Council authorised officers to investigate the acquisition of properties within the area of the Burgess Hill & District Town Map – Central Development Area and noted that some of the properties might shortly become available. On the 28 January 1961 the Burgess Hill UDC's Town Planning and Building Byelaw Committee approved a comprehensive development scheme for the Burgess Hill CDA.
16. Between 1959 and 1968 the Burgess Hill UDC used their planning powers to acquire various properties located within the area of the Burgess Hill CDA by agreement for planning purposes, but eventually had to resort to compulsory purchase powers and on 20 November 1968 the Minister of Housing and Local Government confirmed the Burgess Hill (Central Area) No.1 Compulsory Purchase Order 1965 under which the majority of the property now known as the Martlets Shopping Centre was acquired.
17. At the meeting of its Planning Committee held on 29 April 1970 the Burgess Hill UDC granted planning permission D70. BH1 for the development of a shopping centre. The scheme comprised a substantial shopping element, an open market, car parking for some 700 cars, an office block, new Civic Hall and Library, with some maisonettes.
18. At the meeting of its Planning Committee held on 15 October 1970 the Burgess Hill UDC, with the approval of the Minister of Housing and Local Government, authorised officers to enter into a Building Agreement with Land and House Corporation Limited for the comprehensive development of a shopping centre in Burgess Hill known as Phase I and subsequently a Head Lease of the shopping centre was entered into on 28th March 1974 for a term of 125 years from 25th March 1971, the parties to it being Burgess Hill Urban District Council, Land and House Corporation Limited and National Westminster Bank.
19. On 1 April 1974 the Burgess Hill UDC was abolished and replaced by Mid Sussex District Council as part of a comprehensive re-organisation of local government. The land comprising the Burgess Hill CDA became vested in Mid Sussex District Council on 1 April 1974.
20. Land and House Corporation Limited transferred their leasehold interest to the Friends Provident Life Office in 1980 and subsequently the lease was assigned to Postel Properties Limited.
21. A development brief for Burgess Hill Town Centre was prepared in 1986 for additional shopping of some 70,000 square feet plus car parking with the intention that there be at least a major space user as an anchor store, re-housing of the existing market and further residential units over the shops. At the time the development brief was published the Council were freeholders of 85% of the site.

22. At the meeting of the Council's Land and Property Resources Sub-Committee held on 4 May 1988 the Council resolved to grant a new lease to PosTel of Phase I, subject to an obligation to refurbish Phase I at their own expense and simultaneously with the development of Phase II – the Market Place Shopping Centre - and PosTel conveying the land required for Phase II free of charge, but in consideration of the grant of the new lease of Phase I.
23. On 2 May 1989 PosTel assigned the Head Lease to Sibec Developments Limited and negotiations then continued with them. However, as PosTel had been dragging their feet, which was delaying negotiations for the development of Phase II with another developer, the Council had by that time already resolved to compulsorily purchase PosTel's interests in the Town Centre and a number of compulsory purchase orders were made by the Council being the Mid Sussex District Council (Burgess Hill) Compulsory Purchase Orders 1988 numbers 1, 2, and 3, which confirmed by the Minister Environment and Transport in 1989.
24. The Martlets Phase I Shopping Centre Burgess Hill was refurbished by Sibec Developments Limited pursuant to a Deed of Covenant made on 23 February 1990 made in consideration of the Council granting them a new Head Lease on the same date for a term of 150 from 29 September 1989. The parties to the Head Lease were the Council, Sibec (Burgess Hill) Limited and Sibec Developments Limited, by which time the Council became freeholders of 100% of the site. There have been numerous assignments of the Head Lease since 1990, with NewRiver Retail Limited ("**NRR**"), having taken an assignment in 2010, being the present head leaseholder of the Martlets Shopping Centre Phase I ("**the Centre**"). The Council is also the local planning authority.
25. At a meeting of the Council's Cabinet held on 8 September 2015, the Council received a report from the Assistant Chief Executive on proposals for the re-development of Burgess Hill Town Centre, which outlined an offer from NRR for the redevelopment of the Martlets Shopping Centre and resolved to accept the offer and authorised the Solicitor to the Council (now the Solicitor and Head of Regulatory Services) and the Assistant Chief Executive to agree detailed Heads of Terms of Agreement and the new lease of the Martlets Shopping Centre, minute 16 refers.
26. On 14 March 2016, the Council, in its capacity as the local planning authority, granted planning permission DM/15/3858 ("**the 2016 permission**") for the redevelopment of the Centre including, the demolition of the multi-storey car park.
27. Potential impediments to the redevelopment of the Centre have been identified by NRR. These relate to rights under a deed dated 8 February 1982 ("**the 1982 Deed**") under which the Council granted the neighbouring property, now known as 93 – 107 Church Walk, Burgess Hill, the rights set out below:
 - (a) the right to park vehicles by the multi-storey car park in the positions coloured in red on the plan annexed to the 1982 Deed, a copy of which is annexed hereto at Appendix B;
 - (b) the right to pass over and across so much of the multi-storey car park as is necessary to reach those positions from and to Civic Way; and
 - (c) the right to pass on foot only across so much of the car park and private pathways to reach the part of Church Road which was, at the date of the 1982 Deed, restricted to pedestrians.

