

Appendix 4- Asset Disposal Procedure (2020)

Asset Disposal Procedure

1. Introduction

- 1.1 It is Government policy that local authorities should dispose of surplus property wherever possible but not divest themselves of valuable public assets unless they are satisfied that the circumstances warrant such action.
- 1.2 The Authority's Asset Management Plan is currently being reviewed and will be submitted to Committee for approval in February 2020.
- 1.3 This procedure shall apply to all disposals (as defined in paragraph 1.4 below) of property of the Authority. Property includes land and buildings.
- 1.4 Disposal includes sale of freehold interest, grant of leasehold interest of more than 7 years and assignment or surrender of unexpired term of lease where more than 7 years are remaining (see separate note for leases or licences of 7 years or less).
- 1.5 All disposals must be led by a professionally qualified Surveyor working in conjunction with other relevant officers.

2. The principles guiding disposal

- 2.1 The Authority is empowered to acquire, hold, use and dispose of land for its statutory purposes. A disposal must be undertaken using the appropriate powers and in accordance with all legal requirements. In particular, when exercising any functions in relation to, or to effect, land in the National Park, the Authority must have regard to the purposes specified in paragraph 3.1.1(a) below).
- 2.2 Disposals are also subject to the principles of open competition, fairness, transparency and reasonableness (including financial rationality).
- 2.3 Disposals must comply in all respects with the Authority's Standing Orders [**link to S.O's**].

3. Powers and legal framework

3.1 STATUTORY PURPOSES

- 3.1.1 When exercising its powers to dispose of a freehold or leasehold interest in land, the Authority must:
 - a) pursue its statutory purposes of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National

Park, and of promoting opportunities for the understanding and enjoyment of the special qualities of the area by the public (giving priority in the event of conflicting purposes to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the National Park);

- b) seek to foster the economic and social well-being of local communities within the National Park; and
- c) have due regard to the needs of agriculture and forestry and to the economic and social interests of rural areas.

3.1.2 The three purposes above are referred to in this document as “the Overarching Principles”. Applying the Overarching Principles may result in the need to impose covenants or restrictions to give effect to them (“the Overarching Principles Restrictions”). In any case, where it is not considered necessary or appropriate to impose Overarching Principles Restrictions, officers should consider whether, taking into account all the individual circumstances of the property including the nature and location of the property, compliance with the Overarching Principles would be sufficiently effected and protected by the Authority’s planning policies. If it is considered that planning policies may not provide sufficient protection, officers should consult Legal Services on what (if anything) should be done to give effect to the Overarching Principles. This may necessitate enquiries being made of potential bidders, and consideration of their intentions and how they would help the Authority to comply with its statutory purposes and the Overarching Principles (notwithstanding that the property could be transferred to another party at a later date).

3.2 **S123 LOCAL GOVERNMENT ACT 1972**

Best Consideration

3.2.1 Section 123 Local Government Act 1972 imposes a legal obligation on the Authority not to dispose of land (otherwise than by way of a short tenancy not exceeding 7 years) for a consideration less than the best that can reasonably be obtained. Best consideration reasonably obtainable is not limited to the purchase price, but may include a term or condition attached to the disposal, which identifies a specific direct and quantifiable commercial benefit to the Authority, such as an option or pre-emption clause.

3.2.2 The imposition by the Authority of Overarching Principles Restrictions in order to comply with the Overarching Principles does not of itself constitute a breach of the s123 duty to obtain the best consideration reasonably obtainable. This is because the Authority is required to exercise its functions (which include powers and duties) under section 123 in accordance with the Overarching Principles in any event. The value of the property with such Overarching Principles Restrictions is not for that reason alone a disposal at an undervalue. However, the best consideration reasonably obtainable for the land with those Overarching Principles Restrictions would still need to be obtained.

3.2.3 The duty to obtain the best consideration reasonably obtainable can normally be satisfied by carrying out an open market disposal. However there are certain allowable exceptions to such a disposal (see paragraph 4.7 below), which may

result in the land being disposed of at an 'undervalue'. Where one of these exceptions is considered Programmes and Resources Committee (whatever the value of the property) must approve this, who must be made aware of the following:

- a) The justification for the proposal;
- b) how the proposal satisfies the terms of the Local Government Act 1972 General Disposal Consent (England) 2003 (the General Disposal Consent), namely:
 - i) the disposal is likely to contribute to the promotion or improvement of the environmental, social or economic well-being of the whole or any part of the area or any persons resident or present in the area, and
 - ii) the undervalue is less than £2m
- c) a valuation of the land following the advice provided in the Technical Appendix to the General Disposal Consent

If the proposed disposal does not satisfy the terms of the General Disposal Consent, the specific consent of the Secretary of State will be required.

