

Committee(s)	Dated:
Planning and Transportation Committee Court of Common Council	28 November 2016 8 December 2016
Subject: Rights of Light Issues Affecting Development - Update	Public
Report of: Chief Planning Officer and Comptroller and City Solicitor	For Decision
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Summary

The purpose of this Report is to update Members following recent changes in the law relating to the use of planning powers to override rights of light,, easements and other rights attached to land It proposes that the general approach to these powers adopted in 2011 be continued, namely that in appropriate cases planning powers may be used to assist delivery of developments in the City which achieve public benefit by removing the risk of the construction of such developments being prevented by injunction. It proposes that the arrangements be slightly modified to reflect the changes in the law.

Recommendation(s)

It is recommended that the Planning and Transportation Committee recommend to the Court of Common Council, that the arrangements they agreed in 2011 for exercising powers relating to overriding rights of light and other rights be continued under the new statutory provisions in Section 203 of the Housing and Planning Act 2016 (“S.203”) by resolving as follows:

1. Acquisitions of interests in land under S.227 Town and Country Planning Act 1990 or appropriations for planning purposes, may be considered on a case by case basis in order to engage S.203 powers to allow developments to proceed (where they would otherwise be inhibited by injunctions or threats of 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; (ii) the relevant criteria in Appendix 1 being met (iii) all financial liabilities of the City being indemnified; and (iv) where feasible and appropriate in the circumstances of the case, prior consultation being carried out in accordance with paragraph 14 of this report.
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.

3. Where the Planning and Transportation Committee determine that such acquisition or appropriation be authorised they may delegate the determination of such matters as they see fit and the final decision to the Town Clerk, in consultation with the Chairman and Deputy Chairman of that Committee: the matters to be determined by the Town Clerk may include (i) whether adequate attempts have been made to remove injunction risks by negotiating the release of affected rights of light by agreement; (ii) 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 (iii) the terms on which the acquisition or appropriation is to proceed.

Main Report

Background

1. A Right of Light is an easement (a form of property right) enjoyed by building owners (“rights holders”) over neighbouring land, the right being a right to obtain light over that neighbouring land in different ownership through apertures in a building
2. The general rule is that an actionable 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 resources¹, developments and redevelopments within the Square Mile sometimes involve infringements of rights of light², and other rights
4. Prior to 2010, injunctions were often avoided through developers agreeing with affected neighbours for the release of rights of light upon payment of compensation, allowing development to proceed. However, the Heaney case in 2010³ increased the risks of development being impeded due to Rights of Light infringements. In June 2011 the Court of Common Council agreed an approach towards assisting in the delivery of development using Section 237 of the Town and Country Planning Act 1990 (“S.237”) in appropriate cases and delegated decisions on whether to engage S.237 to the Planning and Transportation Committee and the Policy and Resources Committee⁴. In December 2011 the Court of Common Council delegated decisions whether to engage S.237 to Planning and Transportation Committee alone, on the recommendation of the Policy and Resources Committee.
5. S.237 has now been repealed and replaced by Section 203 of the Housing and Planning Act 2016 (“S.203”) (see paragraph 9 below).
6. The arrangements which have been in place for the purposes of engaging S.237 involve the City as local planning authority acquiring a sufficient interest in the development site

¹ e.g National Planning Policy Framework paras 17 & 18.

² (This has been recognised since the 18th century when the "Custom of London" gave freehold building owners the right to rebuild on their ancient foundations without regard to loss of light to neighbouring properties. However, in recent times, reliance on Custom of London has been extremely rare due to changes in building footprints and uncertainty regarding the scope of “ancient foundations”).

³ HKRUKII (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch)

⁴ See report to 9 June 2011 Court of Common Council “Rights of Light Issues Affecting Development”

for planning purposes⁵ (or, where it already holds the site, “appropriating” it for planning purposes⁶). Where this has taken place, interference with rights of light gives rise only to compensation to be determined in accordance with the statutory compensation code (based upon diminution in value) rather than any risk of injunction.

