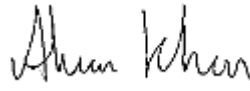


LONDON BOROUGH OF WALTHAM FOREST

Meeting / Date	Cabinet 13 July 2023	
Report Title	Appropriation of land at Priory Court - Sixty Bricks Phase 2 scheme	
Cabinet Portfolio	Councillor Ahsan Khan, Deputy Leader (Housing and Regeneration)	
Report Author/ Contact details	Mark Crane Director Housing Delivery Mark.crane@walthamforest.gov.uk	
Wards affected	William Morris	
Public Access	Open except for Appendices B and C , as listed below, which are EXEMPT in accordance with section 100 (A-H) of the Local Government Act 1972 and Schedule 12A as amended, on the grounds that it involves the likely disclosure of exempt information as defined in Part 2 paragraph 3, as it contains information relating to the financial or business affairs of any particular person (including the authority holding the information) and disclosure would not be in the public interest.	
Appendices	Appendix A- Plan of land to be appropriated Appendix B- Rights to Light Report (Exempt) Appendix C- Compensation Assessment (Exempt) Appendix D- Equality and Diversity Matrix Appendix E – Consultation Summary	

1. SUMMARY

- 1.1 Priory Court is the first scheme to come forward as part of the Sixty Bricks Phase 2 programme. In January 2023 Cabinet approved the scheme business case and agreed that the scheme could progress to planning application submission. In March 2023 the scheme was submitted for planning approval.
- 1.2 The Priory Court scheme is anticipated to deliver 83 residential units in three new blocks on the existing Priory Court estate. In addition, the scheme will deliver significant landscape and social infrastructure improvements i.e. new playground, Multi Use Games Area ('MUGA'), landscaping and public realm improvements.

- 1.3 To ensure that the development can proceed in a timely manner, the Council needs to address any rights and easements that affect the proposed site (as shown edged red on the site plan at Appendix A and hereafter referred to as (**“the Land”**)) and could prevent development being advanced. This report seeks approval to appropriate the Land, so that it is held for planning purposes, thus triggering the protection of s203 Housing and Planning Act 2016 (“HPA 2016”).

2. RECOMMENDATIONS

- 2.1 Cabinet is recommended to:
- 2.1.1 Authorise the Commercial Director of Property and Delivery in consultation with the Director of Governance and Law to appropriate the land edged red on the plan attached at Appendix A (“the Land”) for planning purposes under Section 122 of the Local Government Act 1972 and Section 227 Town and Country Planning Act 1990.
- 2.1.2 To note that the appropriation of the Land will trigger the protection of Section 203 of the Housing and Planning Act 2016 which is subject to:
- i. planning permission for the proposed development of the Land being granted.
 - ii. consent to the appropriation from the Secretary of State in accordance with Section 19 of the Housing Act 1985.
 - iii. the appropriation of open land being advertised in accordance with the requirements of Section 122(2A) of the Local Government Act 1972 and due consideration being given to any representations that are made in respect of the proposed appropriation of the open space land that is situated within the Land.
 - iv. no material matters arising in the engagement process which substantially alter the Council’s factual case so that the Council considers that the criteria for appropriation are no longer met.
- 2.1.3 Authorise the Commercial Director of Property and Delivery in consultation with the Director of Governance and Law to take all necessary steps and deal with all necessary legal arrangements, including (but not limited to) entering into an indemnity agreement with Sixty Bricks Limited, making compensation payments in line with the statutory framework, responding to any claims and dealing with any disputes.
- 2.1.4 Note that, Sixty Bricks Limited will be responsible for negotiating and settling any compensation associated with Rights to Light.

3. PROPOSALS

Background

- 3.1 The Priory Court scheme is comprised of three new blocks of development on Housing Revenue Account (HRA) land (including car

parking area, open land, and existing games area which is to be re-provided) on the Priory Court estate in the William Morris ward. The net area of land proposed for development is a total of 0.97 hectares as shown in Appendix A. The current proposal is for 83 new residential units across three new development blocks, which have been submitted for planning as a minimum 50% affordable by habitable room.

