

BODY	CABINET
DATE	25th May 2016
SUBJECT	Eastbourne Town Centre – Arndale Centre extension - use of 'Section 237' powers to assist with delivery of the proposed development.
REPORT OF	Senior Head of Regeneration Planning & Assets

Ward(s) Devonshire

Purpose To seek Cabinet support for the Borough Council to assist in facilitating the development of the extension to the Arndale Centre by acquiring land from the developer and appropriating the land for planning purposes in order that Section 237 of the Town and Country Planning Act 1990 ('the Act') can be relied upon.

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Recommendations It is recommended that the Cabinet resolve in principle to authorise the acquisition of the land, as identified on the attached plans and schedule by the Council pursuant to Section 227 of the Town and Country Planning Act 1990 in order to then engage powers under Section 237 of the Town and Country Planning Act 1990 for the planning purpose of facilitating the carrying out of the Development (in its current form or as may be varied or amended) and subsequent disposal of that land to the Developer (or an associated company) under Section 233 of the Town and Country Planning Act 1990, and that the following authority be delegated to the Senior Head of Regeneration, Planning and Assets in consultation with the Lead Cabinet member to:

1. Finalise the terms for the acquisition and disposal of the above land with the Developer (or
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associated company) and for the relevant documentation to be entered into by the Council;

2. Finalise the extent/boundary of the land identified in the attached plans and schedule to be acquired by the Council and subsequently disposed of to the Developer once S237 powers have been exercised over the land.

1.0 Introduction

- 1.1 Members will recall that at the Cabinet meeting on 5 February 2014, Members were advised that Performance Retail Limited Partnership (the Developer) had submitted a revised application (application ref: 131071) for an extension to the Arndale Centre. Planning permission was granted on 13 May 2014 for:

Demolition of existing buildings to provide for an extension to the existing shopping centre for new Class A1, A2, A3, A4 and A5 (retail) use at ground and first floors and a multi-screen cinema complex (Use Class D2) plus ancillary space at second floor, a two storey extension to existing car park deck, new pedestrian access including new shopfronts on to Terminus Road and associated highway works ("the Development").

The new 170,000 sq ft scheme, that includes the demolition of buildings west of the existing Arndale Centre along Terminus Road, will bring an additional 22 new retail units, approximately 300 extra car parking spaces, seven restaurants and a nine-screen cinema to Eastbourne. The scheme is expected to create approximately 800 retail and catering jobs.

- 1.2 In order to facilitate the Development the Council considered it appropriate to exercise its CPO powers pursuant to S226(1)(a) to compulsorily acquire the land and new rights needed to enable the Development to proceed. Use of CPO powers was duly authorised by Cabinet on the 6 February 2013 (in relation to planning application 120904 issued on 30 May 2013). Following receipt of the revised application, the Cabinet further authorised on 5 February 2014 that, if consented, the authority to make a CPO (as resolved on 6 February 2013) continued to apply to the Development.

On 26th February 2015 the Council made "The Eastbourne Borough Council (Arndale Centre and Surrounding Land at Terminus Road, Sutton Road and Ashford Road) Compulsory Purchase Order 2015 (the CPO).

The CPO was considered at a public inquiry and was subsequently confirmed by the Secretary of State on 29th February 2016.

- 1.3 As Members were previously advised, prior to the CPO being made, the Developer had sought to separately negotiate with relevant third party landowners in order to secure the land required for the Arndale extension by agreement. The Developer continued to negotiate following the making of the CPO and has been successful in securing the majority of the freehold interests by private treaty. As a result, part of the Development will take place on land that has been acquired by the Developer by private treaty and not as a consequence of implementing the CPO.
- 1.4 Various restrictive covenants exist over some areas of land which have been acquired by the Developer and also over its existing land holding. A composite list of those rights, so far as it is possible to ascertain the rights from the title documentation, is set out in the schedule attached to this report. The Development may interfere with those rights.
- 1.5 Under the CPO Indemnity Agreement (entered into between the Council and the Developer on 10 February 2015) the Developer may require the Council to take a transfer of the land required for the development for planning purposes and to utilise section 237 of the Act over such land for the purpose of enabling the lawful interference with any rights of restrictive covenants which may impede the delivery of the development. The CPO Indemnity Agreement also contemplates that where the developer acquires further parts of the site by private treaty the Council will enter into an option agreement in respect of that additional land for the purposes of utilising S237 powers. One Section 237 has been exercised over the land, it will be transferred back to the Developer in order for it to then commence the development, free of the risk from possible injunction where third party rights are being interfered with.

