

**DISPOSAL POLICY**  
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## **1 INTRODUCTION**

An owner of land is usually free to dispose of land as and when it chooses. But local authorities are subject to constraints when they come to sell land in their ownership. Some of these constraints are enshrined in law; others arise because of a general expectation that local authorities should be seen to act fairly when disposing of land.

The Council introduced its first Disposal Policy in 1991 which provided a 'best practice' framework for processing land sales. It further identified the appropriate method of disposal for the sale of different types of property where varying service objectives and marketing considerations are presented, including the treatment of special purchaser applications.

The policy has been updated periodically and changes relating to the Council's objectives, EU procurement, legislation and case law prompts a further review of the policy. The broad structure and overview of the disposal policy is featured in the flow-chart appended to this report. This document centres on policy and practice following a decision to sell a property asset. The policy on whether to sell freeholds or grant leaseholds and the choices between realising capital receipts or enhancing rental income is a property strategy matter which will be covered separately.

## **2 CONSIDERATION OF CORPORATE POLICY OBJECTIVES**

Property disposals contribute towards the achievement of several important Service objectives, namely:

- **Releasing land for development to aid growth**
  - For economic and employment uses.
  - Land for new house building, both private and social housing schemes.
  - Development and refurbishment opportunities created by disposals linked to the Growth Strategy.
- **Supporting key Council partners by making available sites and/or buildings to them for schemes that deliver specific Community benefits**
- **Programming disposals at particular locations to attract grant allocation for delivery of schemes**
- **Supporting Council's Capital Programme and Property Re-investment Programme**
- **Improving efficiency by disposing of "surplus" or under-performing properties**

These themes further flow through the Council's corporate planning process and strategies. Conducting a systematic programme of property review assessments to identify surplus properties for disposal is integral to the Asset Management process.

Disposals guided by policy objectives, other than the simple generation of a monetary receipt, may be affected in two ways:

- **Disposal for preferred use may reduce receipt**

Sometimes a disposal for a preferred or restricted use does not produce the highest receipt. An example would be the promotion of an office scheme to create greater

employment opportunities on a site where retail development could also be obtained and give a higher land value.

- **Disposal to a preferred purchaser (“special purchaser”) may conflict with equal opportunity and fairness principles**

Disposal to a particular party without the property being first offered on the open market exposes the Council to the challenge that equal opportunity for others to submit an alternative scheme and/or higher price has been denied.

The considerations and procedures to deal with these issues, within a legal and audit framework, are detailed in the following two sections of this report.

### **3 BEST CONSIDERATION ISSUES**

Section 123 of the Local Government Act 1972 requires Local Authorities except with consent of the Secretary of State not to sell land for a “consideration less than the best that can reasonably be obtained”. However the Local Government Act 2000 provides Council with a power to carry out any transaction provided they can prove it achieves the promotion of social, economic or environmental well being. In 2003, the General Disposal Consent was amended to allow Disposals to occur without Secretary of State consent to assist to deliver the 2000 Act, with the proviso that the disposal of the land where the difference between the unrestricted value of the interests to be disposed of and the consideration accepted (“the undervalue”) is £2 million or less. The Consent does not apply to land held for housing purposes (which is usually held under the Housing Act 1985) or planning purposes (which, in relation to disposal, is subject to the Town and Country Planning Act 1990, s 233). Appropriation under section 122 of the 1972 Act may have to be considered.

The Council’s disposal procedures fully reflect this fundamental legal duty.

Although it is accepted that “best consideration” need not be best price, this is the most obvious criteria by which to measure the acceptability of terms of disposal. Circumstances in which other forms of consideration can apply and how they can be quantified are not always clear cut and a cautionary approach is required.

When a property disposal is promoted to achieve non-monetary policy objectives with the potential result that best consideration will not be realised the following methodology needs to be adopted:

- Identify the relevant corporate policy objectives affecting the potential disposal and evaluate the depreciation in value it causes.
- Service Portfolios Executive Board / Executive Members (depending on delegation) to consider the financial and operational implications of implementing a policy objective via a proposed property disposal:
  - Approval is needed if the receipt is going to be less than best consideration. With regard to the General Disposal Consent, Members must be made aware of the implications of approving acceptance of an undervalue.
  - The disposal may be part of a wider scheme that will require additional capital resources, which would also require approval.
  - Note, the majority of capital receipts are not earmarked to fund specific schemes. The receipts are generally viewed as a resource pot that can be applied wherever required across the entire capital programme. Occasionally a scheme will have an

associated capital receipt which the Council may want to identify separately and keep aside.

