Appendix 1

City of London Corporation Response to the Law Commission

Rights to Light Consultation – City of London Response

1 Introduction

1. The comments in this response to the Law Commission's consultation paper 210 on rights to light are intended to provide a guide to the City's current thinking.

2 Impact of rights to light on development

2. In order to evaluate the impact of rights to light issues on development in its area, the City has reviewed those schemes that are actively being delivered and those schemes pending subject to pre-letting.

3. Rights to light have a significant and material impact on the delivery of schemes in the City market. There are 37 schemes that are either currently being delivered or are awaiting a pre-let to commence construction, totalling circa 10.3 million sq ft. Of these schemes, 20 have been subject to intervention by the City (both formal and informal) in terms of promoting resolution of rights to light issues. The ability to deliver these schemes has been frustrated, prior to City engagement, because of rights to light issues. The vast majority of the floorspace being created in the square mile was within the scope of these 20 schemes, amounting to 6.2 million sq ft of office floorspace. A 20 Fenchurch Street demonstrates the City's approach in acquiring an interest in the site so as to trigger its powers under s237 in an effort to resolve difficult right to light issues.

3 Damages

4. On this issue, the City is able to draw on its experience in its capacities as a land owner, developer and planning authority.

5. Damages based on share of profit are not invariably the most apt method of calculating compensation for the loss of a right to light. Such an approach is awkward, for example, where there are overlapping right to light interests. In addition, where, for instance, a building is developed without a direct profit motive it would be inappropriate for a measure of damages to be based on share of profit. Such situations may arise, for instance, where a local authority develops a site for housing social enterprises. It is also possible, as part of the growing moves towards regenerating high streets, that corporate landlords as well as local governmental ones will develop sites on a not for profit – or not mainly for profit – basis. The City suggests that, in its assessment and recommendations, it would be helpful for the Law

Commission to recognise the diversity of reasons for development and support a measure of damages based on loss in value. Assessment on this basis would have the important merit of being in keeping with familiar compulsory purchase valuation principles.

6. The City supports the Commission's apparent inclination towards a diminution in value basis for assessing damages. It may be that the Commission is willing to go further and consider the merits of setting multipliers so that varying multipliers of the capitalised rent loss are linked to specific levels of light reduction. This would enable the level of a loss of light in individual cases to be reflected in the value of damages awarded. The City would welcome an investigation by the Commission into this aspect of damages.

7. From time to time decided cases take the exact nature of the dominant tenement into account in assessing damages – a loss of natural light to commercial office developments, for example. The Law Commission may wish to consider reinforcing the principle that similar losses of light have different effects on different dominant owners, those effects being determined by the nature of the dominant owner. There is a considerable difference, for instance, between the loss of light to a homeowner or small business, perhaps a textile designer, and the loss of an equal amount of light to a commercial business development where electric lighting operates regardless of the number or size of apertures. Such considerations are currently taken into account by courts when determining whether to grant an injunction.

4 Proposed Notices

8. The City agrees with the Law Commission's observation that dominant owners often take a long time to declare their position and any intention to seek an injunction. Dominant owners may have a variety of reasons for not declaring their position – from a long-distance owner knowing nothing of the development until a development proposal is well advanced through to an owner seeking to obtain pecuniary advantage by deliberately declaring his hand at a late stage.

9. The City supports the Law Commission's proposals to introduce a 'notice of proposed obstruction' (NPO). The City agrees with the Commission's broad proposals as to the form and content of the NPO (at 6.14 et seq). The City supports the Commission's proposal (at 6.16) that only freeholders and leaseholders would be permitted to serve NPOs. The Law Commission's broad proposal regarding the requirement to register an NPO as a local land charge is an important feature of ensuring the successors in title of both dominant and servient tenements are easily able to determine the nature of the land and the rights appertaining to it.

10. Whether or not, as the Commission suggests (at 6.9), NPOs are used to "flush out" potential claimants is of little practical significance. The City would observe that, in respect of the intention behind the notice, the use of

NPOs should not be limited and believes that the Law Commission should not make any recommendation in this regard.