3.3 **OTHER CONSIDERATIONS**

- 3.3.1 Sale of open spaces - s123 (2A) Local Government Act 1972 requires an authority to advertise its intentions in a local newspaper for two consecutive weeks and to consider objections **before** a decision on disposal is made. Open space means any land which is laid out as a public garden, or is used for the purposes of public recreation, or is a disused burial ground (s336 (1) Town and Country Planning Act 1990).
- 3.3.2 Land held for planning purposes (s226 Town and Country Planning Act 1990) cannot be disposed of for less than best consideration (with Overarching Principles Restrictions) without specific consent of Secretary of State for Housing Communities and Local Government (s233 Town and Country Planning Act 1990).
- 3.3.3 In some circumstances where land was acquired under a Compulsory Purchase Order, there are specific requirements to seek out the original vendor and offer it back (Crichel Down Rules). In such circumstances, further legal advice will be sought.
- 3.3.4 All disposals currently need to comply with the European Commission's State aid rules. When disposing of land at less than best consideration (with Overarching Principles Restrictions), a subsidy is being provided to the purchaser/lessee. The nature and amount of subsidy must comply with the State aid rules, particularly if there is no element of competition in the sale process. Failure to comply with the rules means that the aid is unlawful, and may result in the benefit being recovered with interest from the recipient.
- 3.3.5 There may be occasions when public procurement rules may apply to disposals, e.g. where certain obligations are imposed on the purchaser as to the nature of

the development of the property or the standards to which works must be constructed. Legal advice should be sought where the disposal includes the provision of works/supplies/services before any agreement is entered into.

4. The Procedure

4.1 IDENTIFY SURPLUS ASSETS

4.1.1 An initial assessment must be made, with the Overarching Principles in mind, to determine whether land is surplus. Each case should be assessed on the circumstances associated with the land and taking into account the Authority's Asset Management Plan, and the Asset Management Plan Decision Tree should be completed. The following matters should be considered:

- a) Whether the land fits with the Authority's three strategic outcomes on landscape, engagement and communities.
- b) Whether there is an operational need and that operational need can only be met by the particular property...
- c) Whether the land held is integral to continuity of service delivery.
- d) If the property does not meet (a), (b) or (c) above, whether it offers or could offer significant revenue raising opportunities to warrant retaining it..

4.1.2 Where land satisfies any of the criteria at 4.1.1 (a) to (d) above, it is unlikely to be surplus. However, even if the property does satisfy any of the above criteria, it could still be considered for disposal if it cannot meet the two criteria below:

- a) **Financial sustainability** – the Authority only owns what it can financially afford to sustain for now and for the period of the capital strategy;
- b) **Asset condition** – any property the Authority owns will be put into satisfactory condition and will be maintained in this condition for the duration of ownership.

4.2 CARRY OUT PRE-DISPOSAL ENQUIRIES AND CONSULTATIONS TO IDENTIFY ANY PHYSICAL OR LEGAL CONSTRAINTS, TO ASSESS POTENTIAL RISK OF DISPOSAL OF THE SITE AND DETERMINE MOST APPROPRIATE METHOD OF DISPOSAL

4.2.1 Enquires and consultations should include the following:

- a) Site inspection, site history, highways/access issues
- b) Legal title report
- c) Whether the land is or includes open space land requiring advertising – if so adverts must be placed and any objections considered BEFORE a decision to dispose is made
- d) Whether the property has any development potential
- e) The existence of a special purchaser to whom the property may have a value in excess of the open market value. This could be where the asset is the key to unlocking a neighbouring development site, or where the asset is required to improve the value of the neighbouring asset
- f) Whether the Crichel Down, State Aid or public procurement rules apply

- g) Any grant conditions or repayment requirements
- h) Consultations with relevant internal teams and external stakeholders in accordance with any engagement/communication plan, to ensure the proposed disposal can be carried out within the Authority's statutory purposes, and that the value of the property can be protected through the recommended method of disposal (including consultation on any evaluation criteria to be applied in the marketing process) and through the imposition of appropriate covenants

4.3 OBTAIN VALUATION REPORT

- 4.3.1 A valuation of the property should be obtained in accordance with RICS 'Red Book' valuation requirements and (where disposal at an undervalue is being considered) in compliance with the Technical Appendix to the General Disposal Consent. The valuation should take into account any Overarching Principles Restrictions to be imposed.