- 3.2 On the 12th January 2023 Cabinet approved the business case for the scheme and Sixty Bricks submitted the planning application for the scheme in March 2023, which is anticipated to be considered in July 2023.
- 3.3 As part of due diligence for delivering the proposed scheme, consideration has been given to whether any rights, easements, or restrictions will be interfered with or will affect the Land. The Council has also carefully considered whether the proposed scheme will interfere with the Right to Light of neighbouring properties.

Proposal- Rights to Light

- 3.4 A Right to Light is an interest in land (an easement) which entitles a neighbouring landowner ("Dominant Owner") to receive light to their property through a defined aperture (ie window) across neighbouring land ("the Servient Land"). In this case the Servient Land is the land at Priory Court which is proposed to be developed. Any development of the Servient Land which interferes with a Right to Light may constitute a breach of that easement. A Dominant Owner who has had their Right to Light infringed may bring a claim against the owner of the Servient Land in Court and if the claim is successful the Court has the power to grant an injunction (which could stop development or require the infringement to be removed) or to award damages to the Dominant Owner for the injury caused.
- 3.5 A Rights to Light report (Appendix B) was commissioned by Sixty Bricks to identify whether the Rights to Light of any nearby properties could be impacted by the proposed development. The assessment also considered whether any of the potential injured Dominant Owners could suffer sufficient injury to succeed in obtaining an injunction. A Schedule of interests and rights is included in Appendix C as part of the Compensation Assessment report.
- 3.6 To provide certainty for the development programme of the Land and to ensure that, subject to receiving planning permission, the development can be delivered in full, without the risk of a third party securing an injunction, it is necessary to appropriate the Land for planning purposes. Interested parties with legal rights, which may be interfered with by the development will be engaged prior to the Land being appropriated. This engagement will take place to secure the release of rights, however, there is no requirement that agreement will be reached with interested parties or that all rights/restrictions over the Land will be identified to allow for engagement.

- 3.7 Appropriating the Land for a planning purpose will trigger the protection of s.203 HPA 2016. This legal provision will allow the Council, or any party deriving title under them, to lawfully interfere with third party rights, restrictive covenants and contractual restrictions relating to the Land, providing the development of the Land is delivered in accordance with the planning permission. Parties who have their rights infringed by the development of the Land will be entitled to compensation for the infringement of their rights which shall be assessed in accordance with the statutory provisions.
- 3.8 Part of the Land on the Priory Court estate is open space. The proposed three new developments will be delivered on some of the open space as identified in Appendix A (Plan of land to be appropriated). To comply with Section 122 of the Local Government Act 1972 ('LGA 1972') and more specifically sections 122 (2A) LGA 1972 the Council must advertise its intention to appropriate open land and must consider any representations before implementing the decision to appropriate. The advertising process must be carried out in accordance with the statutory provisions and will commence once there is certainty the development will proceed. A full assessment of the impact of the loss of the open space and relevant planning considerations are set out in the planning application documents.
- 3.9 The Council will ensure that a robust engagement process regarding Rights to Light will be carried out. The Council will send an initial letter to those parties identified as potentially having their Rights to Light infringed by the development of the Land on the Priory Court estate informing them of the intention to appropriate the Land and seeking representations. This will give the opportunity for impacted parties to engage with the Council and for negotiated settlements to be reached. As part of this, and in addition to any agreed compensation, the Council will need to pay the reasonable legal and surveyor fees of those impacted parties who enter negotiations. Should any potentially impacted party not engage with the Council they will be sent a further two follow-up letters which will ensure that the Council has taken all reasonable steps to meaningfully engage with them.
- 3.10 Should this process reveal matters that substantially alter the Council's factual basis for appropriating under s122 LGA 1972 then a further report will be brought back before Cabinet.

