

<b>Committee(s):</b>	<b>Date(s):</b>	<b>Item no.</b>
Planning and Transportation Committee	11 <sup>th</sup> May 2011	
Policy and Resources Committee	12 <sup>th</sup> May 2011	
Court of Common Council	9 <sup>th</sup> June 2011	
<b>Subject:</b> Rights of Light Issues affecting Development.		
<b>Report of:</b> City Planning Officer and Comptroller and City Solicitor		<b>Public</b>
<p style="text-align: center;"><b><u>Summary</u></b></p> <p>The purpose of this report is to inform Members of issues which have arisen which may prejudice redevelopment in the City due to recent case law concerning rights of light. It proposes a way forward whereby in appropriate cases planning powers may be used to assist delivery of developments which achieve public benefit, by removing the risk that construction of such developments be prevented by injunction.</p> <p><b>Recommendation</b></p> <p>It is recommended, subject to the concurrence of the Court of Common Council, that:</p> <ol style="list-style-type: none"> <li>1. Acquisitions of interests in land under S.227 Town and Country Planning Act or appropriations for planning purposes may be considered on a case by case basis in order to engage S.237 powers in order to allow developments to proceed (where they would otherwise be prevented by injunctions prohibiting infringements of rights of light) subject to (i) such development being in the public interest, such public interest being sufficient to justify interference with any private rights and proportionate, and the relevant criteria in Appendix 1 being met and (ii) all financial liabilities of the City being indemnified.</li> <li>2. Where such acquisitions or appropriations are so considered on a case by case basis, the Planning and Transportation Committee be authorised to determine whether such acquisition or appropriation may be authorised.</li> <li>3. Where Planning and Transportation Committee determine that such acquisition or appropriation be authorised they may delegate to the Town Clerk, in consultation with the Chairman and Deputy Chairman of that Committee, (i) determination of whether adequate attempts have been</li> </ol>		

made to remove injunction risks by negotiating the release of affected rights of light by agreement and whether those entitled to rights of light are prepared by agreement (on reasonable terms and within a reasonable time) to permit infringements of those rights and (ii) the terms on which the acquisition is to proceed.

## **Main Report**

### **Background**

1. Rights of Light are easements (akin to property rights) enjoyed by building owners over neighbouring land whereby a right to obtain light through apertures in the building is acquired over adjoining land in different ownership
2. The general rule is that an interference with a right of light may be prevented by injunction.
3. Due to the dense built form in the City and planning policy advocating efficient use of scarce land resources <sup>1</sup>, redevelopments within the square mile often involve infringements of rights of light. (This has been recognised since the 19<sup>th</sup> century<sup>2</sup> through the “Custom of London” which gives freehold building owners the right to rebuild on their “ancient foundations” without regard to loss of light to neighbouring properties. However, today, reliance on Custom of London is extremely rare due to uncertainty regarding “ancient foundations”.)
4. Until recently, injunctions have been largely avoided through developers agreeing with affected neighbours for the release of rights of light upon payment of compensation, thereby enabling development to proceed.

### **Present Position**

5. The basis upon which negotiations to release rights of light have proceeded has recently been placed in doubt by the Heaney case <sup>3</sup>. Prior to Heaney, the working understanding shared by the Rights of Light Surveyor’s industry, based on judicial precedent, was that in practise the courts would, in lieu of an injunction, award damages based on compulsory purchase compensation levels where: (i) the interference was

---

<sup>1</sup> PPS1 “Delivering Sustainable Development” e.g. para 28

<sup>2</sup> Plummer versus Bentham (1757) 1 Burr 248, 97 ER 297 – terms of Custom certified by Recorder of London

<sup>3</sup> IHRUK II (CHC) v Marcus Alexander Heaney [2010] EWHC 2245 (Ch). The case was settled on confidential terms the day before the hearing of an appeal to Court of Appeal fixed for 30 March 2011.

small; (ii) it could be estimated in money; (iii) it could be adequately compensated by a small payment; (iv) an injunction would be oppressive. The working understanding was that these criteria would be met in many cases where the affected premises were commercial rather than residential.