28. There is some uncertainty regarding the existence of the Rights and precisely how they are held. The division of the property into a number freehold titles and further subdivision of those freehold titles into a number of leasehold titles seems to have extended the benefit of the Rights to a number of interests not originally identified in the 1982 Deed. In particular, in relation to the parking rights, it appears that when the freehold title was subdivided, the rights which attached the whole of 93-107 Church Walk were not separately allocated to portions of the original interest. This creates uncertainty as to precisely how the rights are held.
29. Implementation of the 2016 permission necessitates the demolition of buildings including the multi storey car park, Martlets Heights, Martlets Hall and existing commercial units and the construction of new buildings at the locations where the Rights may be exercised. Undertaking the redevelopment of the Centre would therefore, irrespective of the precise nature and extent of the Rights (and any other rights which may be affected), prevent the Rights being exercised, but as the Rights are legally enforceable rights that can potentially be enforced against both the Council and NRR, if they are still used, the risk of enforcement is such that it would prevent NRR undertaking the redevelopment of that part of the scheme approved under the 2016 permission.
30. The Council in its capacity as freeholder supports the redevelopment of the Centre, given the benefits such redevelopment brings to the Town as set out below and in the report to Cabinet held on 8 September 2015, and given those benefits, the Council has been approached by NRR regarding the potential exercise of the Council's statutory powers aimed at appropriating the land identified in the Site Plan for the purposes of delivering the redevelopment scheme approved under the 2016 permission, and of overriding the Rights. Overriding the Rights would provide the certainty required by NRR to allow the redevelopment scheme to fully proceed.
31. The redevelopment scheme is considered to constitute a sustainable form of development. The apartments, the hotel, cinema and retail units are considered in planning terms to provide a vibrant mix of uses which have the potential to regenerate the town centre. In particular the redevelopment will deliver a significant and substantial improvement to the offering currently available within the town centre. It will also represent an enhancement to the town centre's physical and visual environment.
32. The regeneration benefits to be gained from the redevelopment scheme are considered to be of greater value to the local residents than the retention of the land as identified in the Site Plan for the existing purpose. To put it another way, the benefits provided by the redevelopment proposals are considered to outweigh the desirability of retaining the land for the purpose for which it is currently held.
33. The Council is satisfied that statutory powers contained within Section 203 of the Housing and Planning Act 2016 could be used to remove the Rights. However, the Council has made clear to NRR that the emphasis should always be on securing agreements with the affected parties on a voluntary basis if at all possible. Relying on statutory powers is a last resort to be used only where it is either not possible or is impractical for NRR to agree voluntary settlements.

