

## CABINET MEETING – 7 DECEMBER 2011

### EXECUTIVE SUMMARY SHEET – PART I

**Title of Report:**

ACQUISITION OF LAND AT SUNDERLAND RETAIL PARK, NEWCASTLE ROAD FOR PLANNING PURPOSES

**Author(s):**

THE DEPUTY CHIEF EXECUTIVE AND THE EXECUTIVE DIRECTOR OF COMMERCIAL AND CORPORATE SERVICES

**Purpose of Report:**

The purpose of this report is to obtain approval for the use of the Council's power under section 237 of the Town and Country Planning Act 1990 ("the Act") to override third party interests and rights to enable the proposed comprehensive redevelopment of Sunderland Retail Park ("SRP") by Tesco Stores Ltd ("Tesco") to proceed as quickly as possible and in advance of the implementation of The Council of the City of Sunderland (Sunderland Retail Park) Compulsory Purchase Order 2011 ("the CPO"). The relevant interests and rights and the ability to rely upon section 237 of the Act in respect of these interests and rights are described later in this report. It is considered that there remains a compelling case in the public interest, reinforced by the recent decision of the Secretary of State dated 28<sup>th</sup> November 2011 to confirm the CPO, which justifies reliance on the Council's powers under section 237 of the Act in this case. The compelling case in the public interest is described in more detail later in this report.

**Description of Decision:**

Cabinet is requested to:

1. Reaffirm the authorisation given by Cabinet at its previous meeting on 16th February 2011 to acquire and dispose of any land or interests required in order to enable the proposed development of Sunderland Retail Park ("SRP") to proceed in order to permit the acquisition of Tesco Stores Ltd's freehold interest to SRP by the Council under section 227 of the Town and Country Planning Act 1990 for planning purposes in order that section 237 of the 1990 Act may be relied upon.
2. Consider and agree, as part of the reaffirmation, that the powers to override interests and rights under section 237 of the 1990 Act may be utilised in respect of SRP to allow the implementation of the Scheme proposals to proceed as soon as reasonably possible in the public interest.
3. Authorise the Deputy Chief Executive, the Executive Director of Commercial and Corporate Services and the Head of Law and Governance to take all necessary action in order to implement (1) and (2) above.

Note that the financial implications associated with the proposal are cost neutral to the Council as set out in paragraphs 42 and 43 of this report.

Is the decision consistent with the Budget/Policy Framework?	Yes
<b>If not, Council approval is required to change the Budget/Policy Framework</b>	
<p><b>Suggested reason(s) for Decision:</b></p> <p>Following the making of the CPO, a public local inquiry has been held and the Secretary of State has now confirmed the CPO. However, it will be approximately 3 to 4 months until the CPO procedures will allow vesting of the Plot 2 Land to take place. Notwithstanding the need to compulsorily acquire leasehold interests within the Plot 2 Land to enable the Scheme to be implemented in its entirety, the Scheme could be substantially progressed in advance of the implementation of the CPO by relying upon the Council's power under section 237 of the Act to override the interests and rights enjoyed by the Plot 2 Land tenants, Blockbuster and Farmfoods. Tesco has informed the Council that it wishes to commence the implementation of the Scheme as soon as possible in January 2012 and has given notice to the Council that it requires the Council to acquire the freehold to SRP in order that the Council's power under section 237 of the Act may be relied upon. It is considered that the rights enjoyed by Blockbuster and Farmfoods in relation to service access, service media, car parking (in part) and quiet enjoyment of the Plot 2 land unit are capable of being overridden under section 237 of the Act and that there is a compelling reason in the public interest to the override these rights in accordance with the planning permission in view of the substantial economic, social and environmental benefits of the Scheme and to allow the early implementation of the Scheme ahead of vesting under the CPO. Without the use of the Council's power under section 237 of the Act, the implementation of the Scheme and the public benefits (recently recognised by the Secretary of State) that will flow will be delayed. As a consequence, it is appropriate to use the section 237 power so that the Scheme can be substantially progressed as quickly as possible in advance of reliance on the CPO.</p>	
<p><b>Alternative options to be considered and recommended to be rejected:</b></p> <p>Since the CPO has been confirmed, the alternative option in this case would be to await the completion of the CPO procedures for notification and vesting and allowing the statutory time for challenge to expire, and then acquire Blockbuster's and Farmfoods' interests in the Plot 2 Land in order to carry out the works to, and in the vicinity of, the Plot 2 Land to enable the implementation of the Scheme. Tesco's preference is to rely upon the power contained within section 237 of the Act in order that it may commence work to implement the Scheme immediately in January 2012 and deliver the public benefits that will follow. On the basis that Cabinet has previously authorised the acquisition of the Plot 2 Land for the purpose of enabling the delivery of the Scheme and that section 237 of the Act may be relied upon to override Blockbuster's and Farmfoods' rights in relation to service access, service media, car parking (in part) and quiet enjoyment, it is considered that the use of the power under section 237 of the Act is appropriate in this case. The failure to rely upon the power under section 237 of the Act would only serve to delay the comprehensive Scheme. That public interest in the delivery of the Scheme has been supported by the Secretary of State. Indeed, at para. 36 of her decision, the Inspector referred to the need to avoid delay and while that was a reference to using powers under section 237 of the Act alone, a parallel point can be made for advancing the Scheme as quickly as possible now that confirmation has been given.</p>	

