

FINANCIAL REGULATIONS – Appendix 4

PROTOCOL FOR THE DISPOSAL OF COUNCIL OWNED LAND & BUILDINGS

1.0 Introduction

- 1.1** This Protocol governs the disposal of land and property owned by the Council. It applies to all property interests owned by the Council. If a conflict exists between this protocol and statute or guidance (as may be the case, for example, for school properties or for residential properties held in the HRA) then this protocol will be followed to the extent that it does not conflict with statute or guidance.
- 1.2** A disposal of Council-owned land and/or property includes the following:
- Freehold disposal by way of sale;
 - An exchange of Council owned land or buildings.
 - Leasing of Council owned properties on leases in excess of 7 years.
- 1.3** This Protocol applies to every Member and officer of the Council and anyone acting on its behalf. Any exemptions from this Protocol will require approval from Cabinet and should only be sought in exceptional circumstances. If the need for an exemption is urgent and approval cannot be sought from Cabinet in time, approval must be sought from the Leader of the Council, relevant Scrutiny Chairperson and the Chief Executive; and be reported to the next scheduled meeting of the Cabinet.
- 1.4** The document complies with statutory duties and is in line with Government advice recommending that local authorities should have a document of this nature available for inspection and it is intended for use by members, officers, and as a source of information for the public and developers.
- 1.5** It should be read in conjunction with the Council's Responsibility for Functions, the Scheme of Delegation to Officers, Contract Procedure Rules and Financial Regulations, all of which can be found in the Council's Constitution
- 1.6** Failure to follow this protocol may result in disciplinary action or action under the Members' Code of Conduct and Officers' Code of Conduct.

2.0 Legal Background

- 2.1** Section 123 of the Local Government Act 1972 ('LGA 72') states that "a council may dispose of land held by them in any manner they wish" but that "except with the consent of the Secretary of State, a council shall not dispose of land under this section for a consideration less than the best that can reasonably be obtained".
- 2.2** Circular 06/03: "Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained" provides further guidance, and this is referred to in section 7.0 below.
- 2.3** An important distinction exists between the legislation relating to sale of land and property (set out in the LGA 72) and legislation relating to the procurement of services (set out in Public Contract Regulations 2015 'PCR 15'). This distinction is important because the procurement

regime set out in the PCR 15 imposes certain obligations on a public body when entering into contracts for works and services, that do not apply to the disposal of land or real property, and the disposal of land is clearly set out in the legislation and guidance published relating to disposals. The definition of a "*public contract*" identifies four main constituents of such a contract: (1) that it is "*for pecuniary interest*"; (2) that it is "*in writing*"; (3) that it is entered into by an "*economic operator*" and a "*contracting authority*"; (4) that it should have as its "*object*" the "*execution of works*" or the "*supply of products*" or the "*provision of services*" (see *Faraday Developments Ltd v West Berkshire Council* 2016). The sale or disposal of property does not automatically fall into the definition contract for the execution of works, supply of products or provision of services.

- 2.4** Procurement of services generally involves the undertaking of competitive selection processes, and these are not generally necessary or appropriate for land transactions governed by LGA 72. However, where contracts for the sale of land place contractual obligations on the purchaser (other than planning obligations) to undertake activities for the Council's benefit which could be considered to be services, then in certain circumstances, procurement legislation may apply. Legal advice must be sought where such obligations exist or are proposed.

3.0 Roles, Responsibilities and Decision-Making

This section describes the roles and responsibilities of key officers, Council departments, groups, boards, and committees in the disposal of land and buildings:

- 3.1** Full Council: As land disposal is an executive function, decisions to dispose of land & buildings will not normally be referred to a meeting of Council.

- 3.2** Cabinet: Cabinet makes the decision to:

- i. Declare assets Surplus where their value exceeds £1m.
- ii. Dispose of Surplus Assets which exceed £1m in value. In approving disposals, it may delegate to the Director of Regeneration & Growth the responsibility for approving the details of the transaction.

- 3.3** Cabinet Member for Regeneration & Growth (or equivalent Portfolio): Following consultation with the Land & Asset Management Committee, the Cabinet Member for Regeneration & Growth makes decisions to:

- a. Declare assets Surplus where their value is between £500,001 and £1m.
- b. Dispose of Surplus Assets where their value is between £500,001 and £1m. In approving disposals, they may delegate to the Director of Regeneration & Growth the responsibility for approving the details of the transaction.

- 3.3** Director, Regeneration & Growth: The Director of Regeneration & Growth (or equivalent) is responsible for:

- a. As part of Leadership Team, considering proposals to rationalise the operational property estate in response to service needs.