2.0 Process and Application

- 2.1 The Council may acquire an interest in land to be developed, by agreement pursuant to Section 227 of the Town and Country Planning Act 1990. Such acquisition must be for a reason for which land can be compulsorily acquired under Section 226 of the Town and Country Planning Act 1990. The purposes for which land may be acquired are defined in Section 226(1) as follows:
 - (a) 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

(b) if the land is required for a purpose which it is necessary to achieve in the interests of the proper planning for an area in which the land is situated.

2.2 In this case the purpose falls within Section 226(1)(a) as the carrying out of the scheme which has been the subject of planning permission would be facilitated. The local authority however must not exercise the power under Section 226(1)(a) unless they think the development/redevelopment or improvement is likely to contribute to the achievement of the economic social or environmental well being of their area.

2.3 Section 237 of the Town and Country Planning Act 1990 provides that the erection, construction, or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised if done in accordance with planning permission notwithstanding that it involves interference and easement or breach of restrictive covenant. Section 237(4) confirms that in respect of any interference with such a restrictive covenant then compensation is payable on the basis of diminution in the value of the claimant's land. The loss will only occur and the right to compensation arise once that interference occurs and the measure of compensation payable is therefore the diminution in value of the interest affected.

2.4 Thus an effect of Section 237 is to remove the ability of a third party (with the benefit of any such right) obtaining an injunction to prevent the development; it reduces the risk of the development process being stopped once it has started. Upon acquisition and exercise of S237, the Council would have the power to dispose of the interest acquired pursuant to Section 233 of the Town and Country Planning Act 1990. Disposal takes place where the Council is satisfied it is expedient in order:

(a) 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 any other person); or

(b) to secure the erection, construction or carrying out on it of any building or works appearing to them to be needed for the proper planning of the area.

2.5 There is no formal statutory procedure, notice, requirement, or guidance for the exercise of the Section 237 power. However, the effect is to

deprive a third party of the property rights (albeit be compensated) and the Council should, prior to exercising that right, have proper regard to the likely consequences of using that power.

2.6 Accordingly, the Council, if it is to utilise the above power, should be satisfied with the following:

(i) whether the restrictive covenants/rights to be interfered with cannot reasonably be released by agreement and consider what efforts have been made to reach agreement with the affected parties;

(ii) that use of Section 237 powers will facilitate the carrying out of development, redevelopment or improvement on or in relation to land;

(iii) that the development/redevelopment or improvement will contribute to the promotion or improvement of the economic, social or environmental wellbeing of the Borough and therefore it is in the public interest that it be carried out;

(iii) whether the benefits of the Development could be achieved without giving rise to all or some of the infringements;

(iv) whether the public benefits arising from the recommendations are proportionate to the private rights being infringed having regard to the European Convention on Human Rights.

Whether the relevant covenants can be released by agreement

2.7 As detailed at Appendix 1, the Developer's land is subject to various rights and interests. Extensive due diligence has been undertaken to ascertain the beneficiaries of these rights including:

- a) Serving requisitions for information
- b) Searches at Companies House
- c) Site visits
- d) Reviewing adjacent title registers

2.8 As is detailed in the schedule at Appendix 1 all of the restrictive covenants which have been identified as burdening the land are largely historic, being imposed as early as 1867 to 1971. Consequently identifying those who have the benefit of those covenants has proven difficult to establish; where companies have been identified as being the beneficiaries of the covenants searches have been undertaken by the Developer's advisors at Companies House but it is understood those companies no longer exist. In some instances the details of the restrictive covenants themselves are not known. Where the details of the restrictive

covenants are known, it is questionable whether the Development will genuinely infringe some of these covenants. The broad nature of the covenants fall within the following categories:

(a) restriction on carrying out any dangerous noisy or offensive trade which causes nuisance or disturbance to the beneficiary of the covenant;

(b) not to erect a building or carry out any business involving the wholesale of beers wines or spirits other than those brewed by the Wine Exchange Limited

(c) not to carry out any business other than that of a medical practitioner dental surgeon or other practice

(d) restriction to use of land as a private dwelling;

(e) not to use the land for a public house.

2.9 It is possible some of these covenants will already have been breached by the former/current owners/occupiers of the site. However it is understood the Developer, prior to commencing works on the Development requires any potential risk, which could impede the Development, be removed.