- Where the difference between open market value and undervalue exceeds £2m, then Secretary of State Approval must be sought for the Disposal.
- The imposition of covenants (included in the transfer agreement) to be subsequently monitored to ensure that the policy objectives intended are achieved.

In considering what amounts to 'monetary value' in terms of best consideration, the creation of jobs or desirable social outcomes cannot be considered by the Council.

A key consideration with regard to dealing with Corporate Policy Objectives relates to the Council's financial position and competing needs for both revenue income and capital receipts. The achievement of capital receipts targets may necessitate the disposal of income producing property investments. The issue of maximisation of rental income and rental growth and the need for capital receipts from disposal of property, including freehold reversions, is dealt with under property strategy and the property review programme.

The Royal Institution of Chartered Surveyors has produced a guidance document in relation to best consideration aimed at Councillors and senior officials and this is attached as an appendix to this report.

#### **4 DEALING WITH SPECIAL PURCHASERS**

The general approach to disposing of Council properties is to offer them for sale on the open market and invite offers by way of tender or by auction. These methods are chosen to ensure that a transaction is fair and transparent and that best consideration will be achieved.

Negotiation with a single (special) purchaser is not precluded. There will be occasions when the benefits to the Council lie in dealing with special purchasers. These benefits may relate to policy of the Council, or the locality of an adjoining interest, or an interest already owned in the property by the special purchaser. Where the Council is involved in a site assembly venture with other landowners, special purchaser arrangements are appropriate when the assembled site is sold to the scheme developer, particularly where the developer has done a significant amount of land assembly. Special purchaser is also relevant with the Housing Strategy and the selection of preferred development partners to meet specific housing needs.

Circumstances vary considerably as to whether the grant of special purchaser status may be justified. However, typical tests to be applied include the following:

- Identification of relevant policy objectives (e.g. housing, jobs, business growth)
- Assess degree to which objectives supported and identify any specific outputs/outcomes;
- Identify linkages to other corporate policies/strategies;
- Identify Partnership Working considerations.

- Assess any financial benefit to the Council - premium price and/or marriage value;
- Assess whether any general market for property - determine whether property is of interest or value to one party only by virtue of its particular location, access or other characteristic.

When a Special Purchaser application is received and where time allows, a report shall be submitted to the Executive Member of Resources (or Executive Board) for consideration of direct negotiations prior to their commencement. Once negotiations are underway, the Council's Property Consultants will be able to determine and endeavour to seek the best price and other non-monetary terms (as appropriate) for the property to be disposed of.

Where time is limited, or the transaction is relatively minor a two part approval is acceptable; i.e. consideration of award of Special Purchaser status in principle and then, if approval given, consideration of provisionally agreed disposal terms.

Best consideration rules apply to "special purchaser" transactions in the same way as other disposals. It is usual for the Council's Property Consultants to undertake negotiations with confirmed Special Purchasers and report recommended terms. Where this cannot be achieved the parties could agree to appoint either the District Valuer or independent expert Surveyor to provide an independent valuation to give the Council protection from future challenge. Alternatively, where it is thought that a Special Purchaser is seeking to take unfair advantage of the situation, it may be prudent to market the property generally to stimulate a serious offer from the applicant.

To demonstrate that the agreed terms represent best consideration, and protect the Council from challenge, it is good audit practice for the District Valuer to supply a "franking" report for transactions of a significant nature. A minimum value of £100,000 is proposed as a policy requirement.

## **5 MARKETING CONSIDERATIONS**

When marketing a distinction to be made is the difference between property that has significant development potential (identified through planning allocation, demand assessment etc), and that which has not. Some of the property being dealt with will probably have little or no development potential because it is already fully developed, and planning consent is unlikely to be available for another use.

Properties with development potential might range from an existing building where planning consent might be available to change to a more valuable use, to a vacant site which is ripe for development. It is essential to identify development potential before the sale process gets underway. Within the Borough there are numerous sites with development potential, some of which can easily be marketed, and others that will require careful handling before marketing commences. Of those which are ready for the market, two considerations that need attention. Firstly, what is the level of demand, and when should a particular property be sold to maximise capital receipts. Secondly, which sites and property should be actively promoted to attract inward investment to the borough. Both of these considerations mean the release of land needs to be phased prudently to maximise potential receipts.