- b. Making recommendations to Cabinet to declare assets in excess of £1m in value surplus.
- c. Making recommendations to Cabinet to dispose of assets over £1m in value.
- d. Making recommendations to the Cabinet Member for Regeneration & Growth to dispose of assets between £500,000 and £1m in value.
- e. In consultation with the Cabinet Member for Regeneration & Growth, with Ward Members as appropriate and with the Director of Finance and s151 Officer, declaring assets between £100,000 and £500,000 in value surplus.
- f. In consultation with the Director of Finance and s151 officer, approving the disposal of assets between £100,000 and £500,000.
- g. In consultation with the Cabinet Member and with Ward Members as appropriate, declaring assets up to £100,000 surplus.
- h. Approving the disposal of assets up to £100,000 in value.
- i. Overseeing the negotiation of property transactions.
- j. Approving the details of transactions in accordance with delegations put in place by Cabinet.

3.4 Audit & Risk Assurance Committee: The Committee reviews policies and procedures, including this document. It is therefore responsible for:

- a. Approving this document as part of the revised Financial Regulations and updates
- b. Reviewing this document periodically as part of their wider review of the Financial Regulations
- c. Reviewing the implementation of this policy and seeking assurance that the policy is followed.

3.5 Scrutiny Panel: Scrutiny Panel has the power to call in and scrutinize individual decisions, including decisions to declare assets surplus and decisions to sell land & buildings (including the terms of transactions).

3.6 Director of Law & Governance and Monitoring Officer:

- a. To execute legal documentation in accordance with instructions received from Cabinet or from the Director of Regeneration & Growth.
- b. To ensure that all transactions are in the Council's best interest, are within the Council's powers and are legal.
- c. To ensure that there are no conflicts of interest arising from a relevant entry in the Members Register of Interests or the Employees Register of Interests.

3.7 Director of Finance and Section 151 Officer

- a. Advising on the financial implications of a property transaction (such as the impact on the revenue budget of selling a capital asset, or the impact on the Council's ledger if a sale price is above or below the most recent asset valuation). Preparing the "Financial Implications" section in Cabinet papers.
- b. Processing any financial receipts and ensuring that they are recorded appropriately in the Council's accounts.

- c. Consulting with the Director of Regeneration & Growth regarding the declaring of assets surplus and the approval of disposal of assets over £100,000 and up to £500,000.

3.8 Leadership Team: Leadership Team has no formal delegations under the Council's constitution, so it does not make decisions as such, but it acts as a forum in which directors can collectively set the direction, including:

- a. Considering whether services can be rationalised, whether buildings can be vacated, and assets declared surplus.
- b. Considering whether proposals should go to Cabinet.

3.9 The Land & Asset Management Committee: has no formal delegations under the Council's constitution, however it will be consulted by and will make representations to the Cabinet Member for Regeneration & Growth prior to decisions being made by that Cabinet Member or Cabinet. It also has the ability to review decisions for consideration and to make recommendations to Cabinet.

3.10 The Land & Asset Management Officers Group has no formal delegations under the Council's constitution, so it does not make decisions as such, but it acts as a forum in which officers from across all the Council's service areas can discuss and agree on proposals to be taken to Leadership Team and to Cabinet.

3.11 Strategic Assets & Land Team will develop proposals to put to the Land & Assets Management Officers Group, to Leadership Team and to Cabinet as appropriate. The team will also be responsible for undertaking negotiations and implementing the decisions made by Cabinet and by the Director of Regeneration & Growth.

4.0 The process of declaring Operational assets 'surplus' to the Council's needs.

4.1 Service Managers will be responsible for defining their service needs as part of the service planning process and agreeing these with their relevant Director. The Strategic Land & Assets Team will support this process by advising on property matters and by identifying the most efficient way of providing for a service area's property needs.

4.2 Where the above process results in property assets being no longer required for service provision (and where this has been confirmed by email by the Director responsible for the service), proposals will be brought to Land & Asset Management Officers Group, which will consider the possible needs of other service areas before recommending that an asset is declared surplus.

4.3 Once a service has declared that they no longer require use of an asset and once the Land & Asset Management Officers Group have considered the needs of other service areas, the decision to declare the asset surplus (if it exceeds £1m in value) will be a decision for Cabinet. For assets between £500,001 and £1m it will be a decision for the Cabinet Member for Regeneration & Growth. For assets between £100,000 and £500,000 in value it will be a decision for the Director of Regeneration & Growth in consultation with the Cabinet Member, with Ward Members as appropriate and with the Director of Finance and s151 officer. For assets below

£100,000 it will be a decision for the Director of Regeneration & Growth in consultation with the Cabinet Member for Regeneration & Growth and relevant Ward Members as appropriate.

