

# **DARTFORD**

## **BOROUGH COUNCIL**

### **POLICY ON THE DISPOSAL OF SURPLUS & UNDERUSED LAND & PROPERTY OWNED BY THE COUNCIL**

## 1. AIMS OF THIS POLICY

- 1.1. It is government policy that local authorities should dispose of surplus and under-used land and property wherever possible. The Council has fairly wide discretion to dispose of its assets (such as land or buildings) in any manner it wishes. When disposing of assets, the Council is subject to statutory provisions, in particular, to the overriding duty, under section 123 of the Local Government Act 1972, to obtain the best consideration that can be reasonably obtained for the disposal. This duty is subject to certain exceptions that are set out in the General Disposal Consent (England) 2003.
- 1.2. The way the Council manages its land/property assets can have a significant impact both on the quality of services delivered to the public and the local environment. Effective asset management is essential in bringing 'agility' to land and property assets so that the delivery of the Council's goals and objectives are realised in a sustainable manner, at the right time and on budget. The Asset Management Plan demonstrates the Council's approach to managing its land/property assets.
- 1.3. The Council considers the business case for disposing of any assets that are no longer of any use to it and is unlikely to be in the future or which provides only a benefit that is disproportionate to the opportunity cost of the capital tied up in the asset.
- 1.4. Each asset disposal is treated on its own merits and nothing in this Policy will bind the Council to a particular course of action in respect of a disposal. Alternative methods of disposal not specifically mentioned in this Policy may be used where appropriate, subject to obtaining the necessary authority (see section 9 below).
- 1.5. This Policy:
  - sets out the procedure to be adopted in connection with the disposal of surplus and under-used assets and ensures that requests to purchase Council owned assets are dealt with in a fair and consistent manner and that any person who may have an interest in making an offer to purchase, has the opportunity to do so in circumstances no less favourable than anybody else;
  - distinguishes requests for small areas of land that may be considered for sale by private treaty and larger areas with development potential that should be sold on the open market.
- 1.6. Although this Policy will normally be followed, there will be occasions where the procedure may need to be changed, particularly for larger, more complex land/property sales.

## 1. THE 'SURPLUS' TEST

Land/property will be deemed surplus to the Council's requirements where:

- (a) it makes no contribution to the delivery of the Council's services, strategic or corporate objectives;
- (b) an alternative site has been identified which would be more cost effective in delivering the Council's services, strategic or corporate objectives;
- (c) it has no potential for strategic or regeneration/redevelopment purposes in the near future;
- (d) it will not contribute to the provision of a sustainable pattern of development;
- (e) it makes no contribution to protecting and enhancing the natural, built and historic environment, including making no contribution to helping to improve biodiversity.

The Council is required to publish details of land/property which it has declared surplus to requirements<sup>1</sup>.

## 2. THE 'UNDER-USED' TEST

Land/property will be deemed to be under-used if:

- (a) part of the site is vacant and is likely to remain vacant for the foreseeable future;
- (b) the income being generated from the site is consistently below that which could be achieved from:
  - (i) disposing of the site and investing the income;
  - (ii) an alternative use;
  - (iii) intensifying the existing use;
- (c) only part of the site is used for service delivery and this could be delivered from an alternative site;
- (d) it makes no contribution to protecting and enhancing the natural, built and historic environment, including making no contribution to helping to improve biodiversity.

In the case of open spaces, amenity areas and similar sites, the under-used test should also consider the 'community value' of the asset, which would include visual amenity and not be limited solely to income generation or whether the site is vacant etc.

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<sup>1</sup>Local Government Transparency Code 2015

The Council is required to publish details of land/property which it has deemed to be under-used<sup>2</sup>.

### **3. MEANING OF DISPOSAL**

For the purposes of this Policy, a disposal means any freehold disposal, by sale or exchange, of Council owned land/property (including buildings) and any disposal by the granting of a lease or licence for a period greater than 7 years. Leases of 7 years or less or assignment of a term which has not more than 7 years to run are not covered by this Policy, as they are exempt from the statutory requirement to obtain best consideration.

Disposal takes place at the time of completion and not exchange<sup>3</sup>.

### **4. MEANING OF BEST CONSIDERATION**

‘Best consideration’ means achieving maximum ‘value’ from the disposal, not just maximum price. Disposal at less than market value must contribute to the ‘promotion or improvement of the economic, social or environmental wellbeing of the area’ [see section 1.2 of Appendix 1].