5 Section 237

11. The City supports the Commission's conclusion that s237 fulfils a valuable role and is a useful mechanism to manage some rights to light issues in certain circumstances. The City considers the opportunity for local authority intervention by s.237 arrangements will remain of value in particular cases, and therefore would not wish to see the use of such arrangements prejudiced. The City reaffirms its position as described in 7.56.

12. While the Commission recognises that s.237 is outside the scope of the consultation, it is important to consider how the interface between s.237 and NPO procedures and the expanded Lands Chamber jurisdiction would operate in practice. The Commission is invited to consider whether, if use of s237 is regarded as a tactic of last resort, it would be necessary to complete the NPO process prior to exercising s237 powers. Alternatively might an NPO foreshorten the period within which the powers under s237 might be deployed?

13. If it is the Commission's proposal to expand the jurisdiction of the Lands Chamber to encompass all right to light claims, that approach may run the risk of thwarting the use of s237. By way of example, in 7.117 the Commission notes the likely importance of a 'public interest' test in any new Lands Chamber jurisdiction. The Commission should consider whether this proposed expanded jurisdiction will cut across the public interest considerations that must be taken into account in the use of s237 powers: for example, would it ever be 'necessary' to use s237 powers if there is a recourse to the Lands Chamber under its expanded jurisdiction? Planning authorities' planning powers – which reflect their position as being best placed to balance local interests in a consistent manner - would be diminished if the use of s237 was to be limited or extinguished

14. Subject to this consideration and in seeking to preserve the efficacy of s237, the Commission might consider the merits of a two-step framework to permit planning authorities to engage s237 prior to any recourse to the expanded Lands Chamber. If the planning authority wishes to engage s237 then the process will mirror the current arrangements and the rights and responsibilities of all parties will remain the same. If, however, an authority does not wish to utilise s237 then the Commission's proposed expanded Lands Chamber jurisdiction would be available.

6 Which Tribunal?

15. It will be important to consider how the proposed expanded jurisdiction of the Lands Chamber might interact with the issue of conventional proceedings seeking to injunct an interference with light. The Commission's proposals to expand the Chamber's jurisdiction, with the resulting liberalisation of a developer's ability to apply for the Chamber to use its

power to discharge or modify a restrictive covenant under s84 Law of Property Act 1925, may encourage developers to pursue a free-standing Lands Chamber application to discharge a right to light. It is plausible to imagine that, at the same time, the dominant owner will seek a remedy through conventional county or High court proceedings. In the section dealing with this aspect, 7.112 et seq, the Commission does not appear to consider the possibility that in the future a dominant owner might issue proceedings (or, indeed, a NPO counter notice) to protect his position and separately the developer might commence proceedings in the Lands Chamber to extinguish the same right to light. It seems open to a developer to pursue this course because, as the Commission notes in 7.111, a developer may approach the Lands Chamber under its expanded jurisdiction not only where there is consent or no injury but also based on an argument that his use of the land is reasonable.

16. The Commission should consider whether parallel proceedings (court and Chamber) would impose delay and additional expense when proceedings in, for instance, the Lands Chamber have to be stayed in order for a court application to be heard and the matter rehearsed afresh.

17. Does the Commission propose that a reference to the Lands Chamber would allow a development to proceed – as with compulsory purchase – or would such a reference stay development as in the case of injunction proceedings?

18. Finally, in coming to its judgement on whether to recommend re-aligning the tribunal in which the bulk of rights to light issues are considered, we believe that the Commission should take into account that the Land Chamber sits only in London and that it is well established that no legal aid is available (while legal aid applications are unlikely to be granted in the county court, an application is more likely to be positively considered). While the Commission does not tackle the point directly, does it foresee, as part of a general move towards expanding the Land Chamber's jurisdiction, the introduction of an injunctive power into the Chamber's suite of powers?

7 Prescription

19. The arguments for and against abolition of rights of light being acquired by prescription are finely balanced. However, it is considered that great caution should be exercised in relying, as a justification for abolition, on the ability of planning policy to protect the light and amenity of residential owners. While loss of amenity (including sunlight/daylight) is an acknowledged planning consideration, were owners to lose alternative property law routes to pursue concerns about light, it is likely that those concerns would lead to increased focus on planning amenity and sunlight/daylight issues with implications for evaluation of planning applications and the time involved in determination (and possible appeal).