<p><b>Is this a “Key Decision” as defined in the Constitution?</b></p> <p><b>Yes</b></p>	<p><b>Relevant Scrutiny Committee:</b></p> <p><b>Prosperity and Economic Development</b></p>
<p><b>Is it included in the Forward Plan?</b></p> <p><b>Yes</b></p>	



**ACQUISITION OF LAND AT SUNDERLAND RETAIL PARK, NEWCASTLE ROAD FOR PLANNING PURPOSES****REPORT OF THE DEPUTY CHIEF EXECUTIVE AND THE EXECUTIVE DIRECTOR OF COMMERCIAL AND CORPORATE SERVICES****Purpose of Report**

The purpose of this report is to obtain approval for the use of the Council's power under section 237 of the Town and Country Planning Act 1990 ("the Act") to override third party interests and rights to enable the proposed comprehensive redevelopment of Sunderland Retail Park ("SRP") by Tesco Stores Ltd ("Tesco") to proceed as quickly as possible and in advance of the implementation of The Council of the City of Sunderland (Sunderland Retail Park) Compulsory Purchase Order 2011 ("the CPO"). The relevant interests and rights and the ability to rely upon section 237 of the Act in respect of these interests and rights are described later in this report. It is considered that there remains a compelling case in the public interest, reinforced by the recent decision of the Secretary of State dated 28<sup>th</sup> November 2011 to confirm the CPO, which justifies reliance on the Council's powers under section 237 of the Act in this case. The compelling case in the public interest is described in more detail later in this report.

**Description of Decision**

Cabinet is requested to:

1. Reaffirm the authorisation given by Cabinet at its previous meeting on 16th February 2011 to acquire and dispose of any land or interests required in order to enable the proposed development of Sunderland Retail Park to proceed in order to permit the acquisition of Tesco Stores Ltd's freehold interest to SRP by the Council under section 227 of the Town and Country Planning Act 1990 for planning purposes in order that section 237 of the 1990 Act may be relied upon.
2. Consider and agree, as part of the reaffirmation, that the powers to override interests and rights under section 237 of the 1990 Act may be utilised in respect of SRP to allow the implementation of the Scheme proposals to proceed as soon as reasonably possible in the public interest.
3. Authorise the Deputy Chief Executive, the Executive Director of Commercial and Corporate Services and the Head of Law and Governance to take all necessary action in order to implement (1) and (2) above.

4. Note that the financial implications associated with the proposal are cost neutral to the Council as set out in paragraphs 42 and 43 of this report.