34. As a precursor to exercising its statutory powers, the Council required that NRR undertake detailed title investigations not only to seek to identify all of the holders of the Rights, but to seek to agree a settlement with all of the holders of the Rights. Letters, in the forms of the annexed drafts at Appendix C were sent to the registered owners and occupiers of the Properties at 93 – 107 Church Walk, Burgess Hill explaining the proposals for the redevelopment of the Centre; how this affects their rights and the desire of the Council and NRR to find a solution that, so far as possible, works for everyone. The letters contained an offer of alternative parking rights on the Council's Cyprus Road Car Park and an offer of a financial contribution towards legal advice and fees to enable recipients to obtain appropriate advice on the terms proposed. The letters also explained the Council's statutory powers and stressed the importance of the redevelopment to the inhabitants of Burgess Hill. At the date of writing this report:

10 letters sent in December 2016 and 10 letters sent in May 2017 via the Royal Mail and copies of the May letters hand delivered to the properties affected with a short covering letter. In summary:

4 rights holders have accepted the offer of alternative car parking or have agreed to surrender their rights in return for a cash settlement;

4 have refused to treat or are seeking legal advice; and

the remaining 2 rights holders have not responded at all.

Efforts to communicate with rights holders are continuing.

35. The Council is satisfied that NRR have taken reasonable steps to engage with affected parties and to seek to enter into voluntary agreements. The Council accepts that it is impractical to attempt to rely solely upon voluntary agreements. A failure to reach an agreement would jeopardise the implementation of the redevelopment scheme due to the legal and business risks involved.
36. The Council is also conscious that NRR has a challenging programme for the delivery of the redevelopment scheme, which is driven by (amongst other things) the lifespan of the planning permission. Therefore, without the Council resorting to the use of its statutory powers, there is a risk that the benefits of the redevelopment scheme would not be realised.

PRESENT STATUS AND STATUTORY PURPOSE

37. When land is acquired by a local authority for a statutory purpose or function, it continues to be held by the local authority for that purpose of function until formally appropriated to another purpose or function.
38. Where land is acquired by a local authority for a particular statutory purpose or function and the status under which the land was acquired restricts its use to that particular statutory purpose then the land can only be used by the local authority for that statutory purpose, notwithstanding its designation in the local plan or the existence of any planning permission granted in respect of the land.
39. The land comprising the Martlets Shopping Centre, Burgess Hill was originally acquired for the purpose of the Burgess Hill & District Town Map – Central Development Area and as such was acquired for planning purposes of redeveloping the town centre.

THE PROPOSAL TO APPROPRIATE

40. It is proposed that the Centre be appropriated from the planning purposes for which it is currently held to planning purposes of implementing the 2016 permission, in accordance with the Council's powers under Section 122 of the Local Government Act 1972.
41. If land is held or appropriated for planning purposes by the Council, then Section 203 of the Housing and Planning Act 2016 provides that a local authority or a person deriving title from a local authority may carry out building or maintenance work on the land even if it involves interfering with a relevant right or interest, or breaching a restriction as to the user of the land by virtue of a contract, provided that there is planning permission for such work or user of the land, the local authority could acquire the land compulsorily for the relevant work or user of the land, and the relevant work or user of the land is related to a purpose for which the land was appropriated.
42. Appropriation of the Centre for planning purposes of implementing the 2016 permission or any subsequent planning permission for a similar development scheme in respect of the Centre would facilitate regeneration of the Town Centre in Burgess Hill.

POWER TO APPROPRIATE LAND

43. The Council has a general power to appropriate land from one statutory purpose to another under Section 122 of the Local Government Act 1972 ("**Section 122**"), which confers powers on local authorities that have acquired land for any statutory purpose and are holding that land for the purposes for which it was acquired, and for which it is no longer required, to appropriate that land for planning purposes.
44. For ease of reference, Section 122 provides:

"122.— Appropriation of land by principal councils.