A long term capital receipts programme means that some sites and premises will be dealt with in future financial years. This can mean that some properties may be vacant for a long period of time. There is a need to assess which vacant properties are most vulnerable to vandalism and damage, and thereby erosion of the capital value. This will enable the

formulation of a priority action list in the disposal programme with vacant buildings at the top of the list.

Temporary treatment of long term vacant properties should be pursued in order to positively promote the Borough. This may involve making sites and premises secure in the interest of public health and safety, and keeping property in a neat and tidy condition. This might be enhanced by the inclusion of income producing advertising hoardings subject to planning. Where long term disuse of land is envisaged, funding sources should be explored to create temporary landscaping schemes.

The Disposal Policy also need to take into account capital financing considerations as the value and timing of capital receipts will impact on the cost of financing the Council's capital programme. Whilst the phasing outlined above may generate one approach, the aspirations of the Authority in one particular year may force another. On the other hand, where the capital programme can be easily funded out of receipts from, say, residential land sales, it may be more prudent to seek only leasehold disposals on Industrial Estates unless market conditions dictate that freehold disposals are preferred. Where leases are granted, it could ensure that a well-secured rental income, linked to the growth in the industrial sector, can be available for future years. A flexible corporate property strategy will help to attain these objectives.

Costs incurred in achieving the disposal of assets and realisation of capital receipts include surveyor's fees, legal costs and costs in processing formal approval of disposals. Where the Council is keen to dispose of surplus land or property for which there is little demand, this may be dealt with on the basis of each party bears their own costs, so the views should be sought in advance e.g. from legal services to waive their fees. In cases where a significant market interest is anticipated, or where a direct approach is made say from a special purchaser or a tenant of the Council wishing to purchase the freehold reversion, then the Council should seek to recover its costs from the purchaser. This approach may have a slightly depressing effect on the purchase price offered. There may, however, be instances where the regeneration benefits for example arising from a direct approach to purchase may be such that the transaction reverts to each party paying their own costs in order to secure an agreement and the Disposal Policy needs to be flexible enough to accommodate this.

## **6 EU LEGISLATION CONSIDERATIONS**

### **A. STATE AID**

All disposals need to comply with the EC's state aid rules as a disposal at less than best consideration may constitute the provision of a subsidy. The nature and amount of the subsidy must comply with state aid rules particularly if there is no element of competition in the disposal process. The benefit of unlawful aid is recoverable from the recipient.

The following is a summary of an EU communication (dated 22-01-2015) on State Aid elements in the sale of public land and buildings and guidance on general principles:

#### **A sale through an open and unconditional bidding procedure**

A sale of land and buildings must be sufficiently well publicised (i.e. advertised repeatedly over a period of two months or more in the national or international press) so that the selling price is determined by the market value.

An offer is unconditional when the buyer of the land and buildings can decide how to use them.

In these circumstances the sale does not involve any element of state aid.

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### **A sale without an unconditional bidding procedure**

In such cases the value of the property should be assessed by one or more reputable independent valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price is the minimum purchase price that can be agreed without granting state aid. If the value set by the valuer cannot be obtained, a divergence of up to 5% from that value can be deemed to be in line with market conditions. However, if the land and buildings cannot be sold even at this juncture, a new valuation must be carried out.

### **Notification procedure and complaints**

Without prejudice to the *de minimis* rule, EU countries must notify the Commission of any sale that was not concluded on the basis of an open and unconditional bidding procedure; and any sale that was conducted at less than market value as established by independent valuers.

A third party may also contact the Commission if it suspects that an agreement for the sale of land and buildings by public authorities comprises a state aid element.

## **B. SALE OF LAND AND PROCUREMENT OF WORKS**

The EU procurement rules do not apply to the straightforward sale of land or grant of a lease where building obligations do not arise, since nothing is being 'procured'. However, a land disposal will be caught if it forms part of a larger transaction where a public body needs something built to its specification. For example a local authority may, in the case of a town centre development, want to impose controls on what is being built and when to the extent that this is not available through the planning regime. As the authority is directing what work must be done and when it brings the contract within the rules.

Furthermore the rules would not catch a requirement to develop in accordance with national or local land use policies where the developer submits its own proposals and the contracting authority does not specify the function of the building and any work to be carried out. For example planning obligation Agreements.