- 4.4** Policy decisions which materially affect the delivery of services will usually be made by Cabinet. When such a decision is made it will be good practice to ask Cabinet to delegate responsibility to the Director of Regeneration & Growth, in consultation with the Director of Finance & s151 Officer, to declare surplus any property assets which become surplus as a result of that decision.
- 4.5** Similarly, where policy decisions are made as part of the budget setting process, it will be good practice to ask Cabinet, when they approve the budget, to delegate responsibility to the Director of Regeneration & Growth, in consultation with the Director of Finance & s151 Officer, to declare surplus any property assets which become surplus as a result of the budget setting process.
- 4.6** If Land & Asset Management Officers Group recommends that an asset is declared surplus then a Cabinet paper will be prepared, which will be consulted upon in the usual way with Members and with Leadership Team.
- 4.7** Until an asset is declared surplus in accordance with 4.3 above it remains the budgetary responsibility of the relevant service area. Once it is declared surplus it becomes the responsibility of Strategic Assets & Land who will be charged to dispose of the asset.

5.0 Disposal Method

- 5.1** The Director of Regeneration & Growth will decide on the most appropriate method of disposal taking into account the need to achieve best value, also social value and the corporate priorities of the Council. For assets in excess of £1m in value this decision will be ratified by Cabinet when they approve the disposal. Alternative disposal methods include:
- a. Direct disposal. Where an unsolicited offer is received from a party for an asset, it may be appropriate to negotiate and agree terms with that one party. The Director of Regeneration & Growth will need to be satisfied that the sale complies with the s123 LGA 72 obligation to achieve the best price that can reasonably be obtained, and to that end a Red Book valuation will usually be necessary. Direct disposal is most likely to be appropriate where an offer is made by a special purchaser (eg neighbour), or where there is reason to think that a competitive process is unlikely to achieve a better result. Where there is to be a direct disposal, then the purchaser will be required to formally declare if they have an interest with or are related to an Elected Member or officer of the Council. Where such a relationship is declared, then approval to proceed should be sought from Cabinet regardless of the value of the asset.
 - b. Appointment of agents. Where assets are declared surplus it may be appropriate to appoint a firm of estate agents to market the asset on the Council's behalf.
 - c. Direct Marketing. The Council could itself advertise the asset and deal with enquiries itself.

- d. Sale by tender.
- e. Auction.

6.0 Valuation

- 6.1** For all property disposals a formal written valuation will be obtained and attached to the Cabinet or Individual Cabinet Member report . All valuations must be in line with Royal Institute of Chartered Surveyors professional standards.
- 6.2** The Director of Regeneration & Growth will approve the appointment of a valuer, decide whether the valuation should be conducted internally or by an external valuer, and satisfy himself that no conflicts of interest exist.
- 6.3** If the disposal of an asset has an impact on the value of any retained assets (for example, granting of a lease might have an impact on the value of the retained freehold) then this should be assessed, and it should be explained in the report which seeks approval to the disposal. Advice from Finance should be sought regarding the impact on the Council's annual asset valuations and whether a write-down is necessary.

7.0 Sale at less than Best Value

- 7.1** Circular 06/03: *"Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained"* provides guidance on the circumstances in which assets can be sold for less than Best Consideration Reasonably Obtainable. The Consent removes the requirement for authorities to seek specific consent from the Secretary of State for any disposal where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted ("the undervalue") is £2m or less.
- 7.2** It is Government guidance that local authorities and other public bodies should dispose of surplus land wherever possible. Generally, it is expected that land should be sold for the best consideration reasonably obtainable. However, it is recognised that there may be circumstances where an authority considers it appropriate to dispose of land at an undervalue. Authorities should clearly not divest themselves of valuable public assets unless they are satisfied that the circumstances warrant such action.
- 7.3** The Consent was issued to give local authorities autonomy to carry out their statutory duties and functions, and to fulfil such other objectives as they consider to be necessary or desirable. However, when disposing of land at an undervalue, authorities must remain aware of the need to fulfil their fiduciary duty in a way which is accountable to local people.
- 7.4** In determining whether to dispose of land for less than the best consideration reasonably obtainable, and whether or not any specific proposal to take such action falls within the terms of the Consent, the authority should ensure that it complies with normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer as to the likely amount of the undervalue.
- 7.5** When disposing of land at less than best consideration authorities are potentially providing a subsidy to the purchaser. Legal advice should be sought and consideration should be given to

relevant state aid legislation and to government guidance including the Government's Summary Guidance to Awarding Subsidies.