4.4 PREPARE REPORT SEEKING APPROVAL TO DISPOSE

- 4.4.1 A Pre-Disposal Report must be produced dealing with the following matters:
 - a) how the disposal has been assessed to be surplus;
 - b) how and why the disposal is within the Authority's powers;
 - c) how and why the disposal will be in compliance with the Overarching Principles;
 - d) Any constraints discovered in the pre-disposal enquiries set out in 4.2.1 above and how these are to be overcome;
 - e) the nature of any additional restrictions to be imposed (as consulted on with appropriate teams);
 - f) whether the property has any development potential and if so, how that is to be controlled or the value of development allocated;
 - g) value of the property obtained in accordance with 4.3 above; and
 - h) recommending the most appropriate disposal method for the property (see 4.5 to 4.7 below), whether open market sale (with or without selection criteria), or offered to a select list of purchasers or transferred to an identified party. The report should give all possible options and full justification for the recommended strategy if not open market sale, including details of how the proposal satisfies the terms of the General Disposal Consent... If the proposed method is not open market sale, the disposal must be approved by Programmes and Resources Committee.
- 4.4.2 The Pre-Disposal Report must be authorised by the relevant officer/Committee, in accordance with the Authority's Standing Orders, except that where the proposed method of disposal is not open market sale, the approval of Programmes and Resources Committee is required, whatever the value of the property.

4.5 METHOD OF DISPOSAL

- 4.5.1 Disposals will seek to secure the best consideration that can reasonably be obtained. This can best be achieved through open market sales, advertised appropriately, and leases of land at market value.
- 4.5.2 There are allowable exceptions to this and these are detailed below. Any proposed disposal that is not based on open market disposal must be the subject of a report to Programmes and Resources Committee to approve the alternative disposal route.
- 4.5.3 Each proposed method of disposal should be considered in the context of the type of property, the nature of the market for that type of property, and any specific issues or special characteristics associated with the property such as its cultural heritage, landscape or natural environment value and the potential risk of disposal. Seeking advice from a specialist agent is recommended in more complicated or high value cases.

4.6 OPEN ADVERTISEMENT/MARKETING

- 4.6.1 Disposals will normally be undertaken through a competitive tendering process by open advertisement on the market, wherever there is likely to be more than one potential purchaser, unless there are justifiable circumstances for an alternative method of disposal (see 4.7 below). The principal methods of disposal available and the relative advantages and disadvantages of each are set out in the Appendix.
- 4.6.2 Where covenants or restrictions are to be imposed to give effect to the Overarching Principles, or if there are any additional criteria (other than price) to be taken into account in evaluating bids, these should be made clear during the marketing process to enable prospective purchasers to make an informed bid.

4.7 DISPOSALS WHERE OPEN ADVERTISEMENT MAY NOT BE REQUIRED

In some circumstances, disposals may be justified without open advertisement. Any proposed disposal that is not based on open market disposal and which may therefore result in a disposal at an undervalue must be the subject of a report to Programmes and Resources Committee in accordance with 3.2.3 above to approve the alternative disposal route, whatever the value of the property. The following may be considered as exceptions if fully justified:

- a) In circumstances where the statutory purposes of the Authority can best be furthered by disposal to a limited category of purchasers, the Authority may invite tenders from a select list of parties (or in exceptional circumstances a single party) identified by reference to relevant criteria pertinent to the asset in question. The relevant criteria in each case should be agreed following consultation with the relevant officers in accordance with paragraph 4.2.1(h);b) The land to be disposed of is

relatively small in size and an adjoining or closely located landowner(s) is (are) the only potential or likely purchaser(s);

- c) The nature of the Authority's land ownership and that of the surrounding land ownership is such that the land must be sold to adjoining or surrounding landowners if best consideration is to be obtained;
- d) There may be a right of pre-emption or reversion or other rights of former owners, which prohibit sale on the open market.
- e) Where a 'special purchaser' has been identified i.e. one who is prepared to pay a premium for the site over and above the market value.
- f) Exchange of land - Disposal by exchange of land will be appropriate when it will achieve best consideration for the Authority and is advantageous to the Authority and other parties to exchange land in their ownership. The exchange of land will usually be equal in value. However, any inequality in land value may be compensated for by the receipt of a balancing payment or other means of consideration as appropriate. In such circumstances, the Authority will always obtain an independent valuation to verify that "best consideration" will be obtained.