(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned."
45. Appropriation of land is an Executive function under Section 9D of the Local Government Act 2000.

POWER TO OVERRIDE RIGHTS

46. With effect from 13 July 2016, provisions in the Housing and Planning Act 2016 replaced section 237 Town and Country Planning Act 1990 - concerned with overriding easements and other rights through the acquisition or appropriation of land for planning purposes.
47. For ease of reference, Section 203 of the Housing and Planning Act 2016 ("**Section 203**") provides:

"203 Power to override easements and other rights

(1) A person may carry out building or maintenance work to which this subsection applies even if it involves—

- (a) interfering with a relevant right or interest, or
- (b) breaching a restriction as to the user of land arising by virtue of a contract.

(2) Subsection (1) applies to building or maintenance work where—

- (a) there is planning consent for the building or maintenance work,
- (b) the work is carried out on land that has at any time on or after 13 July 2016 —
 - (i) become vested in or acquired by a specified authority, or
 - (ii) been appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990,
- (c) the authority could acquire the land compulsorily for the purposes of the building or maintenance work, and
- (d) the building or maintenance work is for purposes related to the purposes for which the land was vested, acquired or appropriated as mentioned in paragraph (b).

(3) Subsection (1) also applies to building or maintenance work where—

- (a) there is planning consent for the building or maintenance work,
- (b) the work is carried out on other qualifying land,
- (c) the qualifying authority in relation to the land could acquire the land compulsorily for the purposes of the building or maintenance work, and
- (d) the building or maintenance work is for purposes related to the purposes for which the land was vested in, or acquired or appropriated by, the qualifying authority in relation to the land.

...

(7) Land currently owned by a specified authority is to be treated for the purposes of subsection (2) (c) or (5) (c) as if it were not currently owned by the authority.

(8) Land currently owned by a qualifying authority is to be treated for the purposes of subsection (3) (c) or (6) (c) as if it were not currently owned by the authority."

48. "Other qualifying land" is defined in Section 205(1) of the Housing and Planning Act 2016 to mean (amongst others) land that has, at any time before 13 July 2016, been "acquired or appropriated by a local authority for planning purposes as defined by section 246(1) of the Town and Country Planning Act 1990".

49. Section 204 of the Housing and Planning Act 2016 provides for a right to compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by Section 203.

LEGAL ANALYSIS – USE OF POWERS OF APPROPRIATION UNDER SECTION 122

50. The exercise of the powers within Section 122 requires that:
- a) The land is capable of being acquired by agreement for the purposes for which the Council are proposing to appropriate it. The power to appropriate land which is already owned for a specific purpose is no greater than the power to acquire land by agreement for the same purpose;
 - b) The land must already belong to the Council;
 - c) The land must be no longer required for the purpose for which it is currently appropriated; and
 - d) The purpose for which the Council is appropriating must be authorised by statute.

Criterion a)

51. The question which must be asked is: "*could the land as identified in the Site Plan have been acquired by agreement for the purposes for which the Council is proposing to appropriate it?*" The answer to the question must be yes. The relevant power to acquire land by agreement is provided for in Section 227 of the Town and Country Planning Act 1990 ("**the 1990 Act**"). That section refers to the powers of compulsory acquisition of land for development and other planning purposes under Section 226 of the 1990 Act. Under Section 226, it is necessary for the Council to demonstrate how the acquisition of the land identified in the Site Plan;
- i. "will facilitate the carrying out of development, re-development or improvement on or in relation to the land; or
 - ii. 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."

52. A local authority must not exercise the power under paragraph (i) above 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.

53. The redevelopment scheme to be delivered pursuant to the 2016 permission is likely to contribute to the promotion of the economic, social and environmental well-being of the area for the reasons detailed in the Committee Report dated 10 March 2016, including the contribution to the regeneration of the town centre.

