



REPORT TO: PLANNING COMMITTEE

DATE: 25 SEPTEMBER 2018

REPORT OF THE: COUNCIL SOLICITOR

TITLE OF REPORT: PROPOSED ACQUISITION AND DISPOSAL OF LAND FOR PLANNING PURPOSES – LAND AT RICCAL DRIVE, HELMSLEY, NORTH YORKSHIRE

WARDS AFFECTED: HELMSLEY

1.0 PURPOSE OF REPORT

- 1.1 This report seeks the approval of the Planning Committee in principle for the potential acquisition of land required for open space for planning purposes by agreement under section 227 (“S227”) of the Town & Country Planning Act 1990 as amended (“TCPA”) enabling the operation of powers under Section 203 of the Housing and Planning Act 2016 (s203 of the 2016 Act) to facilitate the carrying out of residential development at Riccal Drive, Helmsley, North Yorkshire (“the Site”) (shown coloured black on the plan at **Appendix 1**).

2 EXECUTIVE SUMMARY

- 2.1 The project for residential development at Riccal Drive, Helmsley, North Yorkshire involves two parcels of land:

- (i) Land subject to a CPO (Compulsory Purchase Order) which has been confirmed by the Secretary of State ;
- (ii) Land needed as open space not covered by the CPO.

Both parcels are subject to restrictive covenants that prohibits housing development on the land. This report relates to the open space land.

- 2.2 The majority of the housing site in question at Riccal Drive is the subject of a compulsory purchase order. The District Council is still progressing the compulsory purchase process and this will extinguish existing restrictive covenants for the majority of the area proposed for residential development.
- 2.3 It is not clear why, historically, the proposed open space was not included in the Compulsory Purchase Order or as part of the residential allocation of the land in the Helmsley Plan.
- 2.4 The District Council’s Planning Committee resolved to grant planning permission for a residential development scheme (“The Development”) for land at Riccal Drive on 8 May

2018 under LPA reference 17/01238/MFUL. The Owners and the Applicant have advised that there is a significant threat to progressing the scheme. There is a need to place pre-construction orders for materials and procure the main build contract in order to progress the development. The Site is encumbered with restrictive covenants and the owner of the covenant may wish to maintain actionable claims. There is therefore concern that the development programme is at risk due to the inability to settle remaining rights.

- 2.5 The Owner and the Developer have asked if the District Council would be prepared to consider intervening by utilising the powers under S227 to enable reliance on the powers in s203 of the 2016 Act. In essence, this converts legal rights under restrictive covenants into a right to compensation. For this to occur it would be necessary for the District Council to acquire an interest in the Site, and the Council's compensation liabilities to be indemnified by the Owner.

3.0 RECOMMENDATION

- 3.1 It is recommended that the Planning Committee authorise acquisition of an interest in the Site by the District Council under Section 227 of the Town and Country Planning Act 1990 as amended in order to engage powers under S203 of the 2016 Act for the planning purpose of facilitating the carrying out of the Development (in its current form or as it may be varied or amended) and subsequent disposal of that interest to the Developer (or an associated company) under section 233 of the Town and Country Planning Act 1990 as amended, subject to the Council Solicitor determining in consultation with the Chairman of the Planning Committee :

(i) that there is a suitable Indemnity in place; and

(ii) the terms on which the acquisition and disposal referred to above are to be made.

4.0 REASON FOR RECOMMENDATION

- 4.1 The District Council is exercising compulsory purchase powers for the proper planning of the area to enable housing and employment development. No progress was being made by the parties in bringing the sites forward for housing and employment development prior to the involvement of the local authority and the last resort of using compulsory purchase powers.
- 4.2 It is considered that the District Council also needs to exercise powers for the acquisition and disposal of land for the provision of open space required for the proposed development to comply with development plan policy on the provision of open space for the proper planning of the area to enable housing development.
- 4.3 Section 203 of the Housing and Planning Act 2016 provides that when land acquired for planning purposes is developed in accordance with a planning permission that is incompatible with the continuation of easements and covenants affecting the land, those easements and covenants are extinguished. There is currently a covenant on the site that prohibits housing development. When planning permission for such a development is granted and the development is undertaken, the covenant will be extinguished. Section 204 of the 2016 Act provides that compensation may be claimable from the person actually carrying out the development. The amount of compensation payable represents the diminution in the value of the land previously benefitting from the covenant - as a result of no longer being able to enjoy it. (See

Holliday v Breckland District Council 2012).