## **Background**

### Need for regeneration of SRP

1. SRP is located approximately 1 km to the north of Sunderland City Centre. It occupies a prominent gateway site on the principal approach to the City Centre from the north, bounded to the west by Newcastle Road, to the south by Monk Street, Shore Street and Roker Avenue and to the east and north by Portobello Lane. It extends to 6.23 hectares and its boundary is shown edged red on the plan attached as Appendix 1.
2. SRP comprises of 12 retail units, a bowling alley and former night club, a McDonalds' "Drive thru" restaurant and a former Reg Vardy car showroom, all with associated parking. However, only three of the retail units are currently occupied (one of which is subdivided) and only two of the other units (McDonalds and Sunderland Bowl) remain in occupation. The extent of the vacancies and the under utilisation of the car parking give the appearance of a predominantly poorly performing retail offer. The vacant units are characterised by closed security shutters, an increasing proliferation of graffiti and a general air of neglect. It is a failing and unattractive retail facility that lacks any vibrancy and vitality. It is no longer a retail destination of choice which exacerbates its poor appearance.
3. Whilst SRP is in an accessible location for car borne traffic and for users of bus and Metro services, there are few safe crossings over the surrounding highways network into the site. In particular, it has poor permeability for pedestrians who have been dropped off by public transport outside of SRP or for those accessing the site from nearby residential areas. Overall, it does not provide a retail offer which makes best use of the level of accessibility that it enjoys.
4. A number of the wards surrounding SRP have some of the highest unemployment figures within Sunderland. Issues with the labour market in Sunderland are identified in the Sunderland Economic Masterplan (adopted by the Council on 29 September 2010), which notes that Sunderland still suffers from high unemployment and a low skills base. These produce a major drag on Sunderland's ability to fulfil its economic potential. The Monkwearmouth area also experiences higher levels of poor health and crime than the national average. The effect of the predominance of vacant units within SRP is that the site fails to provide the maximum levels of employment opportunities that could be achieved in response to the high unemployment rates.

### Need for retail investment

5. In terms of access to shopping facilities for local residents, the Sunderland Retail Needs Assessment produced by Roger Tym and Partners on behalf of the Council (published in September 2009) found that there is a localised deficiency in convenience goods provision in the north of Sunderland along with a qualitative need for additional food and grocery provision.
6. There is also currently significant trade leakage from the Sunderland North area of convenience expenditure to the Asda store at Bolden Colliery in South Tyneside.
7. Members are referred to the attached reports to the Planning and Highways Committee (Appendix 2 in respect of the planning application) and the Cabinet report (Appendix 3 in respect of the making of the CPO) and the Statement of Reasons (Appendix 4) for the public interest reasons in favour of this investment and development at SRP. It is not considered that those reasons have changed significantly since the original decisions were taken by the Council to grant planning permission and authorise the making of the CPO.

### Cabinet Meeting, 16 February 2011

8. At its meeting on 16 February 2011, Cabinet considered a report on proposals for the comprehensive redevelopment of SRP to provide a new retail superstore, additional retail units and improvements to existing retail units, associated public realm improvements and highway infrastructure ("the Scheme") and resolved to:

*"1. Authorise the making of a Compulsory Purchase Order ("CPO") to be known as The Council of the City of Sunderland (Sunderland Retail Park) Compulsory Purchase Order 2011 under section 226(1)(a) of the 1990 Act to acquire land and under section 13 of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act") in order to acquire new rights at Sunderland Retail Park in order to facilitate the carrying out of its comprehensive redevelopment"; and*

*"6. Authorise the Deputy Chief Executive and Head of Law and Governance to acquire and dispose of any land or interests required to enable the proposed redevelopment of the Sunderland Retail Park to proceed, subject to appropriate indemnity provisions being in place with the developer."*

### Making of the CPO

9. On 24 February 2011 the Council made the CPO and on 4 March 2011 served and published notices of the making of the CPO and posted notices on site at SRP. Four statutory objections were received in relation to the CPO. A copy of the CPO is included at Appendix 5.