Use of Powers

- 3.11 **S122 Local Government Act (LGA) 1972**
- 3.12 To appropriate the Land for planning purposes under s122 LGA 1972, the Council must decide that the land to be appropriated is no longer required for the purpose for which it was held immediately prior to appropriation.

- 3.13 The Land is currently open space and a carpark on the existing Priory Court Estate, which is HRA land. These current purposes will cease once the Council enters into an agreement/lease over the Land with Sixty Bricks under the terms of a Development Agreement to deliver the development and much-needed new housing, including affordable housing on behalf of the Council. The net loss of open space to provide the new uses, is circa 0.32 hectares out of a total of 0.97 hectares. The requirement to deliver housing including affordable tenures, across the Borough has led the Council to review HRA land, including existing open space, and assess appropriate development opportunities and by extension deliver intensification projects across its housing estates. The net loss of open space at Priory Court, will result in the delivery of needed affordable housing and the remaining estate open space will be improved considerably in landscape quality. Much needed improved community and social infrastructure including new play areas and a Sports England specification MUGA, will also add to the improved environment of the estate and are a direct result of the redevelopment opportunity.
- 3.14 **S203 Housing and Planning Act (HPA) 2016**
- 3.15 Section 203 HPA 2016 provides that where planning permission has been granted and land has been appropriated for planning purposes then, any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land which could prevent the development of that land from being carried out in accordance with the planning permission, can be overridden providing the development is delivered in accordance with the planning permission. Those parties which suffer an interference which would be actionable in law, were it not for the protection of s.203 HPA 2016, are entitled to receive compensation for the diminution in the value of their interest caused because of the proposed development's interference. The benefit of Section 203 HPA 2016 will apply to Sixty Bricks as the Council's developer. By virtue of appropriating under Section 122 LGA 1972, Section 203 HPA 2016 will be enabled.
- 3.16 Section 203 HPA 2016 does not remove the legitimate rights of those taking the benefit of the easements or other rights to compensation arising from the interference with such rights, but it does remove the potential for such persons to frustrate the development by obtaining an injunction to prevent interference with their rights.
- 3.17 The decision to appropriate and acquire the protection provided by s203 HPA 2016 is analogous to the application of an Acquiring Authority's compulsory purchase powers. The Council therefore has used the requirements of CPO guidance titled 'Compulsory purchase process and the Crichel Down Rules' ("Guidance") to assess the suitability of appropriation in this case. This requires the Council to demonstrate that both Sixty Bricks regarding Rights to Light and the Council regarding other third-party rights, if applicable, has made 'reasonable attempts' to negotiate the release of the affected rights and

agree compensation where relevant. This also includes any unknown restrictive covenants. It requires the Council to give due consideration to a variety of other criteria when making its decision.

These criteria are considered in detail below:

a) Whether the appropriation will facilitate the carrying out of the redevelopment of the land

- 3.18 By engaging Section 203 HPA 2016, the Council and Sixty Bricks have sufficient certainty that an injunction cannot prevent the development from being delivered. If an action is brought against Sixty Bricks, and or the Council the remedy will be compensation.
- 3.19 Appropriation is a key tool available to the Council to ensure that the proposed development can be brought forward and not be constrained by existing rights, restrictions, covenants, easements or obligations. Appropriating the Land for a planning purpose ensures that the development can proceed without risk of injunction from a party having the benefit of a right over the site, either known or unknown. The potential barrier to the proposed development will be overcome via the process of appropriation.

b) Whether the Proposed Development will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

- 3.20 The Priory Court development is a key project in the Sixty Bricks pipeline and aims to deliver 83 residential homes on the existing estate. As a minimum the development will provide 50% affordable housing, it will therefore contribute needed housing to the Council's overall Local Plan target. In addition the proposed scheme will also deliver considerable landscaping, improvements, and new social and community infrastructure (MUGA) and playground to an area in need. It therefore has a significant placemaking improvement role to play as part of the Council's housing estate, upgrade/regeneration programme. There will also be considerable biodiversity net gain - the proposed development will lead to a net gain of 11.37% in biodiversity at the site, which constitutes a net gain of 4.66 habitat units. In addition, there will be a gain of 30.43 hedgerow units.

c) Whether the interference with private rights is proportionate and the alternatives that have been considered.