7. In its “Rights of Light” report of December 2014, the Law Commission recognised the concerns of the development industry and the difficulties caused by the uncertainties relating to Rights of Light. The Law Commission stated that S.237 “can play an important role” and that it was legitimate for local authorities to assist by engaging S.237 in appropriate cases. The City’s approach was referred to. However, the Law Commission also acknowledged that there was: an element of risk for local authorities since such decisions are judicially reviewable; that some local authorities were more willing to contemplate the measures than others, and recommended fundamental reforms of the law⁷.

Current Position

8. Since 2011, resolutions relating to the engagement of S.237 have been made on eight occasions, following the careful approach and strict criteria adopted by Court of Common Council in 2011. Developers continue to approach the City to request it exercises its powers to engage S.203. These requests are carefully scrutinised and when appropriate, are reported to Planning and Transportation Committee (once or twice per annum, on average.)
9. The reforms recommended by the Law Commission have not been progressed. In July 2016, S.237 was repealed and a new, similar power was introduced in S.203 of the Housing and Planning Act 2016 (S.203), aimed at addressing some minor issues/ambiguities about S.237, but not implementing any substantive change. Changes between S.237 and S.203 include: (i) S.203 is engaged where land is held by other public bodies (in addition to planning authorities); (ii) a previous exclusion for statutory undertakers is removed; (iii) an exclusion is provided for the National Trust/ National Trust land; (iv) S.203 is only engaged in circumstances where the authority “could acquire the land compulsorily” for the purposes of the building or maintenance work which is to be carried out; and (v) the S.203 powers are specifically limited to situations where the interference relates to the purpose for which the land was acquired/appropriated.
10. Given the introduction of new legislation, the 2011 resolutions relating to S.237 should be updated to cover the new provisions in S.203, if the City wishes to continue the general approach adopted in 2011.

Evaluation

11. The legal uncertainty as to whether a rights holder will seek to protect that right with an injunction remains a risk which may impede development. If the City was not prepared to contemplate taking measures under S.203, where appropriate, there would be likely to be circumstances where this could cause or contribute to the delay or abandonment of

⁵ Under section 227 Town & Country Planning Act 1990

⁶ Under section 12 City of London (Various Powers) Act 1949

⁷ Law Commission Report No 356 Rights of Light 3 December 2014.

schemes and prejudice the economic development of the City. If the City proposes to continue its general approach by resolving to consider engaging S.203 in appropriate cases, this should continue to be on a case by case basis, where it is in the public interest, and using the criteria and tests adopted in 2011 (as modified to reflect the changes in S.203 - see Appendix 1).

- 12.** There have been no judicial review applications brought against any of the resolutions made by the City to engage S.237. However, representations have been received from rights holders mainly on the following points: (i) that developers were seeking S.237 resolutions to reduce the compensation payable by developers in respect of rights of light infringements; and (ii) that neighbours had been inadequately consulted regarding a proposed S.237 resolution. Members have also raised queries regarding consultation.
- 13.** Compensation – the statutory basis of compensation is the “diminution in value” caused by the infringement. In case of dispute the “diminution in value” sum is decided by the Upper Tribunal (Lands Chamber). In the event of an injunction application, it is open to the courts to fix “damages in lieu” of an injunction. Neither of these sums are matters for the City, although before engaging S.237 the City has had to be satisfied that adequate attempts have been made by the developer to remove injunction risks by negotiation. Rights holders have expressed concern that by engaging S.237 and removing the injunction risks, the potential for damages in lieu of an injunction has also been removed. The developer response is often that, particularly in the context of commercial buildings, rights to light are defended by actual or threatened injunction not for the sake of preserving light, but to drive up the price at which settlements are reached. In practice, it has proved extremely rare in S.237 cases for negotiations to stall due to genuine disagreement regarding the compensation sum. (More often negotiations stall due to silence or delay on the part of rights holders). On the very few occasions where genuine compensation issues have emerged in connection with a possible acquisition (to engage S.237), the City has obtained independent advice (funded under an indemnity from the developer) as to whether adequate attempts to settle have been made by the developer, and negotiations have concluded successfully without S.237 having to be engaged. In the event of similar issues arising in connection with any future S.203 resolutions, it is considered appropriate for the City to adopt the same approach.
- 14.** Consultation – there is no statutory requirement to consult rights holders. However, in applying the relevant criteria, particularly relating to the adequacy of attempts to negotiate and the impacts of the infringement on the rights holder, representations from rights holders can be material. In many instances, the City Property Advisory Team will already have been heavily involved in trying to resolve issues between the parties, so the views and representations of the rights holders will be known to the City and included in any committee report. Where this is not the case, current practice (following concerns expressed by Members) is that (wherever feasible and appropriate in the circumstances of the case) the developer will be expected to demonstrate that rights holders have been appropriately advised of the proposed resolution, made aware of any report, and provided with a contact at the City to whom they can direct comments.
- 15.** It is proposed to continue the practice which has been applied as described in paragraphs 13 and 14, above to any future decisions in relation to engaging S203.