2.10 Accordingly officers are satisfied that the Developer has undertaken sufficient due diligence to identify the potential beneficiaries of the restrictive covenants and that, for the reasons identified above, it is not reasonable to expect the Developer to secure the release of these covenants and rights by agreement prior to the anticipated date to commence the Development in July 2016.

Use of the powers will facilitate the carrying out of development, redevelopment or improvement on or in relation to land

2.11 As already confirmed, the Council granted planning permission for the Development in 2014 and has made and confirmed a CPO in order to facilitate the carrying out of the Development. It is anticipated that works will commence on site in July 2016.

2.12 However in order to carry out the Development the Developer requires comfort that it can commence the development process without any risk that those whose rights are being infringed could seek an injunction preventing the Development proceeding. It is considered that the acquisition of the identified land for planning purposes and use of S237 of the land will provide this comfort and therefore facilitate the carrying out

of the development.

That the development/redevelopment or improvement will contribute to the promotion or improvement of the economic, social or environmental wellbeing of the Borough

- 2.13 This issue has already been considered in detail as part of the CPO process. The Secretary of State's decision confirming the CPO (and supporting Inspector's decision) also agreed that the Development will contribute to the promotion or improvement of the economic, social or environmental wellbeing of the Borough.
- 2.14 The Council is satisfied that development on this scale represents a significant investment in the Town Centre and complies with the Council's planning policies and aspirations for the regeneration of Eastbourne Town Centre; the benefits of which will be considerable to the economical, social and environmental wellbeing of the Borough, in terms of:
- (a) becoming a retail destination for existing residents of the borough and those who live elsewhere;
 - (b) contributing to the town centre's evening economy which will secure additional spending within the town;
 - (c) attracting new retailers to the town centre and investment;
 - (d) creating a significant number and range of new employment opportunities, with the S106 obligations seeking to secure these at a local level so far as possible.
- 2.15 As a consequence of this investment and the economic benefits, there will also be significant social and environmental benefits for the borough, consisting of:
- (a) modern and better designed retail units, a well designed scheme and layout, all of which will enhance the immediate environment and create a more attractive area for the public to visit and enjoy
 - (b) a package of Section 106 measures which will enhance the pedestrian environment and the public transport interchange. Including facilitating the considerable package of environmental improvements to Terminus Road;
 - (c) enhancing the evening economy in the town centre by providing a choice of leisure and food uses.

- 2.16 Accordingly officers are satisfied that S226(1)(A) of the Act is met. The proposed development will provide and enhance the economic, social and environmental wellbeing of the area.

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

- 2.17 As identified in the section above, there are a number of benefits which the Development will deliver. The restrictive covenants affect the majority of the land upon which the extension to the existing Mall will be constructed and some of the Developer's existing land holdings. The Development cannot be feasibly altered to avoid the land affected by the restrictive covenants.
- 2.18 Accordingly if the Development does not proceed then the benefits identified above will not be delivered.

Whether the public benefits arising from the recommendations are proportionate to the private rights being infringed having regard to the European Convention on Human Rights.

- 2.19 The CPO has already been assessed by the Secretary of State, who was satisfied that there was a compelling case in the public interest that it be confirmed.
- 2.20 The European Court has recognised that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole".
- 2.21 Both public and private interests are to be taken into account in the exercise of the Council's powers and duties as a local planning authority. Any interference with a Convention right must be necessary and proportionate.
- 2.22 The Council is therefore required to consider whether its actions would infringe the human rights of anyone affected by the exercise of the s237 powers. The Council must carefully consider the balance to be struck between individual rights and the wider public interest.
- 2.23 Human Rights arise in respect of the proposed arrangements. Following the introduction of the Human Rights Act (1998) the Council is required to act in accordance with the European Convention on Human Rights (ECHR) in deciding whether or not to implement the arrangements. Article 1 of the First Protocol of the ECHR provides that every natural or legal person is entitled to peaceful enjoyment of their possessions.

Acquisition of property under section 227 of the Act which engages section 237 of the Act to authorise interference with rights of light involves interference with a person's right under the article.