- 3.21 It is recognised that an interference with an individual's private rights must be proportionate and considered against the public benefits that are derived when contrasted against an alternative of not interfering with those rights. "Proportionate" in this context means that the interference 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 interests of the public regarding the

proposed development. Therefore, the availability of compensation to those who are deprived of their rights is of relevance to the issue of proportionality.

- 3.22 In the present case it is considered that the public interest that will result from the delivery of the proposed development outweighs the interference with private rights. In respect of Rights to Light, the modelling undertaken shows that the interference caused to properties may be considered as minor/moderate. Furthermore, analysis shows that for actionable injuries to neighbouring properties' Rights to Light to be avoided completely, the amount of housing would need to be significantly reduced thus making the scheme financially unviable. There would also be a significant reduction in the public benefits provided by the development.
- 3.23 Whilst Sixty Bricks and the Council will engage with interested parties to seek to secure the release of rights and restrictions over the Land, officers consider that the appropriation of the Land and the consequential interference with private rights is proportionate given the nature of those rights and the public benefits that are realised from the development.

Does the proposed development accord with the Council's development Plan?

- 3.24 The Land is being appropriated to allow for its comprehensive redevelopment as provided for by the planning consent should the submitted planning application be approved. The redevelopment of the Land will deliver the planning objectives set out in the London Borough of Waltham Forest's emerging Local Plan, in particular the need to promote good growth and the right development in the right places at the right scale, creating attractive sustainable neighbourhoods as well as new economic opportunities. In addition, the Priory Court redevelopment supports the creation of liveable places through increased housing delivery and ensures land optimisation on a key estate in the borough.
- 3.25 **Have reasonable efforts have been made to secure the release of rights and restrictions that burden the Land?**
- 3.26 Sixty Bricks will begin engaging with impacted parties and will lead on the next stage of the negotiation process following, approval of the recommendations set out in Section 2 of this report and following planning permission should it be granted. It is anticipated that 3 engagement letters will be sent to impacted parties, giving them ample opportunity to comment.
- 3.27 Under Section 19(2) of the Housing Act 1985, Secretary of State consent is required for the appropriation of Housing Revenue Account land for development purposes. A formal request setting out the rationale for the appropriation of land at Priory Court Estate, to facilitate

the proposed development, will be made following and subject to Cabinet's approval of the recommendations contained within this report.

Conclusion

- 3.28 The proposed development will interfere with Rights to Light of some neighbouring properties, given their proximity to the former.
- 3.29 The Council has considered each of the criteria and considers that the interference with private rights is proportionate in view of the public benefits that are generated by the proposed development. The Priory Court development will deliver much needed economic, social, and environmental benefits to residents. The Land could not be developed without interfering with identified rights and restrictions and reducing or eliminating interferences with Rights to Light would result in a significant reduction in the form of development deliverable which would result in the development of the Land being unviable. Sixty Bricks and the Council will engage with the relevant parties to secure the release of rights over the Land by agreement, but there is a reasonable prospect that agreement with all parties would not be achievable. To wait until all efforts have been exhausted would result in significant delays to the delivery of the proposed development. Furthermore, the appropriation of the land for a planning purpose so to invoke the protection of s.203 HPA 2016 is necessary given the identification of unknown rights and restrictions over land. A further report will be brought to Cabinet for consideration should the engagement process reveal material matters, which alter the Council's factual case.

4. OPTIONS & ALTERNATIVES CONSIDERED

- 4.1 The alternative to appropriating the land for planning purposes would be to seek to identify and release all rights and remove all restrictions by private agreement prior to commencement of the development works.
- 4.2 This approach would lead to a delay in the delivery of the proposed development as it is unlikely that agreement would be reached with all parties within a reasonable timeframe, and in line with the scheme's programme. It is also possible that there will be greater financial exposure to the Council as impacted parties may seek ransom payments on threat of injunction, and may, due to their lack of agreement with the proposed development, refuse to engage with Sixty Bricks or demand unreasonable levels of compensation. This could result in significant uncertainty regarding the delivery of the scheme by either causing delay or it not proceeding due to the risk of additional costs.