54. The land could have been acquired by agreement in order to facilitate the redevelopment scheme authorised under the 2016 permission.

55. Criterion a) is satisfied.

Criterion b)

56. The Council is the freeholder of the land as identified in the Site Plan.

57. Criterion b) is satisfied.

Criterion c)

58. The land as identified in the Site Plan is no longer required for the purpose for which it is currently appropriated. The improvements which the redevelopment scheme will deliver under the 2016 permission are considered to be of greater value to the local residents than the desirability of retaining the land for the purposes for which it is currently held. It is required to appropriate the land in order to facilitate the redevelopment scheme authorised under the 2016 permission.

59. Criterion c) is satisfied.

Criterion d)

60. The purpose is to facilitate the delivery of the redevelopment scheme already approved under the 2016 permission. As such, the purpose for which the Council is appropriating the land as shown in the Site Plan is authorised by statute.

61. Criterion d) is satisfied.

Policy Guidance

62. "Compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of compulsion" as issued by the Department for Communities and Local Government dated October 2015

63. In summary the policy tests associated with the exercise of powers of compulsory acquisition under section 226 are as follows:

- That the scheme accords with the development plan for the area;
- That the scheme is deliverable in a reasonable timescale (including that funding is available);
- The scheme supports the economic and/or social wellbeing of the area;
- There have been attempts to acquire the rights by negotiation;
- That there are no other impediments to the delivery of the scheme.

64. The reasoning in this report supports positive conclusions on each of these tests.

65. The policy tests are therefore met.

Use of Powers of Appropriation – summary

66. We are satisfied that the powers in Section 122 are satisfied in the present circumstances. This is consistent with external legal advice provided by leading planning counsel.

Legal Analysis – Use of Power to Override Rights under Section 203

67. The effect of Section 203 is that rights such as those identified above may be overridden in certain circumstances, giving rise to a claim for compensation but to no other cause of action. The requirements for such an effect are set out in Section 203(2) and (3).

68. Section 203(2) deals with circumstances where the land is vested in or acquired by, or appropriated for planning purposes by, an authority after 13 July 2016. For the effect of the section to be relied upon, it must be shown that there is:

- (i) a planning consent for the building work concerned;
- (ii) that the authority “*could acquire the land compulsorily for the purposes of the building or maintenance work*”; and
- (iii) that the building work is “*for purposes related to the purposes for which the land was vested, acquired or appropriated*”.

Criterion (i)

- 69. There is a planning permission in place for the building work concerned, namely, the 2016 permission.
- 70. Criterion (i) is satisfied.

Criterion (ii)

- 71. The Council could, in principle, acquire the land as identified in the Site Plan compulsorily for the purposes of the building or maintenance work as permitted under the 2016 permission.
- 72. The test for compulsory acquisition is detailed above in terms of Section 226 of the 1990 Act. Should the Council decide to acquire the land by compulsorily, it would of course have regard to the Secretary of State’s policy in the guidance document: “Compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of compulsion” as issued by the Department for Communities and Local Government dated October 2015.
- 73. Criterion (ii) is satisfied.

Criterion (iii)

- 74. The building work to be undertaken pursuant to the 2016 permission is for purposes related to the purposes for which the land was vested, acquired or appropriated. In other words, even if the land is already held for planning purposes, those purposes do not necessarily relate to the redevelopment scheme authorised by the 2016 permission. It is open to the Council to re-appropriate the land as identified in the Site Plan for the purposes of facilitating the redevelopment scheme.
- 75. Criterion (iii) is satisfied.

Use of Power to Override Rights – summary

- 76. The land as identified in the Site Plan could in principle be acquired by the Council, applying the presumption in Section 203(7) that it is not currently owned by it.
- 77. We are satisfied that the powers in Section 203 (2) are satisfied in the present circumstances. They represent an appropriate way of addressing NRR’s concerns regarding the existence of third party Rights and the impediment they constitute to undertaking the redevelopment scheme. As above, this accords with external legal advice provided by leading planning counsel.