Past Resolutions

16. As regards the eight resolutions already made under the S.237 regime, the majority have been acted upon and/or negotiations successfully concluded, and in some cases the developments have been completed. In respect of other resolutions (yet to be implemented), the Interpretation Act 1978 provides that where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, affect anything done under that enactment. On that basis, and given that a resolution to acquire or appropriate is made under section 227 of the Town and Country Planning Act 1990 or under section 12 of the City of London (Various Powers) Act 1949 respectively, not under section 237, it is considered that resolutions already made concerning engagement of S.237 remain effective in relation to those respective developments and the relevant authorised steps to secure their implementation.

Proposals

17. In recognition of the City's local planning authority role in helping deliver development which meets planning objectives, it is considered appropriate that requests to implement land acquisition⁸ or appropriation⁹ arrangements which engage S.203 powers should continue to be considered on a case by case basis. It is expected that such requests should be supported by a full analysis which explains why exercise of the City's powers to acquire or appropriate are necessary, and why there is a compelling case in the public interest to do so. It is expected that such requests will address the criteria set out in Appendix 1. It is proposed that such requests should continue to be reported to Planning and Transportation Committee for decision, where it is considered in the public interest, such public interest being sufficient to justify interference with any private rights and proportionate, adopting the criteria and tests which have been in place since 2011 (as modified to reflect the changes in S.203 – see Appendix 1).

18. It is likely that agreement on the detailed terms on which an acquisition or appropriation should proceed would continue to be delegated by Planning and Transportation Committee to the Town Clerk in consultation the Chairman and Deputy Chairman of Planning and Transportation Committee. On occasion, decisions as to whether adequate steps have first been taken by the developer to remove the injunction risks by negotiation may also be delegated to the Town Clerk in consultation with the Chairman and Deputy Chairman. This reflects some of the past resolutions.

Corporate & Strategic Implication

19. The planning policies in Appendix 2 are of relevance in considering the suitability of the general approach and in considering requests on a case by case basis. In particular, reasoned justification paragraph 3.10.39 under Policy DM 10.7 indicates that the City may consider acquisition to override rights of light where development is acceptable in planning terms and has planning permission. Any changes will be consulted on as part of the Local Plan Review programmed for 2017. The recommendations in this report would not prejudice the outcome of any such consultation, and any consultation responses on this issue and proposed modifications to the general approach would be reported. Other

⁸ Under section 227 Town & Country Planning Act 1990

⁹ Under section 246 Town & Country Planning Act 1990

planning policies may also apply depending on the characteristics of the proposal and its impacts.