7.6 Where an asset is being sold at less than Best Consideration then:

- a. If the difference between the unrestricted value of the interest to be disposed of and the consideration accepted (ie the "undervalue") is £50,000 or less, then the decision to sell at less than Best Consideration, together with an explanation as to the rationale, must be made in writing by the Director of Regeneration & Growth, the Section 151 officer and the Monitoring Officer.
- b. If the Undervalue is more than £50,000, then the decision to sell at less than Best Consideration must be made by Cabinet.
- c. If the Undervalue exceeds £2m then the approval of the Secretary of State is required.

7.7 In considering the legal and financial considerations of any disposal at an undervalue and/or granting of a lease, there must be demonstrable evidence 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. If possible, the social, economic or environmental benefits, which are argued to be the justification for a disposal at an undervalue, and/or lease should be quantified in monetary terms.

7.8 Where leases are granted as part of a number of linked transactions, ie where a separate service contract is being entered into between the Council and the lessee, simultaneously with the lease, under which the lessee commits to provide certain services to the Council or to residents, the nature and value of this commitment should be taken into account in (a) assessing whether the disposal is at an undervalue and (b) justifying the undervalue if it exists. Advice from Legal and Finance should be sought in this scenario, and care should be taken to ensure that CIPFA, RICS and other appropriate guidance regarding the treatment of Linked Transactions is followed, and that the Community Asset Transfers will only be undertaken on a leasehold basis. When they do occur they will be undertaken in accordance with the Council's protocol on Community Asset Transfers and in accordance with this protocol.

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

8.0 Complex Contractual Arrangements

8.1 This section sets out a protocol for undertaking discussions and negotiations with developers relating to Council-owned land. In particular it focuses on the circumstances in which the Council might enter into complex contractual arrangements with property developers relating to land. It defines, purely for the purposes of this document, what we mean by 'complex contractual arrangements', it highlights the risks to be considered and it sets out clear guidance which officers must follow in negotiating and agreeing such arrangements.

8.2 Complex Contractual Arrangements: For the purposes of this document Complex Contractual Arrangements are contracts which commit the Council to dispose of land but where the receipt of purchase monies is delayed and/or is conditional on a future event. Such arrangements include:

- Option agreements which give a developer the right to acquire land at a future date, either at a pre-agreed price, a price to be fixed by a formula (such as a development appraisal) or a price to be fixed by independent valuation.
- Sale contracts or agreements for lease, which are conditional on receipt of a planning approval, on satisfactory due diligence (eg site investigations), funding or other matters.
- Sale contracts or lease agreements where payment of purchase monies is delayed until a future event takes place such as Practical Completion of a development project, completion of other adjoining site acquisitions, future property sales, funding agreements.
- CPO Indemnity Agreements where developers reimburse CPO costs
- Contracts with Overage or profit-share clauses
- Joint Ventures
- Exclusivity agreements
- Promotion agreements
- Release of restrictive covenants.

8.3 Circumstances in which Option Agreements or Conditional Contracts are appropriate: From time to time the Council will want to encourage and promote property development in order to promote regeneration & renewal or to contribute to strategic targets such as housing numbers – and to this end working with, negotiating with and entering into contracts with property developers is an important part of Council business.

8.4 Promoting complex property development schemes is time-consuming and expensive. Developers often spend years promoting schemes through the planning process, incurring large costs in professional fees, only to find that schemes fail to obtain planning approval or they become unviable as costs and values change. It is common therefore for developers to seek to manage their exposure by securing the right to acquire a site (without which they could not justify the expenditure on fees) but preserving their ability to withdraw, or delaying payments for land, until key risks (such as planning) have been mitigated. To a degree, the Council needs to recognise this in its dealings with developers. It does however need to protect its own interests at the same time.

8.5 Risks for the Council: In entering into complex contractual arrangements the Council must take care that it does not:

- a. Find itself unable to terminate an agreement with a developer who is not performing, or where it has become apparent that the scheme cannot be delivered.
- b. Find that the developer is deliberately delaying (for example by delaying signature of a section 106 agreement) and the Council is unable to terminate.

- c. Finds itself under undue pressure to renegotiate the terms of a transaction because the alternative would be non-delivery and political embarrassment, because the agreement cannot be terminated.
- d. Find that it is committed to sell a site for a price which, because of the valuation mechanism employed or because of the outcome of due diligence work, is significantly less than the Council was expecting and/or less than the existing use value of the site.
- e. Find that the conditions in a conditional sale agreement are such that the purchaser is in complete control, and so the conditional contract effectively functions as an option agreement. An example of this is where a contract is conditional on receipt of a 'Satisfactory Planning Permission' and that is defined as 'A permission which the purchaser in their absolute discretion finds satisfactory'.
- f. Find that it is due substantial payments from a corporate entity that has insufficient financial strength, and no bonds or guarantees are in place.