The OGC guidance states that the rules are likely to apply if:

- the work is required or specified by a contracting authority;
- the developer enters into an enforceable written obligation (under a development agreement) to carry out the work; and
- there is some pecuniary interest – which need not necessarily be a cash payment – in carrying out the work.

This will capture the majority of development agreements, even those that do not involve public work.

## **C. MIXED LAND OWNERSHIP AND PHASED DEVELOPMENT**

The application of the EU procurement rules will depend on the specific facts if the proposed development includes land in public and private ownership. The guidance suggests that the contracting authority may invite tenders for those aspects of the development that have the characteristics of a public works contract and use a development agreement for the remainder.

On the other hand, if the specific circumstances of the contract make it impractical or impossible to separate the two elements there may be a question as to whether the transaction as a whole falls within or outside the rules.

A land disposal under which both parties intend the developer to undertake particular work in accordance with a contracting authority's general needs is not of itself sufficient to engage the public procurement rules. This is the case even if the contracting authority has a contractual right to reacquire the land if the work is left unfinished or not undertaken within a given time frame.

In advance of any marketing, specific advice should be sought in each and every case where works maybe required by the Council to be undertaken by a purchaser to ascertain whether the EU procurement rules apply.

This may mean following the EU process in formally procuring land development projects notwithstanding all the time and cost involved in this. Apart from removing the risk of challenge, the procurement route brings control to the Council as regards the development of the site, i.e. the Council is able to control what the developer has to build. Conversely, under an unrestricted or an unconditioned disposal, the Council has no such control other than via the planning controls and they may not be sufficient in prominent locations such as the town centre. This of course has to be weighed against the potential larger capital receipt likely to be generated from an unconditioned land disposal.

## **7 SPECIFIC RESTRICTIONS ON FORMER SCHOOL SITES**

Former schools sites and associated school playing fields are subject to specific legislation permitting disposal only when approval has been gained from the Secretary of State for Education. Disposal of surplus school sites used within the preceding 8 years and playing fields used within the preceding 10 years require the Ministerial approval of the SoS under specific Acts.

## **8 MINOR LAND ENQUIRIES**

Mechanisms have evolved to actively manage minor miscellaneous land enquiries without compromising customer care. These included setting a minimum disposal consideration to at least cover the costs of disposal.

Many disposals relate to miscellaneous sites of relatively low value (say £5,000) that are not currently on the Property Review Programme. In the interest of efficiency and value the Council may consider deferring of a case by designating it a lower priority in the Programme. This accords with the Asset Management Plan where reviews involving likely receipts of less than £5,000 may be deferred for a period of time, unless exceptional circumstances cause a dramatic increase in value.

The current minimum disposal consideration of £2,000 does not always cover legal costs and surveyors fees. This is still considered applicable where the transaction is straightforward. Where a modest land and property transaction is more complicated and therefore costly to achieve, the disposal price will be reviewed on a case by case basis. However, it is not proposed to increase the minimum price as the Council needs to retain the flexibility to dispose of small sites that are a liability.

With regard to the disposal of the Council's interest in minor residential ground rents or rent charges where the value of the interest is very low (typically less than £100), it is proposed that the minimum disposal price be retained at £1,000.



**9 DISPOSAL PROCESS**

The appendix accompanying this document provides guidance for the treatment of transactions through the disposal process. It consolidates and updates best practice gained through the development of previous disposal policies and draws on experience in processing transactions over many years.

The preparation work required for a success disposal is outlined, together with an analysis of the available methods of disposal (particularly the tender mechanism). Topics relating to the grant property options and the monitoring of disposals are further discussed.

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August 2015**

## **APPENDICES**

### **A. PREPARATION FOR DISPOSAL**

To assist in meeting the corporate targets set for capital receipts, a strict timetable should be set for the sale process, since the proceeds of sale will be required as quickly as possible. The stages of preparation for disposal need to be clearly defined and carefully followed, so that misconceptions and delay are kept to a minimum. These stages need to include the following:

(i) **Internal Circulation**

Under normal circumstances, the Property Consultant will be aware of all Departments' strategic needs for property in future, via the Asset Management Plan. There may be a need to provide a safety net, by offering potentially surplus property to Service Departments at market value, or at the very least notifying departments of a prospective disposal, subject to reasonable timescales.