4.8 ACCEPTANCE OF OFFER AND COMPLETION

- 4.8.1 Following the marketing process, the relevant officer must recommend acceptance of the preferred purchaser. This should be the offer representing best consideration, which will usually be the highest financial offer or, where applicable, the offer, which produces the best overall gain to the Authority, having applied any evaluation criteria, set out in the marketing process. If appropriate (for example in the case of market rent leases), financial checks should be undertaken before approval of the proposed purchaser.
- 4.8.2 Following approval to proceed with the offer in accordance with the terms of the relevant authority, detailed terms will be agreed between relevant officers and the purchaser (relevant officers shall include a qualified RICS Surveyor and a member of the Legal team). There will usually not be any reason to seek further approvals in regard to the disposal unless following site investigations, planning requirements etc. the net price falls below the net price of the under-bidder.
- 4.8.3 The Authority should consider seeking to recover its legal and surveying fees and (in the case of auction) search fees wherever possible in regard to each transaction. Legal Services and the relevant officer dealing with the disposal should identify the fees applicable to standard transactions and consider whether these should be charged to third parties.

APPENDIX

DISPOSAL METHODS FOR OPEN MARKET SALES

There are **four** principal methods of disposal available:-

- a) **Private Treaty** – After a reasonable period of exposure to the market (including signage, advertising by suitable selling agents and/or on the Authority's website and general marketing), negotiations are carried out between the Authority and prospective buyers (or their respective agents) privately and in comparative secrecy, normally without any limit on the time within which they must be completed before contracts are exchanged.

In the event that two or more interested buyers are identified, the Authority may consider moving on to the Informal Tender method at (b) below.

Advantages:

- Allows a flexible approach;
- Time pressures are seldom imposed on either the seller or buyer;
- It is widely understood and accepted by the general public.

Disadvantages:

- Cannot always overcome suspicions of unfair dealings, and it is therefore a method to be used with caution.

- b) **Informal Tender** (also described as an extended auction) – Offers are invited with or without a closing date. Unlike a formal tendering process (when tenders are submitted in sealed envelopes all of which are opened together), offers in the informal process are opened as they are received. Bidders may be invited to increase their bids, possibly having been told that a higher bid has been received. At the end of the informal tendering process, all parties still expressing an interest should be asked to submit a final bid by a specified date. This method allows the Authority to identify a preferred bidder with whom it can negotiate further detailed terms or proposals for the redevelopment of the land. This process is therefore useful for complex development sites where bids are requested for development proposals, which can then be negotiated to meet the Authority's objectives and achieve the best consideration that can reasonably be obtained.

Advantages:

- The most advantageous terms for the Authority can be formulated even in very complex cases;
- The Authority does not need to accept any tender if the offer is not satisfactory;
- As bids are not public, tenderers should put forward their best offer;
- May result in obtaining a higher price for the land than if bidding was restricted to a single sealed tender;

- Most useful as a tool for resolving competing interests following private treaty marketing.

Disadvantages:

- Lacks the certainty of the Formal Tender procedure;
- Post-tender negotiations can be protracted and may not be successful;
- The requirement to negotiate raises some of the disadvantages of a sale by private treaty;
- Not necessarily going to achieve best price because in an auction situation people are sometimes prepared to bid more than they had envisaged, particularly when they see others prepared to bid at that level;
- Can be seen as unfair/not transparent.

- c) **Formal Tender** – The Authority invites sealed bids by a specified closing date. After the closing date, all tenders are opened together and a decision made as to which tender should be accepted, based on price and any other relevant criteria.