Financial and Risk Implications

20. Section 204 of the Housing and Planning Act 2016 provides that where rights are overridden by virtue of S.203, compensation is payable in accordance with the compensation code (the term used to describe legislation applicable to the assessment of compensation following compulsory acquisition) and that where a person other than a specified or qualifying authority is liable to pay compensation under this section, but does not compensate the person so entitled, the claim may be enforced against the relevant authority (i.e. the City). However, the authority may recover from the developer any amount it pays out¹⁰. The authority's right to be indemnified by a developer in respect of such claims is therefore preserved under the new provisions and appropriate indemnities or equivalent solicitors' undertakings should be secured prior to arrangements being implemented.
21. Similarly any costs arising by virtue of land transfer arrangements should be fully met by the developer.
22. Given the nature and significance of the issues under consideration, it is acknowledged that there's a risk that the City's approach or its decisions in considering individual cases may be challenged, which would involve the usual costs and damages risks 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.

Health Implications

23. These would be evaluated as part of any planning application prior to any decision regarding override of rights of light being considered (see Policy DM 10.7 in Appendix 2)

Equalities Act 2010

24. The public sector equality duty applies and therefore due regard must be had to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between persons sharing a relevant protected characteristic and those who do not. It is not considered that acceptance of the recommendations will have a negative impact on any of those considerations. Any site specific impacts such as relating to the needs of any particular users or occupiers will be assessed on a case by case basis. \

Conclusion

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

¹⁰ Section 204(3)

Appendices

- Appendix 1 – Criteria for acquisition/appropriation for the purpose of engaging SS.227/203
- Appendix 2 – Planning Policies

Background Papers

Report - Planning and Transportation Committee Rights of Light Issues Affecting Development, dated 11th May 2011

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CRITERIA

Introduction

It is recognised that the acquisition or appropriation of land to engage S.203 involve interference with human rights: namely, the right to peaceful enjoyment of possessions and, in the case of affected residential property, the right to respect for private and family life and home. This is the case notwithstanding that where such powers are exercised, compensation is payable. Therefore, such powers should not be exercised unless a number of criteria are satisfied and S.203 specifically provides that the authority to interfere with rights or breach restrictions conferred by the section will only apply in cases where the authority could acquire the land compulsorily for the purposes of the building or maintenance work. Whether the relevant criteria are satisfied will depend upon the site specific circumstances. The criteria, which must be carefully considered and weighed in each case, are set out at 1 – 2 below. They broadly require that the local planning authority be satisfied that there is a compelling case in the public interest for the exercise of the powers and interference with property rights and that the public interest to be achieved is proportionate to the interference with private rights which would result.

Criteria

1. There is a compelling case in the public interest that the powers conferred by section 203 of the Housing and Planning Act 2016 be engaged in order that the building or maintenance work or use proposed can be carried out within a reasonable time, and in particular, that:
 - (i) There is planning consent for the proposed development;
 - (ii) Acquisition or appropriation and consequent engagement of section 203 of the Housing and Planning Act 2016 will facilitate the carrying out of development, redevelopment or improvement on or in relation to land, and in particular the proposed development for which planning consent has been obtained, or similar development;
 - (iii) The development, redevelopment or improvement will contribute to the promotion or improvement of the economic, social or environmental wellbeing of the authority's area and those benefits could not be achieved without giving rise to all of some of the infringements - therefore it is in the public interest that the land be acquired by the City or appropriated by them for planning purposes, so as to facilitate the development proposed or similar development.
 - (iv) There will be infringements of one or more relevant rights or interests as defined in section 205(1) of the Housing and Planning Act 2016 or breach of a restriction as to user of land which cannot reasonably be avoided;
 - (v) The easements to be interfered with cannot reasonably be released by agreement with affected owners within a reasonable time (and adequate evidence of satisfactory engagement, and where appropriate negotiation, has been provided to the City) ;
 - (vi) The ability to carry out the development, including for financial or viability reasons, is prejudiced due to the risk of injunction, and adequate attempts have been made to remove the injunction risks;
 - (vii) A decision to acquire or appropriate in order to engage section 203 of the Housing and Planning Act 2016 would be broadly consistent with advice given in the DCLG

Guidance on Compulsory Purchase (2015) (and any replacement thereof) so far as relevant.