- 2.24 However, the rights to peaceful enjoyment of possessions in this Article is a qualified rather than absolute right, as the wording of Article 1 or Protocol 1 permits the deprivation of an individual's possessions where it is in the public interest and subject to the conditions provided for by law, and (in relation to the right to respect for private and family life and a person's home) Article 8(2) allows for interference which is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the rights and freedoms of others".
- 2.25 There must therefore be a balancing exercise between the public interest and the individual's rights whereby any interference in the individuals' rights must be necessary and proportionate. 'Proportionate' in this context means that the inference must be no more than is necessary to achieve the identified legitimate aim. A fair balance must be struck between the rights of the individual and the rights of the public.
- 2.26 Paragraphs 2.11 to 2.12 of this report highlights the substantial benefits from the scheme in terms of meeting the wellbeing tests. The public interest in facilitating the development and achieving the substantial public benefit outweighs the rights of the individuals to peaceful enjoyment of their possessions. The Secretary of State has already determined that there was a compelling case in the public interest to confirm the CPO. The proposed use of section 237 powers therefore amounts to a proportionate interference in all circumstances. In this regard the availability of compensation to those whose rights are interfered with is of relevance to the issue of proportionality.
- 2.27 The planning implications of the development have been fully considered. The development has been deemed acceptable in planning terms by the Council. Consideration of the scheme should not re-open consideration of the accepted planning merits of the development.
- 2.28 On balance, the infringements of the restrictive covenant for which the compensation prescribed by law will be payable, is outweighed by the substantial public benefit which the Development will deliver.

3.0 Implications

3.1 Legal Implication

3.1.1 The legal process and issues are dealt with in detail above. The Borough Council's risks will be managed via the existing strategic risk management process. Procedural risk with regard to the exercise of section 237 powers will be minimised by the use of external legal and commercial advisers and working in partnership with a similar team employed by the Developer.

3.1.2 The CPO Indemnity includes an indemnity in respect of any costs incurred by the Borough Council in connection with the transfer of the Developer's Land and the exercise of Section 237 powers. The Council will not be exposed to costs.

3.2 Financial Implications

3.2.1 The CPO Indemnity Agreement provides that the Council's costs associated with the transfer of third party rights, the exercise of the section 237 power and any compensation payable as a result will be met by the Developer. Accordingly, there are no financial implications for the Council.

3.3 Human Resource Implications

3.3.1 With the help of external specialists, existing council staff across the relevant services can manage the process within existing resources. The costs of external specialists are being fully met by the developer via the CPO Indemnity Agreement.

3.4 Human Rights Implications

3.4.1 The Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with the European Convention on Human Rights. The Borough Council is therefore required to consider whether its actions would infringe the human rights of anyone affected by the exercise of Section 237 powers. While certain Convention rights may be relevant (such as the "right to peaceful enjoyment of possessions"), interference with such rights by public authorities will be justified where the public interest outweighs the interest of the private individual. It is considered that any interference with the Convention rights caused by the exercise of section 237 powers will be justified and proportionate in the wider public interest in order to secure the economic, social, physical and environmental regeneration of the town centre.

3.5 Equalities and Fairness Implications

3.5.1 An Equalities and Fairness Assessment has already been undertaken as

part of adopting the planning policy supporting the regeneration of Eastbourne Town Centre. Equalities was also assessed when proceeding with the CPO process. It is considered that the exercise of S237 to facilitate the proposals is unlikely to have any significant impact on fairness or equality.

4.0 Conclusion

4.1 Following the Secretary of State's decision to approve the CPO to allow the £85 million planned extension to the Arndale to proceed, which will provide an additional 22 new retail units, seven restaurants and a nine-screen cinema, it is considered that the acquisition of the land for planning purposes of the Development, so as to engage S237 of the Act, should be approved on the following basis:

(i) The Development has the benefit of planning permission and it is considered desirable that the Development progress and be completed as soon as possible;

(ii) the Council has already undertaken a lengthy CPO process to secure the necessary land and rights needed to facilitate the Development;

(iii) It is considered that appropriate investigations have been undertaken by the Developer to identify those with the benefits of the rights proposed to be infringed and that it is reasonable to conclude such beneficiaries cannot or will not be identified within a reasonable time period;

(iv) The Development will deliver public benefits to the borough;

(v) those who currently benefit from the restrictive covenants will be entitled to compensation for the interference with their rights;

Accordingly, all relevant considerations have been assessed and on balance it is considered appropriate that the Recommendation be approved.

Appendix

Plans
Schedule of restrictive covenants

Background Papers:

Report to Cabinet – 6 February 2013
Minutes of Cabinet meeting 6 February 2013

Report to Cabinet - 5 February 2014
Minutes of Cabinet Meeting of 5 February 2014

The Eastbourne Borough Council (Arndale Centre and Surrounding Land at Terminus Road, Sutton Road and Ashford Road) Compulsory Purchase Order 2015 and all supporting documentation.

To inspect or obtain copies of the background paper, please refer to the contact officer listed above.

Appendix 1