### The CPO Public Local Inquiry

10. The Inquiry was held on 4 October 2011 by an inspector appointed by the Secretary of State for Communities and Local Government to consider the Council's case for making the CPO, consider the grounds of objection and make a recommendation to the Secretary of State on whether the CPO should be confirmed.
11. Prior to the holding of the Inquiry, the objection to the CPO by Netto, in relation to the acquisition of Plot 3, was withdrawn and their unit has now been acquired by agreement. During the course of the Inquiry the objection to the CPO by McDonalds, in relation to the acquisition of Plot 1, was also withdrawn and an agreement has now been completed in order to vary the existing McDonalds' lease. The agreements reached by Tesco with Netto and McDonalds allow the Scheme to be implemented in respect of Plot 1 and Plot 3 without their compulsory acquisition. An amended Schedule to the CPO and Order Map were provided to the inspector. These are contained in Appendix 6. The land contained within the amended CPO is restricted to the Plot 2 Land.

### The Secretary of State's decision

12. On 28 November 2011 the Secretary of State confirmed the CPO, following the recommendation of the Inspector who held the Inquiry, making only such modifications to the Order as had been suggested by the Council. The Inspector found that the Council had acted properly in pursuing the CPO, had provided a convincing case for the scheme and had acted reasonably in its negotiations with affected landowners and occupiers (see paras. 28-38 of the Inspector's report). The objections made by the remaining objectors were not upheld.
13. The Council must now publicise the notice of confirmation of the CPO under s. 15 of the Acquisition of Land Act 1981 and give notice to the affected landowners/occupiers. S. 23 allows a statutory challenge to be made to the CPO but only if brought within 6 weeks of the first publication of the notice of confirmation. Even then, a challenge may not be brought on the substance of the reasons for confirmation but only on limited judicial review grounds (s. 23(2)).

## **Put Option Agreement**

14. On 24 February 2011 the Council entered into a Put Option with Tesco which confers a right on Tesco to require the Council to acquire the freehold to SRP for planning purposes in order that section 237 of the Act may be relied upon. The Agreement provides that on completion of the acquisition of the freehold, the Council will grant to Tesco a 250 year lease of the SRP site containing an option in favour of Tesco to acquire the freehold reversion back from the Council.

## **CPO Indemnity Agreement**

15. The Council entered into the Indemnity Agreement with Tesco on 16 February 2011 which provides for all costs incurred by the Council in respect of the voluntary or compulsory acquisition of land and interests and costs associated with overriding any third party interests or rights which are required to enable the implementation of the Scheme shall be met in full by Tesco. Under the Indemnity Agreement Tesco may request that the Council accepts a transfer of any part of SRP for planning purposes subject to the Council being satisfied that the statutory grounds in relation to the use of section 237 of the Act may be relied upon.

## **Request to the Council to utilise its powers under section 237 of the Act**

16. Tesco has submitted notice to the Council that it requires the Council to acquire the freehold to SRP and to utilise the Council's powers under section 237 of the Act to override third party interests and rights.
17. As a consequence of the agreements reached by Tesco with Netto and McDonalds, the only interests and rights which prevent the implementation of the Scheme are those of the tenants of the Plot 2 Land, Blockbuster and Farmfoods. Whilst the leasehold interests of Blockbuster and Farmfoods are required in order to implement the Scheme proposals in their entirety, substantial elements of the Scheme could be progressed quickly in advance of implementation of the CPO by relying upon the Council's power under section 237 of the Act to override the interests and rights enjoyed by Blockbuster and Farmfoods. Tesco has informed the Council that it wishes to commence the implementation of the Scheme as soon as possible during January 2012 in order that the regeneration of SRP and the ensuing public benefits may be secured without delay. Those public benefits have been recently upheld by the Secretary of State and his Inspector when confirming the CPO. Even though the CPO has been confirmed, it will take time, approximately 3 to 4 months to complete the procedures, for the confirmation to be out of the statutory challenge period and for vesting of land to take place.

