

APPENDIX 6 – APPROPRIATION

1 BACKGROUND TO THE USE OF SECTION 203 POWERS

- 1.1 The Council proposes to construct a multi-story car park (“MSCP”) that will serve the proposed Indoor Arena on land that is currently used for overflow car parking for the Red Dragon Centre (“Land”). The removal of the current car park arrangements on the Land would infringe car parking rights that exist over the Land. The Council has sought to negotiate with the tenants that hold the car parking rights (“Tenants”) to release those rights and/or agree an alternative location for the car parking, but a release had not yet been agreed.
- 1.2 The provisions that permit persons to carry out building or maintenance work or to use land in contravention of a private right or interest are set out in Sections 203(1) and (4) of the Housing and Planning Act 2016 (‘2016 Act’)¹. Any rights that are overridden would be converted into a right to claim compensation under section 204 of the 2016 Act.
- 1.3 Before the powers within Section 203 can be relied upon, the relevant land first has to have been acquired or appropriated for “planning purposes” under section 122 Local Government Act 1972. Under section 122(1) of the Local Government Act 1972 the Council can appropriate land within its ownership for any purpose for which it is authorised to acquire land by agreement, and where that land is no longer required for the purpose for which it is held. Appropriation is the internal ‘transfer’ of land and property between different departments or purposes. The Land is no longer required for its current purposes and is required to be held for a planning purpose and redeveloped for the purposes of the MSCP to serve the Indoor Arena in accordance with planning permission.
- 1.4 “Planning purposes” are described in section 246 of the Town and Country Planning Act 1990 (‘TCPA’) which states that any reference to the appropriation of land for planning purposes is a reference to appropriation for the purposes for which land could be acquired under sections 226 and 227 of the TCPA. Therefore, planning purposes means an acquisition or appropriation which will facilitate the carrying out of development, re-development or improvement which is likely to contribute to the economic, social or environmental well-being of the area; or which is required for a purpose which it is necessary to achieve in the interests of the proper planning of the area in which the land is situated.

2 SECTION 203 HOUSING AND PLANNING ACT 2016

- 2.1 Where land has been appropriated for planning purposes (pursuant to section 122 Local Government Act 1972 and section 227 Town and Country Planning Act 1990), the consequence (under Section 203 of the Housing and Planning Act 2016) is that the erection, construction or carrying out of any building or other works on such land is authorised, notwithstanding that it may involve interference with third party rights. The following criteria would have to be satisfied in order for the powers within Section 203 to apply to the Land following appropriation to planning purposes:
- 2.1.1 There is a planning consent in place for the works to/use of the land that has been appropriated;
- 2.1.2 The works/use must be intended to be carried out on land which at any time on or after 13 July 2016 has:
- become vested in or acquired by the local authority; or

¹ Section 203(1):

(1) A person may carry out building or maintenance work to which this subsection applies even if it involves—
(a) interfering with a relevant right or interest, or
(b) breaching a restriction as to the user of land arising by virtue of a contract.

Section 203(4):

(4) A person may use land in a case to which this subsection applies even if the use involves—
(a) interfering with a relevant right or interest, or
(b) breaching a restriction as to the user of land arising by virtue of a contract.

- been appropriated by a local authority,

for planning purposes.

2.1.3 The land is land that the authority could acquire compulsorily for the purposes of the works/use; and

2.1.4 The works/use is for purposes related to the purposes for which the land was vested, acquired or appropriated.

2.2 The Council is considering whether to appropriate the Land within the Site for planning purposes so that the relevant land takes the benefit of the powers within section 203 Housing and Planning Act 2016 that permit private rights to be overridden. The Council will take active steps to negotiate a release of those rights before the powers within section 203 are implemented.