- 4.4 A GVD does not, when development is to be undertaken by a third party, extinguish easements and covenants. Section 203 will do so when the covenants and easements are incompatible with the development. Where they are not incompatible, they will continue.

5.0 SIGNIFICANT RISKS

- 5.1 There are no significant risks associated with the recommendation of this report.

6.0 POLICY CONTEXT AND CONSULTATION

- 6.1 The site is allocated for residential use in the Helmsley Plan. The Helmsley Plan itself progressed to adoption following confirmation that the District Council would use compulsory purchase powers to facilitate the development of the site.

7.0 REPORT

Background

- 7.1 The District Council resolved to grant planning permission under reference 17/01238/MFUL for redevelopment of Riccal Drive, Helmsley, North Yorkshire (“the Housing Site”) on 8 May 2018, subject to a Section 106 Agreement. The planning permission relates to the erection of 7no. four bedroom dwellings, 33no. three bedroom dwellings and 6no. two bedroom dwellings with associated garaging, parking, amenity areas, landscaping, bridge across Spittle Beck, associated infrastructure, public open space and formation of vehicular access
- 7.2 As set out in the Planning Officer’s report to the Planning Committee meeting on 8 May 2018, the proposal was considered to be in substantial compliance with the policies that relate to it and would provide much needed housing and affordable housing .
- 7.3 The District Council has been approached by the Owner and Developers to seek assistance in overcoming the potential rights of the owner of restrictive covenants that would adversely impact on the achievement of the Development
- 7.4 The Owner and Developers have asked if the District Council would be prepared to consider acquiring an interest in the Site for the planning purpose of facilitating the carrying out of the Development, if necessary, to enable the operation of Section 203 of the 2016 Act and other relevant provisions. Such interest would be transferred to the Developers who would be able to proceed with the Development.

Considerations

- 7.5 In making a decision as to whether to acquire an interest in the land for the planning purpose of the Development, the following matters are relevant considerations that should be taken into account by the District Council:-
- i) The existing restrictive covenant affected and the likely extent of interference with restrictive covenant ;

- ii) Whether interference with the restrictive covenant is necessary in order to allow the Development to be carried out and, whether agreement can be reached for release of those rights on what terms and in what timescale;
 - iii) Whether interference with the restrictive covenants is necessary in order to allow the Development to be carried out and, whether agreement can be reached for release of those rights on what terms and in what timescale;
 - iv) Whether acquisition will facilitate the carrying out of the Development;
 - v) Whether the Development will contribute to one or more of the following objectives and thus be in the public interest:-
 - a) The promotion or improvement of the economic well-being of the area;
 - b) The promotion or improvement of the social well-being of that area;
 - c) The promotion or improvement of the environmental well-being of the area;
 - vi) Whether the benefits of the Development could be achieved without giving rise to all or some of the infringements.
- vii) Whether the public benefits arising from the recommendations are proportionate to the infringements

Each of these issues is dealt with in turn.

The existing restrictive covenant rights and the likely extent of Infringements

- 7.6 The District Council is exercising compulsory purchase powers and voluntary acquisition powers for the proper planning of the area to enable housing and employment development. No progress was being made by the parties in bringing the sites forward for housing and employment development prior to the involvement of the local authority and the last resort of using compulsory purchase powers.
- 7.7 There is currently a covenant on the housing site that prohibits housing development. When planning permission for such a development is granted and the development is undertaken, the covenant will be extinguished.
- 7.8 Section 203 of the Housing and Planning Act 2016 provides that when land acquired for planning purposes is developed in accordance with a planning permission that is incompatible with the continuation of easements and covenants affecting the land, those easements and covenants are extinguished. There is currently a covenant on the housing site that prohibits housing development. When planning permission for such a development is granted and the development is undertaken, the covenant will be extinguished. Section 204 provides that compensation may be claimable from the person actually carrying out the development. The amount of compensation payable represents the diminution in the value of the land previously benefitting from the covenant - as a result of no longer being able to enjoy it. (See *Holliday v Breckland District Council* 2012).

