

Protocol for the Disposal of Council Land/Property

Introduction

This 'Protocol' aims to set out the Council's practice and procedure for the disposal of Council owned land and property which is at less than the best consideration reasonably obtainable and for dealing directly with third parties. Its purpose is to inform Officers, Members and other interested parties of the principles and rules by which the Council will dispose of land and property.

The Council should always seek to achieve best consideration in respect of any disposal, but there may be cases for disposal at an undervalue. Undervalue disposal cases should not be considered as normal practice and should be backed by a robust business case by the officer recommending such a disposal. The Council should not divest itself of valuable public assets unless satisfied that the circumstances warrant such action.

Generally, best consideration will be achieved by an offer for disposal under agreed competitive processes and in accordance with the Council's existing asset strategy.

A disposal is the transfer of a freehold or a leasehold interest for more than 7 years to a third party, or a surrender/assignment of a lease to a third party, for the payment of a premium or a reverse premium.¹

Disposals may therefore include the following (by way of examples):-

- for profit to market
- as part of service provision (e.g. a Council Depot)
- as part of shared service arrangements (outsourcing of Council functions)
- to a community group ("Community Asset Transfer")
- to a Joint Venture Company

All are subject to corporate asset management disposal policies and guides and this protocol.

1. Purpose of the Protocol

1.1 A clear statement of the terms under which the Council will consider disposal of land and property at an undervalue is important for the following reasons:

- the likely impact on the Council's finances if receipts are lower than they would otherwise be if the asset was disposed of at best consideration, and
- the risk of legal challenge

¹ Options are also considered to be a disposal

1.2 This protocol also aims to provide the Council with a clear and consistent basis for making decisions about using its property assets as a means of obtaining community objectives. Best consideration in terms of asset value on disposal is not always measured in monetary terms. Nevertheless, benefits such as job creation are not relevant to the assessment of best consideration but may form part of the justification for a disposal for the wellbeing of the area.

1.3 This Protocol together with the organisation's Constitution and Scheme of Delegation are key documents in the overall management of the Council's land and property. Any request or proposal to sell or to lease land or property at an undervalue will be regarded as an exception to existing policy and regard must be given to this Protocol.

2. Principles to be applied when considering disposals of land and property for less than the best consideration reasonably obtainable

2.1 The Council has a general power of disposal, contained in **Section 123 of the Local Government Act 1972**. This provides that Local Authorities are not permitted to dispose of land, or grant leases in excess of 7 years, for a consideration which is less than the best which is reasonably obtainable, unless they first obtain consent from the Secretary of State.

2.2 'Consideration' in section 123(2) is confined to transaction elements which are of *commercial or monetary value*. The courts will therefore quash a decision to sell property where the authority has taken into account an irrelevant factor, e.g. job creation, when assessing whether it is obtaining the best 'consideration' reasonably obtainable.

2.3 The General Disposal Consent (England) 2003, ("GDC") provides a general consent removing the requirement for local authorities to seek specific approval from the Secretary of State for a range of disposals at less than best consideration. Authorities are granted consent in circumstances when the undervalue does not exceed £2million **and** where the disposal authority considers that the disposal is likely to contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the whole or any part of the area (the general power of well-being).

See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/7690/462483.pdf

for a copy of the consent.

2.4 Section 123 applies to land and property held for most local authority functions subject to certain exceptions such as a disposal of land held for housing

purposes (which is governed by the Housing Acts)² or Open Space Land³

- 2.5 It is Government policy that local authorities should dispose of surplus land wherever possible.
- 2.6 When disposing of land at an undervalue, the Council must remain aware of its fiduciary duty to Council tax payers.⁴
- 2.7 It is for the Council to decide whether any particular disposal meets these criteria or requires specific consent under the 1972 Act.
- 2.8 Any request or proposal to sell or lease land or property at an undervalue will be regarded as an exception to existing policy. As part of the protocol, **advice from a qualified Valuer must be obtained in the form of a report** (in accordance with the current Royal Institution of Chartered Surveyors, Valuation and Appraisal Standards) **incorporated in or together with a completed pro forma headed “Disposals at less than best Consideration” attached and signed by the Director for Regeneration and Enterprise or other relevant Head of Service.**
- 2.9 Valuation reports should be in accordance with the requirements set out in the General Disposal Consent (GDC) and should form part of the deliberation of any decision to sell at an undervalue.
- 2.10 Legal advice may also be obtained on the question of whether the disposal is capable of falling within the terms of the General Disposal Consent (GDC). In certain cases it may also be prudent to consult with the External Auditor in relation to any proposed action.
- 2.11 The Council must demonstrate that it has acted reasonably in agreeing undervalue transactions in order to be in a position to respond to any potential challenge. Regard must therefore be given to the Council’s Constitution, adopted corporate strategies, existing policies, the terms of this Protocol and the Council's fiduciary duty.