Unlike private and commercial landowners, a local authority is in the position of a trustee in relation to the land that it holds on behalf of the community and has a statutory duty to sell land at the best price reasonably obtainable. The Council will only be able to demonstrate that it achieved the best consideration by obtaining an appropriate valuation of the land.<sup>4</sup>

### **5. MEANS OF IDENTIFYING SURPLUS OR UNDER-USED LAND/PROPERTY**

Surplus or under-used land/property may be considered for disposal:

- (a) following an asset management review;
- (b) following the identification of development opportunities;
- (c) through a corporate property portfolio review;
- (d) through the declaration of specific sites as being surplus to requirements;\*
- (e) through Local Plan designation;
- (f) following a direct approach from an interested party;
- (g) where the disposal helps to deliver other Council objectives e.g. the provision of housing in the Borough;
- (h) where management of the land/property is considered suitable for community ownership or has been determined as an ‘asset of community value’.

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<sup>2</sup>Local Government Transparency Code 2015

<sup>3</sup> Section 128(2) Local Government Act 1972 and R (on the application of Structadene Ltd) v Hackney LBC [2001] 2 All ER 225

<sup>4</sup> (Whitstable Society v Canterbury City Council [2017] EWHC 254 (Admin) (15 February 2017))

\*Where an under-used asset is generating an income, a cost/benefit analysis must be carried out to establish whether it is in the Council's best interests to dispose of the site.

## 6. DISPOSAL CRITERIA

6.1 **Open space (including, parks, playing fields & informal open spaces (excluding amenity land on Council housing estates) of 'public value' whether or not there is public access to it**– assets in this category are considered to be valuable community resources, to be enjoyed by the wider community. Open space also enhances the quality of urban life, the character of residential areas, the environment etc. There will be a general presumption against declaring these assets as surplus/under-used unless:

1. alternative provision of equivalent community benefit is made in the locality; or
  2. the area in question no longer provides a valued opportunity for sport, recreation or leisure; or
  3. there is an excess of provision taking into account the long term recreation and amenity value of such provision; or
  4. sport, recreation and leisure facilities can be retained and enhanced through the redevelopment of a small part of the site;
  5. there is over provision in the area;
  6. the asset is required for the regeneration of the area.
- (a) The Council is required by law to advertise the disposal of land designated as 'public open space' in a local newspaper for two consecutive weeks and to consider any objections received. No final decision about the disposal will be made until any objections have been considered by Cabinet, as the response may be material to the decision. Public response may also be an important factor in any determination by the Secretary of State of an application by the Council for specific consent to the disposal.
- (b) If the Council is seeking advice as to development or re-development potential, or it is known that the land is to be used for a different use on purchase, it should be noted that the Core Strategy Policy CS14 requires protection and enhancement of existing open spaces. The Development Policies Plan (in preparation as of November 2014) will provide more detailed guidance on open spaces which are to be protected.
- (c) There will be a general presumption against disposal of land designated as 'Local Green Space' either through the Local Plan or a Neighbourhood Plan.

Unlike private and commercial landowners, a local authority is in the position of a trustee in relation to the land that it holds on behalf of the community and has a statutory duty to sell land at the best price reasonably obtainable. The Council

will only be able to demonstrate that it achieved the best consideration by obtaining an appropriate valuation of the land.<sup>5</sup>

6.2 **Amenity land** - certain rights, environmental or economic conditions may preclude the sale of amenity land for example:

- (a) the land is subject to rights of way over it;
- (b) the land is a landscaping feature of the local environment, or designated public open space;
- (c) sale of the land would incur additional costs for the Council (for example, the re-siting of lamp posts or telephone cables) unless the applicant is willing to finance the additional costs (payable in advance);
- (d) the land has been identified for future regeneration or development by the Council;
- (e) following a request to purchase amenity land, a review identifies future regeneration or development opportunities for the Council;
- (f) the sale of the land may prejudice future development by the Council;
- (g) there are management or other issues that would cause inconvenience to the Council if the land was to be sold.

Approaches from private individuals to buy Council owned amenity land (e.g. green space land on council housing estates) to benefit their existing residential property will be considered where:

- there is a broader community benefit to the disposal e.g. a rationalisation of small parcels of 'backland' open space, either rarely used or often misused; or
- there are management/financial issues for the Council e.g. the land is costly to maintain; or
- the applicant has extenuating circumstances e.g. there are health grounds in relation to the applicant and/or their family and the sale of the land would improve their quality of life and would not adversely affect the quality of life of others in the neighbourhood – (the applicant will need to provide evidence to support and justify the application to purchase).