(ii) **Inspection**

The purpose of inspection is to spot any matter that is likely to hinder the disposal. This may be some physical defect in a building or land encroachments. These matters will have to be dealt with before the property comes onto the market. The property to be sold should be as "clean" as possible. The inspection should bring to light any potential for development about which the Council is not already aware.

(iii) **Special Purchaser**

At an early date, it should be established whether the balance of advantage is likely to lie in dealing with a special purchaser. There will be situations where the adjoining owner wishes to acquire the Council's land, for example where the purchaser desires to extend their current land ownership, or where they may own an overriding interest over the Council's land, such as a right of way. In dealing with this party direct it may produce marriage value which would enhance the capital receipts above that which would be paid in the general market. In such circumstances, it may be prudent to deal with the special purchaser against a strict time limit and go to the market if negotiations cannot be progressed.

(iv) **Legal Matters**

The Legal Department should be instructed to report fully on the Council's title and any rights or obligations which might affect it. Typical examples could include restrictive covenants, rights of way and reversion clauses. It is often too late if any problems become apparent once marketing and negotiations are under way, as these tend to prejudice the Council's position. In addition, where it is intended to include covenants or conditions, it is essential to obtain legal advice at an early stage to ensure that these can be fulfilled in practice, prior to negotiations.

(v) **Physical Constraints and Services**

Certain physical constraints will be obvious from inspection; others (e.g. underground cables etc) may not be. It will be necessary, therefore, to check the Council's own records, and also to check with statutory undertakers. The merit of

undertaking condition surveys will need to be considered in relation to each site, and the extent of the restrictions which the Authority intends to place on the development activity.

(vi) **Development Sites**

At this stage, a view will have been formed on any development potential which might exist, and any matters affecting potential value will have been brought to light. It will also be necessary to decide if any identified constraints should be dealt with before marketing takes place. For those properties with development potential, it is essential, in order to maximise the realisation from disposal, to give potential purchasers the most detailed possible guidance on planning approvals which may be available. In some cases, the equivalent of an “outline planning consent” for the most valuable use available might be considered. Where a range of development options is possible, a “planning brief” should be agreed which gives some scope for the “flair” of individual developers. Where the Council wishes to consider ensuring a desired use of property to achieve its policy objectives, it will be necessary to introduce absolute user clauses in leases and restrictive covenants, where appropriate. In addition, disposals should include provisions to ensure that development proceeds according to a pre-determined timescale.

In the disposal of property, there is a possibility that the “planning consent” agreed may not be as beneficial as that which might be achieved by a third party on appeal to the Minister. In such cases, the Council can negotiate a clawback provision, so that it can participate in the benefits of the development at a later stage. For this reason, appraisal of potential disposal property should always consider the means by which maximum sale proceeds can be generated.

(vii) **Land Assembly**

There may be circumstances where assembly of adjoining land, in the absence of a joint venture for example, is recommended in order to improve accessibility or site dimensions and layout with a result that the value of the assembled site is greater than the sum of the individual parts. This must be given consideration as part of any preparation for disposal. An Acquisition Strategy will cover the detail of land assembly mechanisms and good practice.

## **B. METHODS OF DISPOSAL**

In view of the potential scale and sensitivity of land transactions, a high standard of probity is necessary to avoid any possible allegation of corruption. The chosen method of disposal must therefore be fair and consistent, transparent and in accordance with the Council’s Constitution.

Where the property is marketed, as opposed to negotiations with a special purchaser or through a Joint Venture arrangement, there are four principal methods of disposal available:

- (i) Private Treaty
- (ii) Informal Tender (sealed bids)
- (iii) Formal Tender (contractual bids)
- (iv) Public Auction

Clearly, each method of disposal engenders varying degrees of ensuring fairness and transparency with the sale by formal tender probably being the most likely to avoid any challenge. However, it is not always appropriate to adopt the formal tender route, nor does it always guarantee best consideration when potential purchasers are put off by the sometimes complex and lengthy procedures. The Property Consultant should recommend to the Council which other method of disposal is appropriate provided that best consideration can be achieved. For transparency purposes, normally one person should decide the method and another should carry out the negotiations.

The Council's Constitution applies to property disposals that are dealt with by way of tender (whether formal, informal, contractual or sealed bids) in the same manner as they apply to contracts for goods and services.

It will also be noted in the Constitution that the decision on the method of any disposal will be taken in accordance with the principles and guidelines set out in this policy document. Further, it will be noted in the Constitution that any disposal method other than by tender will follow the procedures described in this policy document that are designed to enable fairness, consistency and transparency in all transactions.