² Specific rules apply to housing land (including property assets). A 2013 General Consent under section 32 of the Local Government Act 1988, permits a local authority to dispose of such land at market value subject to condition that:

(a) the disposal the property asset is not subject to a secure, introductory or demoted tenancy to occupy from the local authority to a landlord who is not another local authority;

(b) the disposal of land where there is Reversionary Interests in Houses and Flats; or

(c) the disposal of land to a body in which the local authority owns an interest except:

(i) where the local authority has no housing revenue account; or

(ii) in the case of a local authority with a housing revenue account, the first 5 disposals in a financial year.

Secretary of State consent is required if a local authority wishes to dispose of housing land (including any property assets built on that land) at less than best value, including disposal to a local authority housing company.

³ Sections 123(2A) and 127(3) of the Local Government Act 1972 and section 233(4) of the Town and Country Planning Act 1990 (“the 1990 Act”) require a local authority wishing to dispose of open space to advertise its intentions in a local newspaper for two consecutive weeks and to consider objections. This is to be undertaken before making any final decisions about disposal as the public response to the notices may be material to any such decision. It could also be an important factor in any determination by the Secretary of State of an application for specific consent.

⁴ The Council is the custodian of public funds provided by the taxpayer. As such there is an overriding duty on the Council to deal with those funds as efficiently as possible. This duty applies to all spheres of Council activity but is of special importance when it is proposed to dispose of property assets at an Undervalue. Whatever legal provisions may be relevant in a particular case they should always be applied with regard to this fiduciary duty. Just because the Council has a power to do something, it should not do it if that would involve breaking this rule.

- 2.12 In considering the legal and financial considerations of any disposal at an undervalue, there must be demonstrable evidence by an appropriate officer that the outcome will be equally beneficial as compared to a disposal at market value and will be for the well-being of the whole or part of the area. The social, economic or environmental benefits, which are argued to be the justification for a disposal at an undervalue should be in accordance with existing policies.

3. Options

- 3.1 Where the Council wishes to grant an option, or an option holder wishes to exercise their option on land which the Council holds, the Council will need to consider whether the consideration for either the grant or exercise of the option will result in a discount.
- 3.2 In relation to the exercise of an option this will depend on the valuer's assessment of whether, if the option were to be exercised, the terms would be likely to require the Council to accept less than the best price that could reasonably be obtained for that interest at the time of disposal and, if so, whether that would fall within the terms of the General Disposal Consent (GDC).

4. Procurement

- 4.1 If the Council is involved in determining the scope of the future development of its land/property, and the intention is to impose on the Buyer/Lessee certain obligations as to the nature of the development, and/or the standards to which the works must be constructed, then consideration should be given as to whether such an arrangement may be construed as a public works contract and subject to Procurement Rules.
- 4.2 The Council must give due consideration to the possibility of public procurement rules applying to any particular disposal of land and obtain case-specific procurement and legal advice before entering into any agreement.

5. State Aid/Subsidy Control

- 5.1 European State Aid law was revoked on 31 December 2020, although any public support granted before the 1 January 2021 will remain subject to state aid law until 31st December 2024.
- 5.2 The UK and therefore Local Authorities are now subject to less rigorous "Subsidy Control" obligations, which may still have an impact on land and property disposals. In addition, the UK has an obligation to create a new regime in order to prevent unlawful competition between the UK and other European Countries, but this may take some time to develop.

5.3 In the meantime, it should be assumed that a disposal of land and property at less than best consideration, may still have the effect of subsidising the buyer/lessee, developer and/or occupier of the land and constitute an unlawful subsidy.

5.4 Until the position becomes clearer further legal advice must be sought to consider whether any such proposals are subject to subsidy prohibition or control and if so, which structure best suits the Council's objectives.