Where the Council considers that amenity land has development potential and agrees to dispose of the land, the valuation will reflect this. An overage clause may be applied and/or restrictive covenants placed on any future development.

The Council as landowner may, through a development agreement, engage a developer to carry out the development of the site on its behalf. Arrangements may comprise a grant of a lease of the whole site with the developer receiving a fee based partly upon the development value. In circumstances where there is a development agreement or the grant of a lease associated with the disposal, this may trigger the need for an EU tendering exercise [see Appendix 1, section 1.9].

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<sup>5</sup> (Whitstable Society v Canterbury City Council [2017] EWHC 254 (Admin) (15 February 2017).)

Disposals of amenity land will normally be by private treaty. However, where the Council considers that the amenity land may be of interest to persons other than the applicant, the Council may dispose of the land on the open market.

The procedure for the disposal of amenity land is detailed in Appendix 2.

**6.3 Commercial Properties** - There will be a general presumption against declaring the following categories of assets as surplus/under-used:

1. units designed to meet the needs of new and developing small businesses where there is anticipated to be demand for such units from different occupiers in future;
2. offices/rooms within business centres that have communal reception areas, facilities and services;
3. shop units where there is a community need for continued retail occupation, or where the integrity of a building or parade of shops might be adversely affected by the sale of individual units;
4. sites in industrial estates and sensitive locations where management control by the Council is required to ensure that amenity is maintained;
5. land or property which provides revenue income for the Council where disposal would adversely impact on the Council's revenue budget.

**6.4 Allotments**

Where land has been purchased or appropriated by the Council for use as statutory allotments, the Council cannot, without the consent of the Secretary of State, sell, appropriate, use or dispose of the land for any purpose other than use for allotments<sup>6</sup>.

The Council will consider the disposal of an allotment against the following criteria, having regard to the Secretary of State's guidance on allotment disposal:

1. The allotment in question is not necessary and is surplus to requirement;
2. The number of people on the waiting list has been effectively taken into account;
3. The Council has actively promoted and publicised the availability of other sites and has consulted the National Allotment Society; and
4. the implications of disposal for other relevant policies, in particular, the local plan and neighbourhood plan policies, have been taken into account.

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<sup>6</sup> Section 8 Allotments Act 1925

## 6.5 Assets of Community Value

Every town, village or neighbourhood is home to buildings or amenities that play a vital role in local life. They might include community centres, libraries, swimming pools, village shops, markets or pubs. Local life would not be the same without them, and if they are closed or sold into private use, it can be a real loss to the community.

An 'asset of community value' is an asset, which in the opinion of the Council furthers the social well-being or social interests of the local community (or has done in the recent past). 'Social Interests' can include cultural, recreational and sporting interests<sup>7</sup>.

The Council maintains a list (on its website) of land and buildings which may from time to time be nominated by the local community as an 'asset of community value'.

In reviewing the future of any asset, the Council will assess all the options, to be sure that it obtains best value. Options include using the asset in a different way, disposing of it on the open market or transferring it to a voluntary or community organisation at less than best consideration to achieve wider social benefits.

Community organisations operate on a business model, often using volunteer effort, community intelligence about local needs and sources of funding not available to local authorities. They are in a position to run a community asset as a social enterprise. The business plan for the community asset transfer should demonstrate financial viability.

The Council may either advertise all community asset transfer opportunities or consider transfer requests from organisations which currently manage a property, without seeking other bids.

A community asset transfer should contribute to the Council's policies and targets. Where there are competing interests, the Council will consider which of the proposals put forward are viable and sustainable in the long term. The Council will deal with competition for a specific asset by identifying its key objectives in that area, using, for example, deprivation indices, local priorities and the current mix of buildings and services in the area and assess which bid best meets those objectives.

## 7. MARKETING STRATEGY

Where applicable, the consultant valuer, in consultation with the relevant Director, will determine the marketing strategy for the disposal of surplus or under-used land/property. The marketing strategy may be conducted either in-

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<sup>7</sup> Section 88 Localism Act 2011



house or through an external agent. Costs should be recovered from the eventual purchaser.