### **The third party rights affecting the Plot 2 Land**

18. The Plot 2 Land comprises of a retail unit, the freehold to which is owned by Tesco, which is subject to a lease dated 18 August 1994 made between Granchester Shopping Centres Limited and Blockbuster Entertainment Corporation Limited and Blockbuster UK Group Limited ("the Lease"). The unit has been sub-divided and Blockbuster occupies part of the unit. The Lease expires on 24 March 2019. The remaining part of the unit is subject to an underlease dated 27 June 2002 made between Blockbuster Entertainment Limited and Farmfoods Limited ("the Underlease"), and is occupied by Farmfoods. The Underlease expires on 21 March 2019.
19. The implementation of the Scheme proposals could impact upon a number of rights granted to Blockbuster and Farmfoods in respect of the wider SRP site. The relevant rights and the potential effect of the implementation of the Scheme on these rights are set out below.

#### Service access

20. The implementation of the Scheme proposals would involve the redevelopment of the land adjoining the Plot 2 Land unit and the formation of a new purpose built service bay to the south of the units. It is intended that rights to use the new service bay will be granted by Tesco to Blockbuster and Farmfoods. However, it is possible that the interference with the existing service arrangements and the provision of the new service bay may amount to a breach of the terms contained in the Lease and Underlease.

#### Service media

21. It may be necessary to reposition some of the service media (e.g. cabling and connections) in order to implement the Scheme proposals. In addition it is conceivable that an interruption to service may be experienced by Blockbuster and Farmfoods. It is possible that the repositioning of the service media and any interruption to service may amount to a breach of the rights enjoyed by Blockbuster and Farmfoods.

## Quiet enjoyment

22. The carrying out of works to implement the Scheme proposals will necessarily impact to some degree upon the use and enjoyment of the Plot 2 Land retail units, notwithstanding the right which Tesco enjoys to build upon the land adjoining the Plot 2 Land provided that it does materially adversely affect the use and enjoyment of the Plot 2 Land by Blockbuster and Farmfoods. It is possible that the nature and extent of the works and the manner in which they are managed by Tesco may not result in a materially adverse impact on Blockbuster's/Farmfoods' use and enjoyment. However, for the avoidance of any doubt and in order for the Scheme to be delivered as soon as possible it is necessary to enable the tenants' rights to quiet enjoyment to be overridden if required for the purpose of the Scheme.

## Car parking

23. Under the terms of the Lease and Underlease, customers and employees of Blockbuster and have a legal right (in common with all other existing units) to park within any part of the SRP car park. The Scheme proposals comprise the formation of dedicated car parking areas to serve each part of the Plot 2 Land unit to the east and west of the unit. It is intended that the proposed amended Lease and Underlease to be granted by Tesco will include rights permitting customers and employees of Blockbuster and Farmfoods to park within the two new dedicated car parking areas, together with the right (in common with other units) to park in the car park on the eastern half of SRP, but will not grant express proprietary rights over the car park serving the new superstore.
24. Whilst the proposed amendments to the Lease and Underlease would restrict the proprietary rights enjoyed to park within certain areas of SRP, customers of Blockbuster and Farmfoods will, in any event, be entitled to park within the main superstore car park under the arrangements to be formalised through the approval of a car park management scheme under Condition 16(vii) of the outline planning permission for the Scheme. The Transport Assessment which was submitted with the planning application provides for car parking throughout SRP, including the main superstore car park, to be made available to customers of the superstore and the other retail units. The car park management arrangements to be submitted by Tesco for approval under this planning condition should reflect the Transport Assessment. Accordingly, it is not anticipated that the creation of new car parking as part of the Scheme and the subsequent management of the car parking will interfere with the ability of customers of Blockbuster and Farmfoods to use whatever car parking is most convenient to them.