6. In the Heaney case the Court ordered a mandatory injunction to remove part of the top two floors of a recently completed office block as they interfered with a right of light enjoyed by a neighbouring office building. Although in the Heaney case the court looked very closely at the specific facts and the conduct of the parties, it has served to shift the working understanding on which the development industry previously operated. Therefore since Heaney, affected neighbours who would previously have agreed to release rights of light on a CPO compensation level are now being advised that their rights are injunctable, and that such settlements are not appropriate.
7. The development industry in the City has reported that the effect is that the risk of injunction to prevent development cannot now be sufficiently managed by negotiations and construction cannot therefore commence. This is particularly relevant to schemes requiring an element of bank funding to deliver the scheme, as monies will not be released until risks pertaining to rights to light agreements have been resolved through agreement of a deeds relinquishing all third party right to light where injunctable positions exist. A number of developers have demonstrated that but for the risk of injunction, they are virtually ready to implement extant planning permissions. However injunction risks have arisen which prevent them from doing so. (This also reflects the City's experience in respect of some sites within the City's freehold title).

## **Use of Planning Powers**

8. As a result a number of developers have approached the City to request that it exercise its local planning authority powers of land acquisition<sup>4</sup> in order to engage the right of a planning authority and its successors to develop land notwithstanding interference with rights of light<sup>5</sup> ("S.237 power"). It is hoped by developers that this will enable development to proceed by removing the threat of injunction.

---

<sup>4</sup> S.227 Town and Country Planning Act 1990

<sup>5</sup> S. 237 Town and Country Planning Act 1990c

9. In determining planning applications, property rights and easements are not relevant (relevant light considerations being limited to amenity impacts caused by loss of daylight and sunlight, whether or not Rights of Light exist). However property rights are of relevance when considering local planning authority powers of land acquisition, site assembly, and reliance on S.237. Indeed, national and local policies recognise that these are important tools available to local planning authorities for assembling land needed to help deliver social and economic objectives.<sup>6</sup>
10. At the same time, it is recognised that the exercise of such powers involve interference with human rights namely the right to peaceful enjoyment of possessions<sup>7</sup>, and, in the case of residential property, the right to respect for private and family life and home.<sup>8</sup> This is the case notwithstanding that where such powers are exercised, compensation is payable (including where S.237 powers are used, compensation for any interference with rights of light). Therefore, such powers should not be exercised unless a number of criteria are satisfied. Whether the relevant criteria are satisfied will, of course, depend upon the site specific circumstances. The criteria, which must be carefully considered and weighed in each case, are set out at Appendix 1. They broadly require that the local planning authority be satisfied that the acquisition of land or interference with property rights is required in the public interest, and that the public interest to be achieved is proportionate to the interference with private rights which would result<sup>9</sup>

## **Proposed Way Forward**

- 14 In recognition of the City's local planning authority role in helping deliver development which meets planning objectives, it is appropriate that requests to implement land acquisition/appropriation arrangements which engage S.237 powers be considered on a case by case basis. This has been the City's approach in the past<sup>10</sup>, but requests were relatively rare. However due to the Heaney case they are now likely to be more frequent. Where it appears to officers that the public interest test may be satisfied and the relevant criteria met, it is proposed that this be reported to Members. It is suggested that the Planning and Transportation Committee be authorised to determine the need

---

<sup>6</sup> ODPM Circular 06/2004 "Compulsory Purchase" e.g. at para 1; Draft Core Strategy policy CS1 "To ensure the City of London provides additional office development of the highest quality to meet demand...", and narrative headed "How will we make it happen – Development management, compulsory purchase powers, land ownership and joint working with developers to assist in site assembly, where appropriate..."

<sup>7</sup> Article 1 of the First Protocol of European Convention on Human Rights ("ECHR")

<sup>8</sup> Article 8(2) ECHR

<sup>9</sup> See also ODPM Circular 06/2004 at para 17

<sup>10</sup> See Report to Policy and Resources Committee 28 July 2005 regarding Old Stock Exchange building.

to acquire property interests , in cases where such ownership would arise from the implementation of arrangements to exercise S.237 powers. (See Recommendation 2.)

15 In circumstances where Planning and Transportation Committee is satisfied that all criteria are satisfied, other than concerns as to whether attempts to negotiate should be pursued further prior to S.237 powers being exercised (in relation to the “necessity” test (where third parties are known to have rights, an authority cannot properly embark on an appropriation or acquisition unless it has good reason to believe that interference with such rights is necessary) – see Appendix 1), in order to act quickly, it may be appropriate for the Planning and Transportation Committee to delegate determination of whether adequate negotiation attempts have been made to meet the “necessity test”, to the Town Clerk in consultation with the Chairman and Deputy Chairman of that Committee. (See Recommendation 3)