CONCLUSION

78. The Council is the freeholder of the land on which the Centre is constructed and as identified in the Site Plan. The land is not currently held by the Council for the purposes of the redevelopment scheme as approved under the 2016 permission. Accordingly, the land must be appropriated for the purposes of delivering the redevelopment scheme before it can be developed.
79. A potential impediment to the delivery of the redevelopment scheme has been identified. Were the redevelopment scheme to be carried out as per the 2016 permission, it would prevent the Rights being exercised. The redevelopment cannot coexist with the Rights. Efforts have been made to agree voluntary terms with rights holders but all of the Rights have not been relinquished. The risk of enforcement of the Rights remains.
80. The regeneration benefits to be gained from the redevelopment scheme are considered to be of greater value to the local residents than the retention of the land as identified in the Site Plan for the existing purpose. To put it another way, the benefits provided by the redevelopment proposals are considered to outweigh the desirability of retaining the land for the purpose for which it is currently held.
81. The Council indicated that it would be prepared to consider appropriating the land using the powers available to it (as contained within Section 122 of the Local Government Act 1972) for the purpose of allowing the implementation of the redevelopment scheme approved under the 2016 permission. Appropriating the land in this context would mean transferring the allocation of the land from one purpose to another, namely from its current use to the purpose of delivering the redevelopment scheme.
82. The Council has also indicated that in principle, it would be prepared to consider the appropriate exercise of statutory powers available to it under Section 203 of the Housing and Planning Act 2016 to override the Rights. However as a precursor to exercising its statutory powers, the Council required that NRR undertake detailed title investigations not only to seek to identify all of the holders of the Rights but to seek to agree a settlement with all of the holders of the Rights. To illustrate, efforts have been made with rights holders affected by the loss of the right to park a car. To encourage a settlement, an alternative car parking space in the vicinity has been offered in return for the surrender of the right. Letters issued to rights holders have explained the desire of the Council and NRR (as developer of the redevelopment scheme) to find a solution which works for everyone. The Council's statutory powers to enable the redevelopment scheme to proceed have also been explained. A financial contribution towards legal advice and fees has also been made as part of the settlement terms. Some rights holders have accepted the offers made to settle, others have refused but the majority have not responded. Efforts to reach settlements have continued.

REASONS FOR THE RECOMMENDATION

83. The Martlets Shopping Centre ("**the Centre**"), which is the subject of this report, is in the freehold ownership of Mid Sussex District Council ("**the Council**").
84. NewRiver Retail Limited ("**NRR**") has a long leasehold interest in the Centre.

85. On 14 March 2016, the Council granted planning permission for the redevelopment of the Centre. The redevelopment involves the construction of 142 residential apartments, a hotel, and cinema, library and retail units. Together the redevelopment is considered to provide a vibrant mix of uses which has the potential to regenerate the town centre. In particular the redevelopment will deliver a significant and substantial improvement to the offering currently available within the town centre as well as representing an enhancement to its physical and visual environment. The addition of the residential apartments would also make a significant contribution towards meeting the housing supply need.
86. Appropriation under Section 122 of the Local Government Act 1972 engages the provisions of Section 203 of the Housing and Planning Act 2016. The provisions of Section 203 override third party interests in the Rights Land and convert them to a compensatable sum. Section 203 is only engaged if the development carried out is in accordance with the planning permission to which the appropriation or acquisition for planning purposes specifically relates i.e. in this case the 2016 permission.