6. Possible Alternatives

6.1 In all cases, where a disposal is undertaken at less than best consideration, then to protect the Council's interest in the event of subsequent disposal, it may include, where appropriate, an asset lock, clawback, overage or uplift clause, restrictive covenants, deferred payments provision, ransom strip retention, user rights, forfeiture or break clause or right of pre-emption⁵. This is to ensure that the Council eventually obtains best consideration and a purchaser does not profit excessively at the expense of the Council.

7. Principles to be applied when dealing directly with third parties

7.1 The Council will normally dispose of land and property in accordance with the existing asset strategy disposal guide, for example on the open market by private treaty, public auction, informal tender or formal tender. The benefits of this are:

- Transparency
- greater likelihood of the achievement of best consideration/open market value
- a defence against "late bids" (in most circumstances)

7.2 In certain circumstances, the Council may decide not to offer the property for disposal on the open market. This decision will be restricted to cases where there is some specific and quantifiable benefit to be gained from dealing solely with a named party. Examples of such cases are as follows:

- where land to be disposed of is relatively small in size and an adjoining landowner is the only potential and likely purchaser.
- where the land to be disposed of needs to be sold to an adjoining owner if best consideration is to be obtained.
- where the Council's land is part of a larger area of land proposed for redevelopment or regeneration and the complexity of the proposed development of the overall site is such that the Council's corporate

⁵ This list is not exhaustive

objectives or best consideration can only be achieved by a disposal to a purchaser with an existing interest in property in the area.

- sale to a community group, charitable body or where there are specific legal obligations e.g. Community Right to Bid
- sales to former owners under the 'Crichel Down rules'
- sale to a 'special purchaser' where a higher value can be realised from treating directly with a particular buyer.
- sale to another body with statutory powers, e.g. Police or utility providers.
- disposals of land and property where the main terms are contained in a separate service or other contract.

7.3 The Council must demonstrate that it has acted reasonably in agreeing to dispose of land/property directly to a third party in order to be in a position to respond to any potential challenge that a better bargain could have been struck elsewhere, or that other parties' ambitions have been thwarted. Regard must be had to any opportunities that could be missed by agreeing to treat directly,

7.4 Regard may also be had to other scenarios when considering such an offer. These may include;-

- a) The provision of detailed information and plans of a proposed development.
- b) Closing date for the offer and the timescale for completion.
- c) The existence of competitive bids.
- d) Detailed funding arrangements and confirmation that these are in place.
- e) Evidence of end user commitment.
- f) Details of the Buyer's financial offer for the property.
- g) Whether a Buyer has a track record with similar developments and/or other local authorities
- h) Details of any conditions precedent to which the proposal is subject.
- i) Any wider/longer term regeneration benefits from the proposal during construction or from the proposed end user.
- j) Whether a proposal aligns with existing Council policies.
- k) Provision of any other off-site benefits or facilities.

- l) Capacity of the proposal for bringing other sites forward or opening up other development potential
- m) Potential for leverage of private or other public funds and grants
- n) Capacity of the proposal to remove or reduce other Council financial objectives in the Corporate Plan.

The list is not exhaustive, and the principles of best consideration must remain paramount at all times.

8. The interaction of best consideration, procurement and subsidy control obligations

- 8.1 Best consideration, procurement and subsidy control obligations are separate and independent of each other. The fact that the Council may meet its Section 123 obligations for the disposal of land or property does not necessarily mean that its public procurement regulations have also been met.
- 8.2 Nevertheless, the carrying out of a full procurement exercise probably still demonstrates that its obligations in relation to subsidy control and to obtain best consideration have been met.
- 8.3 That is not to say, however, in the absence of a procurement process (where such a process is not required) that the Council will not be able to demonstrate subsidy control compliance and/ or compliance with its best consideration obligations. This is still possible through the release of land for sale on the open market and this guidance must be applied in the light of the specific circumstances and the reasons recorded in writing.
- 8.4 Given the evolving nature of subsidy control, the interaction between best consideration, and subsidy control will need to be assessed on a case-by-case basis.

Note

In October 2018, the government launched a consultation on proposals to extend the freedoms to dispose of surplus land at less than best consideration without seeking consent from the Secretary of State. The consultation proposed:

- that the Secretary of State's power to issue a general consent for the disposal of land held for planning purposes (governed by the Town and Country Planning Act 1990, Section 233 and Part IX) should be switched on

- increasing the existing £2m threshold for disposals of land held for purposes other than planning or housing to £5m, or alternatively £10m, because of increases in the value of land.

To date there has been no amending regulation or instrument enacting these proposals but the situation should continue to be monitored.