3 JUSTIFICATION FOR APPROPRIATION

3.1 It is necessary in making a decision as to whether to support the recommendation to appropriate the land to planning purposes to give consideration to all relevant matters:

a) Whether the appropriation of the Council's land and the acquisition of the Developer's land will facilitate the carrying out of the redevelopment of the land;

By engaging Section 203 in respect of the Section 203 Land, the Council will have sufficient certainty that an injunction cannot defeat the proposed development. If an action is brought against the Council, the remedy will be compensation.

b) Whether the development of the land will contribute to the promotion or improvement of the economic, social or environmental well-being of the area;

The development would facilitate the delivery of a new MSCP that is required to serve the Indoor Arena and will assist in the delivery of the benefits described at section 28 of the main Cabinet Report.

Overall the development will make a significant contribution to the economic, social and environmental well-being of the area. The delivery of the Indoor Arena that is associated with the MSCP is key to the regeneration of Atlantic Wharf.

c) Whether the use of Section 203 is proportionate with any interference with the human rights of those persons affected.

Human Rights issues arise in respect of the proposed arrangements. The Government guidance "Compulsory purchase process in Wales and the Crichton Down Rules (Wales Version 2020)" advises that compulsory acquisition (and therefore, by analogy, appropriation for planning purposes under s.122(1) Local Government Act 1972 or Section 122 (2A) Local Government Act 1972, which have the effect, by virtue of Section 203, of infringing Convention Rights) should consider (Part 1 Paragraph 20):

"...When making a CPO, acquiring authorities should be sure the purposes for which the CPO is made sufficiently justifies interfering with the human rights of those with an interest in the land affected.... Depriving an individual or business of their rights is a serious step which an acquiring authority should consider carefully"

Furthermore, under the Human Rights Act 1998 the Council is required to act in accordance with the European Convention on Human Rights ("ECHR") in deciding whether to implement the arrangements. Article 1 of the First Protocol of the ECHR provides that every natural or legal person be entitled to peaceful enjoyment of his or her possessions. Engagement of Section 203, to allow interference with private rights, involves interference with a person's rights under this Article. However, the right to peaceful enjoyment of possessions under Article 1 is a qualified rather than absolute right, as the wording permits the deprivation of an individual's possessions where it is in the public interest and is 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 economic well-being of the country, for the protection of health and morals, or for the protection of the rights and freedoms of others."

There must therefore be a balancing exercise between the public interest and the individual's rights whereby any interference in the individual's rights must be necessary and proportionate. "Proportionate" in a 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 rights of the public. It is for the Council to consider the issues raised in this report and to strike that "fair balance" in coming to its decision as to whether the Land should be appropriated to planning purposes.

It is considered that the public interest in appropriating the Land to facilitate the development of the MSCP that is required for the Arena outweighs the rights of the individuals to peaceful enjoyment of their possessions, and that the proposed use of Section 203 powers amounts to a proportionate interference in all the circumstances. In this regard, the availability of compensation to those who are deprived of their third party rights is of relevance to the issue of proportionality.

e) The acquisition and appropriation of the land required for the Development must be acquired or appropriated for 'planning purposes';

The Land would be appropriated to allow the comprehensive redevelopment of the Land as will be provided for by the planning consent. The redevelopment of the Land will deliver the planning objectives noted in the main report. The appropriation of the Land is necessary in order to facilitate the delivery of the MSCP that is required to serve the Indoor Arena.

f) The Third Party Rights affected by the Development and the likely extent of interference with those rights caused and whether such interference is reasonable;

The Land is burdened by a number of car parking rights and attempts to seek a release of those rights, or an agreement to provide alternative car parking rights have not reached a successful conclusion. The Council will continue to take active steps to negotiate a release of those rights before the powers within section 203 are implemented.

Due regard will need to be had to the Council's Public Sector Equality Duty (PSED, in particular with respect to general duties arising under the Equality Act 2010, section 149.

It is considered that the public interest in appropriating the Land to facilitate the development of the MSCP that is required to serve the Arena outweighs the rights of the individuals that hold private rights over the Land, and that the proposed use of Section 203 powers amounts to a proportionate interference in all the circumstances. In this regard, the availability of compensation to those who are deprived of their third party rights is of relevance to the issue of proportionality.