Whether interference with the restrictive covenants is necessary in order to allow the Development to be carried out and, whether agreement can be reached for release of those rights on what terms and in what timescale;

- 7.9 In deciding whether it is necessary to acquire an interest in land under S227 so as to be able to rely on s203 of the 2016 Act and thereby facilitate the carrying out of the Development, consideration should be given to whether agreements to lift the restrictive covenant can be reached with the owner affected on reasonable terms and within reasonable timeframes.

- 7.10 Given the history of failure to reach agreement between the relevant parties it is highly unlikely agreement would be reached with in a timeframe that enables the Development to be carried out in the foreseeable future. It is necessary to engage s203 of the 2016 Act to authorise interference with rights in order to facilitate the carrying out of the proposed development of the Site.
- 7.11 Against that background the Owner and the Developer consider that there is considerable uncertainty as to whether they would be able to conclude negotiations and enter binding deed of release of the restrictive covenant within time to enable the works programme to commence in the near future that would facilitate completion of the development during the life of the planning permission.

Whether acquisition will facilitate the carrying out of the Development;

- 7.12 The District Council have resolved to grant planning permission for the Development subject to the land owner entering into a planning obligation. The landowner is likely to enter into such an obligation and therefore it is highly likely that planning permission will be granted.
- 7.13 However, the Development cannot be carried out unless the owner of the restrictive covenant agree to release the covenants.
- 7.14 If the Site is acquired so as to engage s203 of the 2016 Act the Owner and Developer will have sufficient confidence to obtain funding and to proceed; as a result the acquisition by the District Council will facilitate the carrying out of the Development.
- 7.15 **Whether the Development will contribute to one or more of the following objectives and thus be in the public interest:-**
- a) The promotion or improvement of the economic well-being of the area;
 - b) The promotion or improvement of the social well-being of that area;
 - c) The promotion or improvement of the environmental well-being of the area;

The proposed residential development gives rise to the following benefits:

- (i) Housing;
- (ii) The provision of 16 units of affordable housing;
- (iii) Significant improvement to the character and appearance of the area;
- (iv) Provision of public open space
- (v) Improvements to public rights of way.

The Development is considered to be in substantial compliance with policies.

- 7.16 The provision of open space is supported by the following policies of the Local Plan:
- 7.17 The requirement to secure on-site open space as part of new development is clear in the Development Plan. Policy H13 of the Helmsley Plan establishes the standard for the level and type of open space provision that the Local Planning Authority will look to secure when it considers planning applications at the Town. In addition, a development brief for this site in the Helmsley Plan, also recognises the opportunity to improve green infrastructure around the site, particularly next to Spittle Beck.

7.18 In conclusion, the use of S227 to enable the operation of s203 of the 2016 Act will facilitate the carrying out of the Development which will contribute to the achievement and improvement of the economic well-being of this part of the District (for example through the provision of housing including 16 affordable housing units) and of the environmental and social well-being of this part of the District (for example through the provision of public open space , productive use of an unused site, and the significant improvement to the character and appearance of the area).

7.19 Whether the benefits of the Development could be achieved without giving rise to all or some of the infringements.

The key benefits of the Development have been identified above.

The key benefit of the Development need to be balanced against the infringement of the restrictive covenant by the productive use of an unused site.

The benefits to be derived from the Development could not be achieved without giving rise to infringements of the restrictive covenants.

7.20 Are the public benefits proportionate to the interference?

Advice on the approach to be taken when considering compulsory acquisition of land is given in the February 2018 MHCLG publication “Guidance on Compulsory Purchase Process and The Crichel Down Rules” (“the CPO Guidance”). The advice given in the CPO Guidance should be taken into account in deciding whether to acquire land in order to engage the provisions of Section 203 of the Housing and Planning Act 2016. At paragraph 2, the CPO Guidance states that a compulsory purchase order should only be made where there is a compelling case in the public interest. Given that it is in the public interest that the Development should proceed, and the fact that the Development or some similar development will not proceed whilst the prospect of an injunction to restrain interference with the restrictive covenant remains, there is a compelling case in the public interest that the Site should be acquired for planning purposes in order to engage the provisions of Section 203 of the Housing and Planning Act 2016.

7.21 The public benefits arising from the Development are set out and the public interest is demonstrated in this report.

7.22 The planning implications of the Development have been fully considered in the report to the Planning Committee meeting on 8 May 2018. The Development has been deemed acceptable: planning permission was resolved to be granted by the District Council’s Planning Committee.