## Recladding of the Plot 2 Land retail unit

25. The Scheme proposals incorporate the recladding of the Plot 2 Land unit. The carrying out of the recladding works would directly impact upon the premises demised in the Lease and Underlease rather than interfering with rights granted in the Lease and Underlease in relation to the wider SRP site. As a consequence, the power under section 237 of the Act cannot be used to enable the recladding works to be carried out. However, the right to carry out these works will be secured by agreement through the proposed variations to the Lease and Underlease or, if required, through the implementation of the CPO. It is also a condition of the outline planning permission that the Scheme shall be carried out in accordance with the approved plans which include the recladding works (unless agreed in writing with the Local Planning Authority).

### **The power contained within Section 237 of the Act**

26. The power contained in section 237 of the Act allows the carrying out of development of, and use of, land in accordance with planning permission notwithstanding the fact that the carrying out of that development of or use of land might breach or interfere with a third party's interests or rights attached to the land. The power may be relied upon by a local authority or by a person deriving title under them.
27. A number of requirements must be met in order for the Council to rely upon its power under section 237 of the Act. The land must be capable of being acquired under the Act for planning purposes by the Council to enable the development to go ahead. The carrying out of the development must be in accordance with a planning permission which has been granted. The interests and rights must be the type of interests or rights that are capable of being overridden under section 237 of the Act. These requirements are considered in relation to each of the rights affecting the implementation of the Scheme below.
28. Where an interest or right is overridden by section 237 of the Act, the party with the benefit of the interest or right is entitled to compensation. In this case the Council has entered into the Indemnity Agreement with Tesco. The Indemnity Agreement provides for the payment by Tesco of all costs incurred by the Council in relation to compensation payable as a result of the use of section 237 of the Act.

## **Justification for using the power under section 237 of the Act in relation to SRP**

29. The first matter to be considered by Members is whether the land is capable of being acquired by the Council for planning purposes to enable the Scheme to proceed. Cabinet has previously authorised the use of compulsory purchase powers to assemble land contained within SRP under section 226(1)(a) of the Act. In making that decision, Cabinet was satisfied that the Scheme would facilitate the carrying out of the redevelopment of the land and would be likely to contribute to the achievement of the promotion or improvement of the economic, social and environmental wellbeing of the area.
30. In this case, the freehold to SRP held by Tesco would be acquired by agreement pursuant to section 227 of the Act. However, the tests relating to voluntary acquisition for planning purposes under section 227 of the Act are the same as those relating to compulsory acquisition under section 226(1)(a) of the Act. The acquisition by the Council of the freehold to SRP would be for planning purposes to enable the Scheme proposals for the redevelopment of SRP to proceed. The Scheme would deliver a number of important public benefits. These include meeting the quantitative need for additional food and grocery provision in the Sunderland North area and thereby improving access to facilities for local people and assisting with the economic revitalisation of the area; improving the retail offer within SRP; generating up to 400 full time and part time jobs which will be available to local people; the physical regeneration of this important gateway site; acting as a catalyst for further regeneration of the local area surrounding SRP; the delivery of a development incorporating sustainable design features which will minimise its impact upon the environment; the visual improvement of SRP through the removal of vacant units with knock-on improvements to the perception of safety at the site; the enhancement of the landscaped buffer with the potential to attract further wildlife to the area; improvements to the highways network; and measures to enhance pedestrian and cycle linkages with the surrounding area. It is considered that the delivery of these public benefits would result in improvements to the economic, social and environmental wellbeing of the area.
31. The next requirement is that the carrying out of the development and its subsequent use must be in accordance with planning permission which has been granted. In this case, outline planning permission was granted for the Scheme proposals on 27 October 2010 and approval of reserved matters were subsequently granted on 26 May 2011. The works to be carried out by Tesco to construct the Scheme and its subsequent use will be in accordance with this planning permission. The interference with service access, service media, Blockbuster's and Farmfoods' quiet enjoyment and the reclading of the Plot 2 Land unit are a necessary consequence of the implementation of the planning permission. To a degree the interference with the existing rights of Blockbuster and Farmfoods to park within SRP is also an inevitable consequence of the implementation of the planning permission. However, it is not a necessary consequence of the

planning permission for Blockbuster and Farmfoods to be restricted in their ability to use the new superstore car park, save as set out in the car park management plan to be submitted. This will not therefore be achieved in its entirety by section 237 of the Act. This point was accepted by the Secretary of State in confirming the CPO.