The characteristics and constraints of each method of disposal are as follows:

(i) **Private Treaty**

This is the simplest to adopt, and the asking price can be at a pre-determined figure. It allows a flexible approach, time pressures are seldom imposed and it is widely accepted by the public. A disadvantage is potential for claims of unfairness, and it is therefore a method to be used with caution. To overcome potential problems, unless a special purchaser situation applies, all properties to be sold under this method should be advertised for sale, in any event, so that all interested parties have an opportunity to participate.

This approach is suitable for properties whose sale value is reasonably easy to predict, and therefore settlement of an asking price is straightforward, e.g. dwelling-houses. An acceptable price is generally given at the outset and it is considered bad practice to play parties against each other to build up their offers. Strict time limits can mitigate this.

This procedure can be time-consuming, since time limits are difficult to fix, and there may be many individual negotiations before a satisfactory transaction takes place. It is the method with the least openness and, therefore, the most susceptible to abuse. There are procedures such as segregation of valuation and negotiation duties to ensure transparency in this type of transaction.

The Council should clearly set a time limit against potentially tardy prospective purchasers, and the Council must satisfy itself as to the financial ability of the prospective purchaser to complete, before negotiations become too advanced.

(ii) **Informal Tender (sealed bids)**

Here, tenderers may put forward conditional offers which will only become binding once the conditions have been resolved. The Council may pursue discussions with more than one tenderer in order to achieve the most advantageous transaction. Since considerable time and effort may be spent on such discussions, it is essential

that *bona fide* shortlisted tenderers should be established at the outset, with guarantees that finance is available.

There is more opportunity to arrive at a deal which suits both parties. Some conditions may not be capable of fulfilment for a some time, but provisions can be included for the Council to take advantage of a better planning consent or better receipts above an agreed threshold.

For more complex development sites, interested parties may be interviewed and an outline of their development schemes presented, before the tender procedure starts. This is in line with key criteria: quality of the scheme, deliverability and the financial bid. A selected list of purchasers can then be compiled. This saves wasted effort from potential purchasers, and cuts down the possibility of abortive tender negotiations. The Council should not seek to increase the basic tenders put forward, nor accept increased offers from unsuccessful tenderers. However, the Council may seek increased rewards from the fulfilment of conditions which would create more value than the original offer envisaged.

Informal Tender lacks the advantage of speed and the certainty of the Formal Tender procedure, since negotiations may not be successful. There is greater burden on the professional skills of the Council's advisers, as the requirement to negotiate raises some of the disadvantages of a sale by private treaty. For this method to be a success, the rules for Informal Tenders must be laid down very clearly. The main advantage of the Informal Tender process is that the most advantageous terms for the Council can be formulated even in very complex cases.

**(iii) Formal Tender (contractual bids)**

The Formal or Contractual Tender procedure requires a great deal of preparation, as the tender document forms the contract for sale. A full appraisal of the transaction needs to be carried out in order to have a baseline against which to assess the tenders when they are returned, and provide a guide price during the course of marketing. The Council will need to indicate in the tender documents that it is not bound to accept the highest or any tender. Tenderers must be required to provide evidence that finance is available to proceed. In order to ensure fairness and the best chance of an acceptable offer, the tender will be widely publicised, and all parties given the chance to participate.

The advantages of the Formal Tender procedure are that a transaction can be concluded quickly where it is unconditional, it avoids tentative time-wasting enquiries, the Council does not need to accept any tender if the offer is not satisfactory, the tender procedure should guarantee complete fairness and tenderers should put forward their best offer, rather than, as at auction, a figure marginally more than the second bid. This method does have its disadvantages: some potential purchasers may be put off by the procedure whereby they commit themselves contractually upon making the financial offer. All matters must be completely clear before the procedure starts. There is little room for discussion about the scheme itself although this could take place with prospective purchasers during the marketing preparation provided care is taken not to compromise the transparency of the transaction.

This method of disposal is inappropriate for straightforward transactions where conditions of substance remain to be overcome before the bid can be finalised. In development situations, it could, for example, be effective in the sale of cleared sites

for residential development where planning consent is available and the density of development is not in question. It would not be appropriate where several development schemes might be possible and negotiations with various parties will be required to achieve the best scheme and best consideration. It is however, common in residential land sales for Formal Tenders to take place conditional upon detailed planning consent where outline consent has been previously obtained.