Legal Implications

7.23 The District Council may acquire an interest in the Site by agreement under S227 TCPA. Such acquisition must be for a reason for which land can be compulsorily acquired under S226 TCPA. The purposes for which land may be acquired are defined in Section 226(1) as follows:

- i) if the authority think that the acquisition will facilitate the carrying out of development/ redevelopment or improvement on or in relation to the land;
- or

- ii) if the land is required for a purpose which it is necessary to achieve in the interests of proper planning of an area in which the land is situated
- 7.24 In this case, the purposes fall within the ambit of section 226(1)(a) as the carrying out of the scheme would be facilitated as described in this report.
- 7.25 But a local authority must not exercise the power under paragraph (a) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement or the promotion or improvement of one or more of the following objects (namely) the economic, social or environmental wellbeing of their area.
- 7.26 The District Council would need to conclude that the acquisition would satisfy these tests to take the matter further. Advice on this is provided above.
- 7.27 The District Council would have power to dispose of the interest acquired by agreement under S227 by virtue of Section 233 Town and Country Planning Act 1990 as amended. It is not necessary to justify acquisition for the authority itself to carry out the purposes. It may be acquired with a view to onward disposal. Disposal may take place under Section 233 where the District Council is satisfied that it is expedient in order:
- i) to secure the best use of that or other land and any buildings or works which are to be erected or carried out on it (whether by themselves or by any other person);
or
 - ii) to secure the erection, construction or carrying out of it of any building or works appearing to them to be needed for the proper planning of the area.

Human Rights considerations

- 7.28 When using S203 Housing and Planning Act 2016, we should consider whether there is any infringement of human rights. In particular, Article 8: Right to a Private and Family Life, and Article 1 of the First Protocol: Peaceful enjoyment of property of the European Convention on Human Rights. Only the Duncombe Park Estate holds the benefit of the restrictive covenant which it is proposed will be overridden. The Human Rights Act 1998 and the European Convention rights are not engaged as there are no persons whose rights are infringed.

The Public Sector Equality Duty

- 7.29 All public sector acquiring authorities are bound by the Public Sector Equality Duty as set out in [section 149 of the Equality Act 2010](#). Throughout the compulsory purchase process acquiring authorities must have due regard to the need to: (a) eliminate unlawful discrimination, harassment, victimisation; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. In performing their public functions, acquiring authorities must have due regard to the need to meet these three aims of the Equality Act 2010. It is not considered that there are any people or groups of people with relevant protected characteristics who will be affected by this proposal.

Notifying those affected

- 7.30 There is nothing contained in statute requiring the District Council to publicise its intention to use its powers under S203 Housing and Planning Act 2016. However, it is good practice to notify all those who may be affected by this proposed action. The landowner is fully aware of what is proposed and supports it. Notice will be given to the Duncombe Park Estate as the holders of the benefit of the restrictive covenant which is to be overridden. As stated above, the holder of the rights is entitled to claim compensation.

8.0 IMPLICATIONS

- 8.1 The following implications have been identified:

a) Financial

The Council has a sum of money set aside to cover the costs of the CPO. However, administrative and legal costs will be paid from the proceeds of the sale of the site as agreed with the current landowner. Accordingly the receipt of the purchase price from Yorkshire Housing will cover the cost of compensation payable to the Owner under compulsory purchase legislation. There should therefore be no strain on the Council's budget.

In implementing arrangements under Section 203 of the 2016 Act and disposing of any interest acquired under S227 to the Developers, the District Council will need to be satisfied that the Developers are in a position to commence and complete the Development in a reasonable period. All liabilities and legal costs arising from the arrangements (including any compensation liabilities falling to the District Council and potential costs associated with undertaking negotiations in relation to proceedings brought in the Upper Tribunal (Lands Chamber) would need to be met by the Owners.

Section 203 of the 2016 Act of the TCPA provides that the liability to pay compensation (if not discharged by the Owners or Developers) would be enforced against the District Council. The Owner has agreed to provide the necessary indemnity against any costs and expenses and compensation liabilities, however, the precise terms have yet to be agreed.

b) Legal

The Council is progressing the CPO process with specialist legal advice from Norfolk County Council (nplaw).

c) Other (Equalities, Staffing, Planning, Health & Safety, Environmental, Crime & Disorder)

There are no direct implications associated with the recommendations of the report.

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