32. Members must also be satisfied that the interests and rights must be of the type that are capable of being overridden under section 237 of the Act. The interests and rights to which section 237 of the Act applies are: “... *any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.*” The rights enjoyed by Blockbuster and Farmfoods to obtain service access, use service media and benefit from quiet enjoyment of the premises are considered to be rights falling within the definition contained in section 237 of the Act. As explained above, the potential interference with these rights is necessary to enable the Scheme to be carried out. The proposed recladding of the Plot 2 Land involves works which would amount to a direct interference with the premises demised in the Lease and Underlease, rather than interference with the type of interest or right defined in section 237 of the Act. Accordingly, the recladding works could not benefit from the protection afforded by section 237 of the Act as the Secretary of State has found. However, as explained above, these works can be carried out by Tesco at a future date, either by agreement or if necessary through the implementation of the CPO.
33. In summary, it is considered that the rights enjoyed by Blockbuster and Farmfoods in relation to service access, service media and quiet enjoyment of the Plot 2 land unit are capable of being overridden under section 237 of the Act and that the overriding of these rights in accordance with the planning permission is justified. However, the restriction on the legal right of customers of Blockbuster and Farmfoods to park within the main car park to serve the superstore and the recladding of the unit are not capable of being overridden under section 237 of the Act.

### **Alternative options**

34. Since the CPO has been confirmed, the alternative option in this case would be to await the completion of the CPO procedures for notification and vesting and allowing the statutory time for challenge to expire, and then acquire Blockbuster’s and Farmfoods’ interests in the Plot 2 Land in order to carry out the works to, and in the vicinity of, the Plot 2 Land to enable the implementation of the Scheme.

35. Tesco's preference is to rely upon the power contained within section 237 of the Act in order that it may commence work to implement the Scheme immediately in January 2012 and deliver the public benefits that will follow. On the basis that Cabinet has previously authorised the acquisition of the Plot 2 Land for the purpose of enabling the delivery of the Scheme and that section 237 of the Act may be relied upon to override Blockbuster's and Farmfoods' rights in relation to service access, service media, car parking (in part) and quiet enjoyment, it is considered that the use of the power under section 237 of the Act is appropriate in this case. The failure to rely upon the power under section 237 of the Act would only serve to delay the comprehensive Scheme. The substantial public interest in the delivery of the Scheme has been recognised by the Secretary of State. Indeed, at para. 36 of her decision, the Inspector referred to the need to avoid delay and while that was a reference to using powers under section 237 of the Act alone, a parallel point can be made for advancing the Scheme as quickly as possible now that confirmation has been given.

### **Human Rights considerations**

36. Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with the European Convention of Human Rights ("ECHR").
37. The potential use of the power under section 237 of the Act will impact upon two ECHR rights. Article 1 of the First Protocol contains the right to peaceful enjoyment of one's possessions and the right not to be deprived of one's possessions. This right can be interfered with in the public interest and subject to the conditions provided for by law. That interference is only justified if the fair balance of the factors, which comprise a proportionate interference, is in favour of the public interest against the private interests to be acquired. Article 6 of the ECHR contains the right to a fair and public hearing by an impartial tribunal.
38. The Secretary of State has not found there to be any Human Rights considerations which prevent the making and confirmation of the CPO and the same must also hold true of the exercise of powers under section 237 of the Act, pending the completion of the CPO procedures.

## Article 1

39. Whilst Blockbuster and Farmfoods will be deprived of their rights under the Lease/Underlease these rights will be interfered with in accordance with the law. This would be achieved in the public interest as required by Article 1 of the First Protocol. The public benefits arising from the Scheme are set out earlier in this report. It is considered that the reliance upon the power under section 237 of the Act will strike a fair balance between the public interest in the implementation of the comprehensive redevelopment of SRP and those private rights which will be affected by the use of the power.