Formal Tenders are appropriate for disposal of development sites. These can include sale incorporating development agreements, Joint Venture land disposals (which may or may not involve a JV Company) and consideration of freehold or leasehold disposals, the latter adopted where there is a need for estate management controls or where there is the prospect of a change in planning to a more valuable use at some point in the future. Development Agreements, Joint Ventures and leasehold disposals could equally apply following informal tenders although less common.

The Authority's Constitution requires tenders for disposal which are in a similar form to the more common tenders for the provision of goods and services. The rules for formal tenders for sale cover:-

- advertising that tenderers are to be sought;
- procedure for pre-tender shortlisting of applicants, where appropriate;
- evidence of financial standing required from tenderers;
- the principal contents of the tender package, including a clear tender return date;
- inclusion of a pre-addressed envelope indicating tender details and opening date;
- Method of recording and safekeeping tenders prior to the opening date;
- the constitution of the Council's team which should be present at opening of tenders;
- arrangements for listing and witnessing tenders on opening;
- the form of Committee Report recommending which tender(s) should be accepted;
- rules for informing successful tenderers;
- instructions not to solicit or accept increased basic offers after receipt of tenders;
- Members should not engage in negotiations under any circumstances;
- the external advisers should be bound by similar rules.

**(iv) Public Auction**

To achieve success with this method of disposal, external auctioneers are normally used. The auctioneer is briefed at an early stage, and fully involved in preparing conditions of sale and fixing the reserved price. The reserve should be approved by the Council and conveyed to the auctioneer immediately before the auction. It should also be recorded in a sealed letter which the auctioneer will have available at the time of sale. Sale by auction requires preparation of all contractual details beforehand in order that a binding contract may be effected immediately a bid is accepted.

The advantages of an auction are openness and swift completion of the transaction if an acceptable bid is generated. Disadvantages are the principle of sale by auction falls in and out of favour with the market, and there are times when auction should not be considered as the interest from the market will be low. Success of an auction depends on the atmosphere generated in the sale room which may depend on the

quality of other lots on offer and a great deal will rest with the skill of the auctioneer. As a contract must be entered into immediately a bid is accepted, funds to meet the sale price must be available within 28 days. This may exclude purchasers who need to raise finance. There may be little time for potential purchasers to consider the transaction, and no opportunity to discuss alternative ways to structure the deal. The winning bid need only be marginally more than the second highest bid, and may not represent the maximum the purchaser would have been willing to pay. In view of the above, auctions are only considered appropriate for property where they do not hold any major strategic influence.

### **C. CONSIDERATIONS FOR DEVELOPMENT SITES**

Disposal of development sites, notably valuable major sites in town centres or those sites aligned to major regeneration and employment projects in the borough require special mention and often special treatment to achieve multiple objectives. Invariably, disposal of such sites will be subject to a rigorous tender procedure which may involve a number of steps to filter out potentially weak purchasers and often culminating in formal presentations to lead officers and Members. In view of the profile of key development sites, development agreements are often employed in the sale transaction as a mechanism to avoid land banking, ensuring delivery of the development within a reasonable time and securing a preferred type and quality of development. This will most likely mean following the EU process in formally procuring land development projects

Building licences, as an alternative to a development agreement, allows the Council to retain the freehold and ensure the purchaser's construction activities comply with specific land obligations. Once this work has been done then the freehold is transferred. A building licence is not be subject to the procurement rules provided that the purpose of the licence is to ensure the purchaser does not go back on its own intended proposals or activities made at the time of purchase.

For very high profile and valuable sites, and where a straight disposal of land cannot produce wider development objectives, a Joint Venture Development Agreement is worthy of consideration. This is essentially a business agreement in which the parties agree to develop, for a finite time, new assets by contributing respective "equity". The parties jointly exercise control over the project and consequently share revenues, profits, assets and expenses (typically in proportion to the inputs). In the context of a JV between a Local Authority and Private Company/Developer the respective contributions can achieve results that would be unlikely where each was operating in isolation. The LA can contribute land and other property assets, local knowledge and experience, political support, additional capital funding if necessary and, crucially in some cases, CPO powers. The private developer brings external funding, extensive development expertise, a professional team specialising in property development if not present in the LA, the ability and willingness to take greater risks and ultimately the profit motive to drive results. As with other major disposals, the process for selection of the JV partner must be robust and compliant with legislation.