The marketing strategy for sites identified by the relevant Director as being 'strategic', will require Cabinet approval.

## **8. VALUATIONS**

- 8.1 Although there is no particular prescribed route to achieve the best price reasonably obtainable, there may be circumstances in which an actual sale to the market is the only way to achieve it as opposed to one particular sale at a price according to an independent valuation.
- 8.2 Before disposing of any interest in land for a price, which may be less than the best consideration reasonably obtainable, the consultant valuer will ensure that a realistic valuation of that interest is obtained, following the advice provided in the Technical Appendix to Circular 06/2003. This will apply even for disposals by means of formal tender, sealed bids or auction, and irrespective of whether the Council considers it necessary to make an application to seek the Secretary of State's specific consent. By following this procedure, the Council will be able to demonstrate that it has adopted a consistent approach to decisions about land disposals by carrying out the same step by step valuation process on each occasion. Supporting documents will provide evidence, should the need arise, that the Council has acted reasonably and with due regard to its fiduciary duty.
- 8.3 The return from any disposal is to be maximised unless there are over-riding factors identified in the Corporate Plan or otherwise agreed by the relevant Director or Cabinet, that take precedence over the receipt of capital e.g. preferred use or preferential purchaser.

## **9. DECISION MAKING**

- 9.1 In accordance with the Scheme of Delegations to Officers, the consultant valuer has delegated authority to deal with:
- (i) sales of houses in the possession of the Council as mortgagee;
  - (ii) sales of sites for electricity sub-stations and gas governors;
  - (iii) the grant, surrender and renewal of licences, wayleaves, and easements;
  - (iv) grants of grazing licences;
  - (iv) grant, surrender and renewal of leases where the Property concerned has been previously let;
  - (v) sales of land/property.

The consultant valuer must check the Scheme of Delegations for any limitations placed on the exercise of his/her delegated authority.

- 9.2 Except with the consent of the Secretary of State, the Council cannot dispose of land otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.

Disposals of land/property by way of a short tenancy<sup>8</sup>, for a consideration less than the best that can reasonably be obtained, will only proceed on the specific authority of the relevant Director on a report of the relevant Director justifying the reasons for disposal at less than the best that can reasonably be obtained.

- 9.3 The Council is required by law to advertise the disposal of land designated as 'public open space' in a local newspaper for two consecutive weeks and to consider any objections received. No final decision about the disposal will be made until any objections to the disposal have been considered by Cabinet [see section 6.1.(a) above].
- 9.4 The marketing strategy for sites identified by the relevant Director as being 'strategic', will require Cabinet approval.

## 10. MEANS OF DISPOSAL

1. **Private Treaty** – a sale of land/property negotiated with one or a small number of interested parties either through a direct approach from an individual(s) or through a marketing exercise.

A private sale without marketing the land may be justified where for example:

- (a) the land to be disposed of is relatively small in size and an adjoining or closely located landowner is the only potential or likely purchaser;
- (b) the Council's corporate objectives and best consideration can best be achieved by a sale to a particular purchaser;
- (c) the purchaser has a particular interest in purchasing the land or a particular association with the land;
- (d) the nature of the Council'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;
- (e) the Council's land is part of a larger area of land that is proposed for development, redevelopment or regeneration and the nature and complexity of the proposed development of the overall site is such that the Council's corporate objectives and best consideration can only be achieved by a sale to a purchaser with an existing interest in land in the area.

2. **Public Auction** – a sale of land/property by open auction available to anyone. The sale will be publicly advertised in advance. A binding legal agreement is created upon the acceptance of a bid by the auctioneer. Reasons justifying sale by this method and how the reserve price is determined must be recorded in writing.

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<sup>8</sup> The grant of a term not exceeding seven years, or the assignment of a term which at the date of the assignment has not more than seven years to run

3. **Formal Tender** – a sale of land/property by a process of public advert and tenders submitted by a given date. This is a suitable mechanism where there are identified development proposals. A fair and transparent tender process will need to be adopted.
4. **Exchange of Land** – a transaction involving the exchange of Council owned land with another land owner. The land acquired by the Council will meet at least one of its corporate objectives and will be 'equal' in commercial worth to the land exchanged whether from the value of the land itself or where a payment is made in addition to the land exchanged.
5. **Informal Negotiated Tender** – a transaction involving a public advert that requests informal offers or bids that meet a given specification or set of objectives. The Council may then negotiate further or more detailed terms with one or more individuals who submitted the most advantageous bid or bids.