Other risks for the Council include:

- g. Lack of clear distinction between the Council's statutory role as planning authority and its role as landowner and financial beneficiary. A clear distinction is essential from a probity perspective and to avoid Judicial Review of decisions.
- h. Lack of an appropriate competitive process in selecting developers to work with, resulting in procurement challenges and/or best value not being achieved.

8.6 Mitigations: To mitigate these risks the Council should:

- a. Only enter into exclusive discussions with a developer about a development project where that developer has an exclusive position relating to the project, such as ownership of an adjoining site, access rights or other rights which mean only they can deliver the scheme. 'Exclusive discussions' include informal meetings with officers and Members.
- b. Not enter into option agreements which are longer than reasonably necessary. Only under exceptional circumstances should options be more than 18 months long, and they should never be more than five years long. Any extensions beyond the original option period (apart from automatic extensions linked to Judicial Review) must be subject to Cabinet approval at the time that the original option period expires.
- c. Only enter into Option Agreements which have clearly set out milestones which the developer must achieve, and the ability for the Council to terminate if they are not achieved. They might include:
 - i. A timescale for formal planning pre-application discussions
 - ii. A timescale for development of design to each of the RIBA stages
 - iii. A public consultation strategy, with timescales
 - iv. A timescale for submitting planning applications, outline and/or detailed.
 - v. A timescale for satisfactory conclusion of due diligence (site investigations, discussions with the Environment Agency etc) and the ability to terminate if the results are unsatisfactory.

- vi. A timescale for entering into funding agreements
- vii. A timescale for signing section 106 agreements etc.
- d. Only enter into Conditional sale contracts which have similar milestones (and similar ability for the Council to terminate) as set out in c. above. The Conditional Period should not be longer than reasonably necessary. Only under exceptional circumstances should it be more than 18 months long, and it should never be more than five years long. Any extensions beyond the original conditional period (apart from automatic extensions linked to Judicial Review) must be subject to Cabinet approval at the time that the original conditional period expires.
- e. Ensure that before entering into any complex contractual arrangement, it has had sight of the developer's financial appraisals and cost plans, it has had obtained its own professional advice on these and is satisfied that the scheme is viable. If the scheme is not viable then it is inevitable that the developer will delay or will seek to renegotiate, and the Council's expectations will not be met.
- f. Does not enter into contracts for the sale of land where purchase monies are delayed beyond Completion unless:
 - i. There is a guaranteed minimum purchase price (which is not dependent on a future valuation or appraisal) which is equal to or greater than the Open Market Value of the site at the date of the contract, that this is payable unconditionally and that it is suitably secured against the appropriate assets of the purchaser.
 - ii. Payment of the guaranteed minimum purchase price must not be delayed more than 2 years beyond Completion.
 - iii. There is an appropriate drop-dead date by which all purchase monies must be paid regardless of any other factors.
 - iv. The Council retains a charge over the land until all purchase monies are paid.
- g. Only enters into Complex Contractual Arrangements with companies of suitable financial standing or where suitable guarantees are in place.

8.7 The decision to enter into a Complex Contractual Arrangement is a decision for Cabinet if the likely end sale price of the land (including any uplift resulting from change of use) exceeds £1m. If the likely price is between £500,001 and £1m it will be a decision for the Cabinet Member for Regeneration & Growth. If the likely price is between £100,000 and £500,000 it will be a decision for the Director of Regeneration & Growth in consultation with the Cabinet Member, with Ward Members as appropriate and with the Director of Finance and s151 officer. If it is below £100,000 it will be a decision for the Director of Regeneration & Growth in consultation with the Cabinet Member and Ward Members as appropriate.

9.0 Legal Documentation

9.1 For Complex Contractual Arrangements or for transactions with a consideration in excess of £1 million, the Director of Regeneration & Growth, in consultation with the Director of Law & Governance, will approve the selection and appointment of an appropriate firm of lawyers to represent the Council.

9.2 Documents will be executed in accordance with the Scheme of Delegations, including affixing the Council's common seal when necessary. Documents prepared by external legal representatives will be reviewed by the Director of Law & Governance and Monitoring Officer, to ensure they comply with the Council's legal duties and responsibilities and in accordance with the Council's Constitution (including this protocol, to the extent that it is relevant).