POLICY CONTEXT

87. Regeneration of Burgess Hill town centre is a corporate priority. The corporate aim of achieving a better environment through distinctive and sustainable towns is supported by proposals such as the redevelopment of the Centre by NRR.
88. Town centre improvements also contribute to the aims of the Sustainable Communities Strategy 2008-2018 as follows:
89. Theme 2: Ensuring cohesive and safe communities (with a strong sense of identity and civic pride);
90. Theme 3: Promoting economic vitality by delivering vibrant town centres that meet economic, social and cultural aspirations of the community.
91. Policy DP2 of the consultation draft of Mid Sussex District Plan states that the Council's strategic aims in relation to retail development are 'to create and maintain town and village centres that are vibrant, attractive and successful and that meet the needs of the community'. The proposed redevelopment of the Centre contributes substantially to achieving this objective.
92. In planning terms, the redevelopment scheme enjoys planning permission under the 2016 permission. It is therefore acceptable in land use planning terms. The committee report contains a very comprehensive analysis of planning application reference DM/15/3858 and is a background paper to this report. However for ease of reference, the following should be noted.
93. The primary purpose of the redevelopment scheme is to provide enhanced town centre facilities. It provides for a significant and substantial improvement to the offer of the town centre, as well as its physical and visual environment.
94. The enlarged retail offer, the hotel and cinema are matters that will attract additional visitors to the town centre and increase the vitality and viability of the town centre's daytime and night time economies.

95. The redevelopment scheme also includes 142 new residential units which are an important component. The 142 residential units will make a significant contribution towards the housing supply and will provide additional economic benefits associated with the new homes bonus and the increased business rates revenue. The redevelopment scheme will result in the creation of significant number of permanent jobs, as well as temporary jobs during the construction phase.
96. The principle of the proposed redevelopment and the uses proposed are supported by the development plan, which includes the newly made Burgess Hill Neighbourhood Plan. These are matters that attracted significant weight in support of scheme.

OPTIONS CONSIDERED

97. There are two options open to the Council:

1. To decide that the land as identified in the Site Plan is no longer required for the statutory purpose(s) for which it is being held at present; to confirm the appropriation of the land under Section 122 for the purposes of allowing the implementation of the redevelopment scheme approved pursuant to the 2016 permission; and to rely on the powers contained within Section 203(2) of the Housing and Planning Act 2016 in respect of the Rights and any other rights.

Relying on the rights available to the Council in terms of Section 122 and Section 203 would facilitate the delivery of the redevelopment scheme as described above.

This is the recommended option.

2. To decide that the land as identified in the Site Plan is still required for the statutory purpose(s) for which it is being held at present, and therefore not to appropriate the land under Section 122 (and by extension not to seek to override the Rights using the powers contained within Section 203(2) of the Housing and Planning Act 2016).

If the Council considers that the land is still required for the statutory purpose(s) for which it is being held at present, then the statutory test in Section 122 of the Local Government Act 1972 would not be met. In those circumstances, Section 203 would not therefore be engaged.

This option is not recommended.

FINANCIAL IMPLICATIONS

98. There are no financial implications directly arising as a result of these proposals. However it should be noted that engagement of Section 203 (overriding the Rights) would be subject to the payment of compensation.
99. It should be noted that if NRR was to fail to pay the compensation due to those parties whose rights have been overridden, the Council could be pursued for these sums. The Council would only seek to exercise the powers within Section 203 subject to the provision of an indemnity from NRR in respect of these sums.

RISK MANAGEMENT IMPLICATIONS

100. As indicated above, the Council could be pursued for the sums payable in compensation as a result of the overriding of the Rights. However, the Council would only seek to exercise the powers within Section 203 once an indemnity from NRR had been provided in respect of these sums. The provision of an indemnity in acceptable terms would satisfactorily mitigate the risk to the Council.

EQUALITY AND CUSTOMER SERVICE IMPLICATIONS

101. There are no equalities or customer service implications arising as a result of these proposals.

OTHER MATERIAL IMPLICATIONS

102. None.

BACKGROUND PAPERS

1. Committee Report to the District Wide Committee in respect of planning application DM/15/3858 dated 10 March 2016
2. the Cabinet Report dated 8 September 2015
3. Site Plan and Location Plan
4. Rights Plan
5. Template Letters
6. Cyprus Road Plan