16 It is likely that developers whose interest have been acquired by the City under planning powers in order to engage the S.237 override provisions, will wish this to be subject to arrangements for the interest so acquired by the City to be transferred back to the developer. It is proposed that in any case where the principle of using S.237 powers may be agreed by Planning and Transportation Committee, to ensure swift resolution of the terms of acquisition, including the interest to be acquired and any arrangements for transfer back, it may be appropriate to delegated such arrangements to the Town Clerk, in consultation with the Chairman and Deputy Chairman of that Committee (subject to there being no adverse financial implications for the City). (See Recommendation 3)

### **Land already acquired by the City for Planning Purposes**

17 In cases of land already acquired by the City under planning powers, S.237 may already be engaged such as to permit right of light infringements, even where the land is no longer owned by the City, but by its successors. However, there are limitations on the extent to which S.237 can be relied upon in that the proposed development which the City or its successors seek to impose on adjoining owners must be related to the purpose for which the land was acquired or appropriated. Where this is not the case because the planning purpose now contemplated does not relate to the purpose contemplated when the land was originally acquired or appropriated, S.237 may nevertheless be engaged by the local planning authority declaring the land surplus to its original purpose and then appropriating it afresh for the

purpose now contemplated.<sup>11</sup> Whether such arrangements are appropriate must be determined by reference to exactly the same criteria as apply to acquisitions of land from other parties to engage S.237. Whether land held for planning purposes is surplus to the original acquisition purpose and should be so declared, and whether it should then be appropriated afresh, is within the functions delegated to Planning and Transportation Committee. It is proposed that where the City Surveyor requests that such arrangements be put in place, the request be considered by Planning and Transportation Committee. This will be on the same basis as a request from an arms-length owner would be considered.

## **Financial and Risk Implications**

18 S.237(4) and (5) provide that where rights are overridden by virtue of S.237 compensation is payable in accordance with the compensation code (the term used to describe the legislation applicable to the assessment of compensation following compulsory acquisition), and that, if the current owner does not so compensate, the compensation claim may be enforced against the local planning authority. S.237(7) recognises that owners may indemnify the local planning authority in respect of such claims, and such indemnities or equivalent solicitors' undertakings should be secured prior to arrangements being implemented.

19 Similarly, any costs arising by virtue of land transfer arrangements should be fully met by the developer.

20 Given the nature and significance of the issues under consideration it is acknowledged that there is a risk that the City's approach proposed in this report, or its decisions in considering individual cases, may be challenged, which would involve usual costs and damages risk associated with litigation. The Comptroller and City solicitor advises that the issues have been carefully considered and the report and recommendations accord with advice received from Leading Counsel. While litigation risks can never be removed, they have been minimised.

## **Legal and Strategic Implications**

21. These are included in the body of the report

---

<sup>11</sup> S.12 City of London (Various Powers) Act 1949, and S.226 and 227 Town and Country Planning Act 1990.

## **Consultees**

20. A draft of this report has been the subject of consultation with the Town Clerk, the Chamberlain, the City Surveyor and the Comptroller & City Solicitor. Their comments have been incorporated.

## **Conclusion**

21. The recommended action is proposed in order to achieve planning purposes as expressed in local and national policy.

**Background Papers: PPS1; Plummer versus Bentham (1757) 1 Burr 248; IHRUKII v Marcus Alexander Heaney [2010] EWHC 2245 (Ch); Report to Policy and Resources Committee 28 July 2005 re Old Stock Exchange;**

## **Contact: Deborah Cluett**

Comptroller and City Solicitors Department  
tel: 0207 332 1677  
email: [deborah.cluett@cityoflondon.gov.uk](mailto:deborah.cluett@cityoflondon.gov.uk)

## **APPENDIX 1**

### **Criteria**

1. The use of the statutory powers is required in that:
  - (i) The infringements cannot reasonably be avoided
  - (ii) The easements to be interfered with cannot reasonably be released by agreement with affected owners.
  - (iii) The development is prejudiced due to the risk of injunction and adequate attempts have been made to remove the injunction risks
2. The authority thinks it will facilitate the carrying out of development, redevelopment or improvement on or in relation to land (S.226(1) Town and Country Planning Act 1990)
3. The authority thinks that the development, redevelopment or improvement will contribute to the promotion or improvement of the economic, social or environmental well-being of the authority's area and therefore it is in the public interest that it be carried out. (S.226(1A) Town and Country Planning Act 1990), and whether those benefits could be achieved without giving rise to all or some of the infringements.
4. It is in the public interest that the development is carried out
5. The public interest to be achieved is proportionate to the private rights being infringed (Human Rights Act 1998)