## Article 6

40. Blockbuster and Farmfoods have been informed of the Council's power to rely upon the effect of section 237 of the Act to override rights that they currently enjoy. Blockbuster and Farmfoods will therefore have an opportunity to make representations to the Council. However, unless there is anything they can add to the points made before the Inspector, they have already made their objections known in the context of the CPO and have been unsuccessful in persuading the Secretary of State to their view.
41. Blockbuster and Farmfoods will also be entitled to compensation proportionate to any losses that they have incurred. In this case, compensation will be based on the diminution in value between the land which has the benefit of the rights and without the rights in place, in accordance with the Compulsory Purchase Compensation Code. The Compensation Code has been held to be compliant with Article 6.

## **Financial implications to the Council**

42. As explained above, the proposed transaction would involve the Council acquiring Tesco's freehold interest to SRP for planning purposes pursuant to its powers under section 227 of the Act. Upon completion of the acquisition of the freehold, the Council would grant to Tesco a 250 year lease containing an option in favour of Tesco to acquire the freehold reversion. Tesco would then be in a position to implement the Scheme and rely on section 237 of the Act to override the relevant interests and rights in relation to service access, service media, quiet enjoyment and car parking (in part) for the Plot 2 Land.
43. The Council has entered into the Indemnity Agreement with Tesco in respect of all costs, liabilities and expenses arising from the exercise of the power under section 237 of the Act. These include all costs associated with the acquisition of the freehold to SRP and the payment of all compensation to Blockbuster and Farmfoods. Accordingly, the provisions of the Indemnity Agreement ensure that the use of the power under section 237 of the Act and the overall process is cost neutral to the Council.

## **Reasons for Decision/ Conclusion**

44. Following the making of the CPO, a public local inquiry has been held and the Secretary of State has now confirmed the CPO. However, it will be approximately 3 to 4 months until the CPO procedures will allow the vesting of the Plot 2 Land to take place.
45. Notwithstanding the need to compulsorily acquire leasehold interests within the Plot 2 Land to enable the Scheme to be implemented in its entirety, the Scheme could be substantially progressed in advance of the implementation of the CPO by relying upon the Council's power under section 237 of the Act to override the interests and rights enjoyed by the Plot 2 Land tenants, Blockbuster and Farmfoods.
46. Tesco has informed the Council that it wishes to commence the implementation of the Scheme as soon as possible in January 2012 and has given notice to the Council that it requires the Council to acquire the freehold to SRP in order that the Council's power under section 237 of the Act may be relied upon.
47. It is considered that the rights enjoyed by Blockbuster and Farmfoods in relation to service access, service media, car parking (in part) and quiet enjoyment of the Plot 2 land unit are capable of being overridden under section 237 of the Act and that there is a compelling reason in the public interest to the override these rights in accordance with the planning permission in view of the substantial economic, social and environmental benefits of the Scheme and to allow the early implementation of the Scheme ahead of vesting under the CPO.
48. Without the use of the Council's power under section 237 of the Act, the implementation of the Scheme and the public benefits (recently recognised by the Secretary of State) that will flow will be delayed. As a consequence, it is appropriate to use the section 237 power so that the Scheme can be substantially progressed as quickly as possible in advance of reliance on the CPO.

## **APPENDICES**

- |            |                                                                                             |
|------------|---------------------------------------------------------------------------------------------|
| Appendix 1 | Plan showing extent of Sunderland Retail Park                                               |
| Appendix 2 | Report to Cabinet dated 16 February 2011                                                    |
| Appendix 3 | CPO, Schedule of Interests and Order Map                                                    |
| Appendix 4 | Report to Planning and Highways Committee dated 5 October 2010                              |
| Appendix 5 | Statement of Reasons for the making of the CPO                                              |
| Appendix 6 | Amended Schedule of Interests and Order Map submitted to CPO Inquiry on 4 October 2011      |
| Appendix 7 | Decision of Secretary of State dated 28 November 2011 on the the CPO and Inspector's report |