- (viii) The use of the powers is proportionate in that the public benefits to be achieved so as to outweigh the infringement of human rights;
 - (ix) The developer has consulted with rights holders regarding the engagement of section 203 wherever feasible and appropriate in the circumstances of the case.
2. The authority could acquire the land compulsorily for the purposes of the building or maintenance work or the use of the land (and where the land in issue is currently owned by the authority it is to be treated for these purposes as not currently owned by the authority);

APPENDIX 2

PLANNING POLICIES

The London Plan includes the following relevant policies:

- i) **Policy 2.10 “Central Activities Zone – Strategic Priorities”** which says that the Mayor will and boroughs should sustain and enhance the City of London as a strategically important globally-oriented financial and business services centre
- ii) **Policy 2.11 “Central Activities Zone – Strategic Functions”** which says the Mayor will and boroughs should secure completion of essential new transport schemes necessary to support the roles of CAZ, including Crossrail, and realise resultant uplifts in development capacity to extend and improve the attractions of the Zone
- iii) **Policy 4.2 “Offices”** which says that the Mayor will, and boroughs should recognise and address strategic as well as local differences in implementing this policy to meet the needs of the central London office market by sustaining and developing its unique and dynamic clusters of “world city” functions and by encouraging renewal and modernisation of the existing office stock in viable locations to improve its quality and flexibility

1 The City of London Local Plan includes the following policies:

- i) Under Implementation And Delivery it states that the City Corporation will, where necessary, use its land and property ownership to assist with site assembly and use its compulsory purchase powers to enable the high quality development the City needs; and
- ii) Strategic Objective 1 which is “to maintain the City’s position as the world’s leading international and financial and business centre”
- iii) Core Strategy Policy CS1 which is: “To ensure the City of London provides additional office development of the highest quality to meet demand from long term employment growth and strengthen the beneficial cluster of activities found in and near the City that contribute to London’s role as the world’s leading international financial and business centre, by:
 - Increasing the City’s office floorspace stock by 1,150,000 m² gross during the period 2011 – 2026 to meet the needs of projected long term economic and employment growth, phased as follows:
 - 2011 – 2016:650,000 m²
 - 2016 – 2021:250,000 m²
 - 2021 – 2026:250,000 m²

A pipeline of at least 750,000 m2 gross office floorspace with planning permission but not yet commenced will be maintained to provide office occupier choice.

- Encouraging the assembly and development of large sites, where appropriate, to meet the accommodation needs of the City's biggest occupiers, protecting potential large office sites from piecemeal development and resisting development that would jeopardise the future assembly and delivery of large sites.
 - Encouraging the supply of a range of high quality office accommodation to meet the varied needs of City office occupiers.
- iv) Policy DM 1.2 which is "To promote the assembly and development of large office schemes in appropriate locations".
- v) Policy DM 1.3 which is "To promote small and medium sized businesses in the City".
- vi) Policy DM 1.5 which is "To encourage a mix of commercial uses within office developments which contribute to the City's economy and character and provide support services...".

Policy DM 10.7

- 1) To resist development which would reduce noticeably the daylight and sunlight available to nearby dwellings and open spaces to unacceptable levels, taking account of the Building Research Establishment's guidelines
- 2) The design of new developments should allow for the lighting needs of intended occupiers and provide acceptable levels of daylight and sunlight

Supporting text paragraph 3.10.42 states that 'If a development is considered acceptable in planning terms and has planning permission, but it not proceeding due to rights to light issues, the City Corporation may consider acquiring interests in land or appropriating land for planning purposes to enable development to proceed.'

Policy DM 10.8

To achieve an environment that meets the highest standards of accessibility and inclusive design in all developments (both new and refurbished), open spaces and streets, ensuring that the City of London is:

- Inclusive and safe for all who wish to use it, regardless of disability, age, gender, ethnicity, faith or economic circumstance;
- Convenient and welcoming with no disabling barriers, ensuring that everyone can experience independence without undue effort, separation or special treatment;
- Responsive to the needs of all users who visit, work or live in the City, whilst recognising that one solution might not work for all.