5. COUNCIL STRATEGIC PRIORITIES (AND OTHER NATIONAL OR LOCAL POLICIES OR STRATEGIES)

5.1 Planning policy will guide sustainability proposals. The redevelopment of the Land will specifically contribute to the Council's policy of:

- Creating and establishing a sustainable neighbourhood by providing a range of quality new homes in terms of tenure, size and affordability to meet the housing needs of the local community

5.2 The Council has set ambitious plans for housing delivery and has demanding housing targets to reach from the Mayor of London. The development of the scheme could contribute to meeting these targets by providing 83 units of new housing.

6. CONSULTATION

6.1 Consultation on the Priory Court scheme has been ongoing. In Summer 2022 under Section 105 of the Housing Act 1985, there was extensive engagement with the Council's secure tenants. Further engagement and consultation has been ongoing including in 2022 with wider stakeholders. The Statement of Community Involvement submitted with the planning application outlines the community engagement that has been taking place to shape design proposals.

6.2 As identified in the main report Sixty Bricks will actively engage and consult with key stakeholders in matters related to the appropriation of land for planning purposes.

7. IMPLICATIONS

7.1 Finance, Value for Money and Risk

7.1.1 The terms of the Development Agreement will be subject to the Heads of Terms agreed between the Council and Sixty Bricks. The indemnity insurance taken out by Sixty Bricks will also cover the costs in relation to the potential infringement of Rights to Light. Compensation payments may be required following the completion of the development, after the site has been handed back to the Council.

7.1.2 Appendix C includes the compensation assessment in relation to the rights to be appropriated as outlined in this report.

7.2 Legal

7.2.1 The Council holds land for various statutory purposes to perform its functions. From time to time, the purpose for which the land is held may change. Appropriation is the process by which a Council formally changes the purpose for which land is held, from one purpose to another. Section 122 of the Local Government Act 1972 authorises the Council to appropriate land to a particular purpose for which it is

authorised to acquire land by agreement, where that land is no longer required for its original purpose.

- 7.2.2 Section 227 of the Town and Country Planning Act 1990 authorises a local authority to acquire land by agreement for a purpose for which the local authority may be authorised to acquire land under Section 226 of the Town and Country Planning Act 1990. As a result, the appropriation of the Land for planning purposes must be made pursuant to Section 122 Local Government Act 1972 and Section 227 Town and Country Planning Act 1990.
- 7.2.3 Section 226 Town and Country Planning Act 1990 authorises a local authority to acquire compulsorily any land in their area for planning purposes if the local authority believe the acquisition is likely to contribute to achieving the promotion or improvement of the economic social and/or environmental well-being of the whole, or any part, of the area in question in the interests of the proper planning of the area.
- 7.2.4 Statutory powers under Section 203 of the Housing and Planning Act 2016 can be used on land appropriated for planning purposes, to safeguard land from potential third-party injunctions seeking to protect their rights. The effect of appropriating land for planning purposes under Section 122 of the Local Government Act 1972 and using powers to address third party rights under Section 203 of the Housing and Planning Act 2016 is that such third-party rights will be converted to compensation. A prospective claimant will not be able to obstruct the development by obtaining an injunction seeking to stop the development providing that the development is carried out in accordance with the planning permission. The appropriation will affect third party rights such as rights of way or rights of light either derived from a deed or obtained by prescription under usage. The rights of statutory undertakers and electronic code operators will not be affected and, if appropriate, the Council will have to negotiate with them separately. The criteria to be satisfied for the powers within Section 203 of the Housing and Planning Act 2016 to apply are:
- There is planning consent in place for the work/use of land that has been acquired or appropriated;
 - The work/use must be intended to be carried out on land that has been appropriated by a local authority for planning purposes;
 - The land could be acquired compulsorily for the purposes of the works/use; and
 - The works/use is for the purpose for which the land was vested, acquired, or appropriated.
- 7.2.5 Subject to planning permission being obtained for the development of the Land and the Land being appropriated for planning purposes, all the above criteria would be satisfied.
- 7.2.6 Existing third-party legal rights and easements (eg rights of light, etc) will be converted into compensation under Section 203 powers. The