#### **D. DEALING WITH LATE BIDS**

In the context of sale of land and property by tender, the issue of dealing with late bids is one area that can lead to challenges against the Council of maladministration and judicial review.

Whilst it may be appropriate to maintain a policy of disregarding any late bids in a tender exercise, the Council may miss the opportunity to secure best consideration where a late bid substantially exceeds bids received on time. Indeed, a Council could be found to fall short of achieving best consideration if rival bids are not fully investigated.

The policy of the Council in respect of late bids should be as follows:

- The Council discourages the submission of late bids in all cases when it is disposing of land. It will attempt to minimise problems by aiming for early exchange of contracts.
- Late bids cannot be considered where land is being disposed of by public auction after a successful bid has been accepted.
- Where a land and property is sold by tender, whether informal or formal, any bids received after the specified closing date and time will not be accepted.
- This will at all times be made quite clear in the tender documentation.
- In the case of a tender where the highest bid is less than £50,000 the Property Consultant will seek approval of all bids received on time and exchange contracts with the approved bidder accordingly.
- In the case of a tender where the highest bid opened is £50,000 or more the Property Consultant will seek approval of all bids received on time. If at any time before exchange of contracts a higher bid is received the Property Consultant will bring such a bid, or bids, to the attention of the Council.
- Where late bids are brought to the attention of the Council, a re-tender exercise should be undertaken, unless the late bid is less than £5,000 above the highest bid, in which case best consideration would be compromised by a re-tender exercise.
- Late bids will not be considered unless there are good commercial reasons. This should be explained to any purchaser in sales particulars.
- Consideration of a late bid does not mean that it will necessarily be accepted even if it is the 'highest bid'.
- The Council may ask both the late bidder and the original highest bidder to submit their last and final bids by a set deadline.

Dealing with late bids would be less of an issue where the period between receipt of tenders and exchange of contracts is minimised. The Property Consultancy will, therefore use all practical means to reduce the time taken to complete transactions after receipt of bids.



## **E. OPTIONS**

In relation to land and property, these are rights enabling a party to acquire property at a future date if certain pre-conditions are satisfied. Options are used to assist with long term business planning and expansion or to give developers an opportunity and comfort to work up expensive development proposals on complex schemes. The latter can sometimes be linked to a “Lock Out” agreement whereby the Council would agree to withdraw a piece of property from the disposal market for a fixed period of time, usually of short term duration.

Options are favourable where market conditions have deteriorated, and they are needed to bring confidence to future investment. Should options be considered they need to be tightened up from those offered previously, and should give the Council the right to trigger the termination of the option quickly, should market conditions change. In any event, there is invariably a potential value to an option, and in the right commercial circumstances, the Council should negotiate a suitable consideration before granting an option on land or property.

## **F. MONITORING DISPOSALS**

Disposals of land and property play a key role in both realisation of policy objectives, and in maintaining an acceptable capital programme through the generation of capital receipts. The Property Review process has helped to bring forward substantial capital receipts in recent years, but it is proving more difficult to identify opportunities, as assets reduce. Nevertheless, important links have been established with the Director of Finance to successfully monitor the situation and, with the limitations of capital controls, the freeflow of up-to-date information is always important.

To assist in the monitoring role, the Property Consultant reports on a regular basis progress with disposals through the Capital Receipts Monitoring Report. This information schedule provides senior managers with regularly updated information and target action to progress individual cases. This report links closely to the existing financial monitoring system that can help tie-up target priority cases. These monitoring reports will contain information of a confidential nature, fundamental to the Council’s success in negotiations, and distribution needs to be carefully controlled so that problems do not arise.

This monitoring process needs to stretch through to completion, as the availability of capital receipts greatly affects the flexibility of the Council’s actions. Targets for legal completion are fundamental to an improved process. Where disposals at restricted values are agreed, it will be important for the Council to monitor the position on the ground to ensure that its objectives are achieved, and, where developments change, to seek clawback. Post-disposal monitoring also extends to checks to ensure that purchasers comply fully and timely with any conditions of sale or covenants specifically imposed in order to achieve Council Policy objectives. As part of wider property management best practice, post-monitoring procedures are followed to ensure that the Council does not miss any opportunities created in the past or in the future.

## **G. RICS GUIDANCE NOTE**

### **DISPOSAL OF LAND AT LESS THAN BEST CONSIDERATION**

See attached.