Before the invitation to tender is submitted, a full appraisal of the transaction must be carried out, and the contract documents must be available as part of the tender documentation. It is important that the Authority indicate in the tender documents that it is not bound to accept the highest or any tender, gives an indication of any additional criteria for evaluating bids, and specifies the requirements for the tender submission, such as evidence of availability of finance to complete the transaction. The tender document should also state that, if a higher offer is received before exchange of contracts, then the Authority might be under an obligation to consider it. In the event that a successful bidder lowers their bid following its acceptance, all interested parties should be given the opportunity to make a further bid.

This method is not suitable for non-straightforward transactions where detailed terms/conditions remain to be overcome before the bid is finalised. Neither is it appropriate where discussion is required about the merits of various competing schemes.

Advantages:

- Can be concluded quickly, as the documentation should be in place and there will be no negotiations on the terms of the transaction;
- Avoids tentative time-wasting enquiries;
- Authority does not need to accept any tender if the offer is not satisfactory;
- The tender procedure should guarantee complete fairness;
- As bids are not public, tenderers should put forward their best offer.

Disadvantages:

- There is little room for discussion about the scheme itself, and this method is too inflexible to take account of any conditional offers, e.g. subject to planning etc.;

- May not achieve as high a price as the Informal Tender procedure as no further offers can be invited;
 - The preparation process is time-consuming and must be correct.
- d) **Public Auction** – the property is marketed as part of the auction process. The contract is signed and exchanged at the auction with the highest bidder. This method will involve the use of external Auctioneers, who should be briefed at an early stage and be fully involved in the preparation of conditions of sale and the setting of the reserve price. It would be necessary for the Authority to approve the reserve price in advance before the auction proceeds. As the fall of the hammer constitutes a binding sale, it is important from both sides that all contractual details and investigations have been properly completed beforehand.

Advantages:

- Certainty and speed: contracts are exchanged on the fall of the hammer;
- The transaction is open and fair;
- Open process of competitive bidding may lead to a price in excess of that by private treaty;
- Regional/national marketing by the auction house.

Disadvantages:

- Seller has no control over who buys;
- Some purchasers who need to raise finance may be put off;
- Timing is important, as the market's interest in auctions tends to fluctuate;
- The winning bid may only be marginally more than the previous bid, and may not represent the maximum the purchaser would have been willing to pay.

Dealing with late bids

A difficult situation arises if the Authority receives a higher offer after another offer has been accepted "subject to contract". There is a general obligation to obtain the best consideration reasonably obtainable, and the Authority should therefore fully investigate any rival bids. Each late bid must be considered in the context of the individual circumstances at the time.

The Authority's approach to late bids should be as follows:

- a) The Authority discourages the submission of late bids in all cases, and will attempt to minimise problems by early exchange of contracts;
- b) Offering the preferred bidder a period of exclusivity can enable the purchaser to confidently proceed with the sale, through the removal of the threat of another purchaser making a late bid;
- c) Where Formal Tender is used, bids received after the deadline for tenders will be recorded as late, with the time and date of receipt. A decision whether to consider and accept the late bid should be made by the Chief Finance Officer

and Corporate Property Officer following consultation with the officer dealing with the disposal.

- d) Until the Authority has exchanged contracts, it will consider late bids unless there are good commercial reasons for not doing so. This should be explained to a bidder when a bid is accepted, and receipt of any late bids should be notified to them;
- e) Consideration of a late bid does not mean that it will necessarily be accepted even if it is the highest bid. It may be rejected for sound commercial reasons. The Authority will take into account the likelihood of the late bid proceeding to completion in a timely manner (compared with the progress of the accepted bidder's transaction) and the possibility of late bids being used as a spoiling or delaying tactic;
- f) The Authority may, in appropriate circumstances, ask both the late bidder and other interested parties, to submit their best and final offers in a sealed envelope by a set deadline.

Dealing with revised bids

The Authority may be faced with the successful bidder seeking to substitute a lower bid. This process might also be repeated as the successful bidder in effect explores to find the level of the next bid below their own believing that the Authority will be prepared to accept any offer above that next bid. The general obligation to obtain the best price, which can reasonably be obtained for the land, may mean that these bids have to be considered.

Conclusion

Each disposal method engenders varying degrees of fairness and transparency. For each disposal case, appropriate prior approval for the method of disposal should be obtained. The principles set out in this guidance should be followed in all disposal cases.