powers under Section 203 to address third party rights are similar to compulsory purchase powers under section 226 of the Town and Country Planning Act 1990. It follows that, in accordance with The Guidance before such powers are used, the Council must demonstrate that meaningful attempts to negotiate compensation have been pursued or at least genuinely attempted with known interested parties. This would not be the case where the rights or beneficiaries are unknown or in question. The approach set out in this report shows how the Council propose to meaningfully attempt to negotiate compensation with known interested parties whose rights of light may be impacted by the development of the Land.

7.2.7 The Council is required to act in accordance with the public sector equality duty under Section 149 of the Equality Act 2010 and have due regard to this duty when carrying out its functions, which includes making new decisions. Appendix D contains the Equalities Impact Assessment, and the Council will have to ensure that it removes or mitigates ad potential factors which may interfere with its public sector equality duty.

7.2.8 The Human Rights Act 1998 incorporated into domestic law the European Convention of Human Rights ("the Convention"). Specific rights protected by the Convention include, amongst others:

- a) The right of everyone to the peaceful enjoyment of their possessions, which can only be impinged upon in the public interest and subject to relevant national and international laws, and
- b) The right to a private and family life, home and correspondence, which can only be impinged upon in accordance with the law and where such encroachment is necessary in the interest of national security, public safety or the economic wellbeing of the country.
- c) The above Convention rights should be considered by the Council before using the power to appropriate for planning purposes. European jurisprudence has recognised that "regard must be had to the fair balance that has to be struck between competing interests of the individual and of the community as a whole". Any interference with a Convention right must therefore be necessary and proportionate.

7.2.9 The proposed development land is outlined in red in Appendix A.

7.2.10 In considering the appropriation of the Land for planning purposes, the Council will need to carefully consider the factors above and the balance to be struck between individual rights and the wider public interest. The Council must be able to demonstrate the public benefits to be derived from the proposed development of the Land are of a significant magnitude to justify the appropriation of the Land for planning purposes.

7.3 **Equalities and Diversity**

7.3.1 The Equality Act 2010 requires public authorities to have due regard to the need to eliminate discrimination and advance equality of opportunity. The Council must further consider its wider Public Sector

Equality Duty (PSED) under s.149 of the Equality Act 2010 when making its' decisions. The public sector equality duty (s.149, Equality Act 2010) requires the Council, when exercising its functions, to have "due regard" to the need to:

- a) eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited under the Act;
- b) advance equality of opportunity between those who share "protected characteristics" and those who do not share that protected characteristic and foster good relations between persons who share a relevant protected characteristic and persons who do not share it (this involves having due regard to the need to (a) tackle prejudice, and (b) promote understanding)

7.3.2 A preliminary Equality and Diversity assessment has been undertaken and attached at Appendix D.

7.3.3 When contacting interested third parties and negotiating compensation, any vulnerable parties and their requirements will be taken into account in accordance with the public sector equality duty.

7.4 **Sustainability (including climate change, health, crime and disorder)**

7.41 A sustainability and climate change matrix was publicised as part of the Priory Court business case report at 12th January 2023 Cabinet committee. The scope of the scheme is unchanged and since the focus of the current report is on appropriation, there are no direct sustainability implications associated with this document.

7.5 **Council Infrastructure**

7.5.1 The Priory Court scheme and actions related to appropriation will be delivered using existing Council resources.

BACKGROUND INFORMATION (as defined by Local Government (Access to Information) Act 1985)

None