## 11. TIMING OF DISPOSALS & DUE DILIGENCE

The **timing** of any marketing/disposals will need to be considered against the background of the current market conditions, potential for the site value to increase in the future, whether there is a need to raise capital receipts and current planning policies.

In order to properly assess the likelihood of and business case for disposal, the asset holding department in consultation with Legal Services and/or the consultant valuer will carry out early **due diligence** on land/property identified as surplus or under-used. In particular, the asset holding department will consider the following issues which have the potential to prohibit disposal or influence the sale price:

- 11.1 **Reviewing the title** - Once surplus land/property has been identified and a prima facie business case made for its disposal, the title is reviewed to identify whether there are any title issues, which may impact upon the disposal process.
- 11.2 **Unregistered land** - If the land and property identified for disposal is unregistered, then it is important that the title deeds are located as soon as possible and checked for evidence of the Council's title. This can be achieved through a voluntary application to the Land Registry to register the land/property before it is put on the market.
- 11.3 **Restrictive covenants** - The land/property may be subject to restrictive covenants, which limit or restrict its use or the extent to which development can be carried out on it. Whether these are a concern will depend upon the likely use of the land/property following disposal, particularly where surplus land/property is being sold for re-development. A restrictive covenant against a certain type of development may have a significant adverse effect on the land value.

It is possible to apply to the Lands Tribunal under section 84 of the Law of Property Act 1925 for the release or modification of restrictive covenants in some circumstances. This can be a time consuming process and it is usually better undertaken before the land/property is placed on the open market. Alternatively, it is often possible to obtain restrictive covenant indemnity insurance against future losses for breach of a restrictive covenant and a policy with an adequate limit of indemnity cover will satisfy most purchasers.

It is very important that no negotiations are carried out with any adjoining or nearby owners who may have or claim to have the benefit of the relevant covenant, prior to receiving legal advice. If negotiations do take place, then it could materially prejudice the Council's ability to obtain insurance cover against breach of the covenant.

- 11.4 **Ransom strip** - It will generally be sensible to resolve ransom strip issues prior to offering the property to the open market. It is crucial if the property is to achieve full value on the open market that it has adequate access rights. If development is anticipated, then access may need to be by a different route than that used historically, either because of a physical aspect of or defect with the existing access or for planning purposes or as a consequence of intensification of use. By whichever route access is obtained, a title review should be carried out to establish whether any ransom strips are present.

A ransom strip is an area of land which is owned by someone other than the Council. If access is only possible via a ransom strip, then the person with title to that strip will hold the key to unlocking the development potential of the land and that may involve payment to the ransom strip owner, either in return for a formal right of way or transfer of ownership of the strip. The conventional approach to valuing ransom strips has been to offer the ransom owner one-third of the uplift in value of the land/property released by unlocking it for development. However, any agreement will ultimately depend on market conditions and the specifics of the land/property and its locality.

- 11.5 **Rights of way and other easements** - It is important to establish the nature of any easements benefitting the land/property, so that any that are missing can be addressed, if possible. As well as access rights, the property may benefit from rights to run services over adjoining land, rights to light, rights of support or other property specific rights. It is also useful to check whether the land/property is subject to any rights which might adversely affect the proposed disposal and subsequent development, for example, public or private rights of way or rights of support.

- 11.6 **Retaining rights over adjoining land** - It may be the case where surplus land/property is being disposed of, that the Council will be retaining adjoining land. In that case, the Council will consider whether it needs to reserve any rights over the land/property being disposed of for the benefit of that adjoining land, most commonly, access to the public highway or mains utilities.

- 11.7 **Outline planning consent** - Assessing whether an application for a change of planning use might have the potential to increase the value of the surplus

land/property. If the change of use is obtained by the Council, it removes an element of risk and uncertainty for potential buyers, which may lead to an increase in the purchase price that they are willing to pay.

- 11.8 **Development agreements** - The Council as landowner may, through a development agreement, engage a developer to carry out the development of the site on its behalf. Arrangements may comprise a grant of a lease of the whole site with the developer receiving a fee based partly upon the development value. In circumstances where there is a development agreement or the grant of a lease associated with the disposal, this may trigger the need for an EU tendering exercise [see Appendix 1, section 1.9].

## 12. OTHER STEPS TO FACILITATE THE DISPOSAL PROCESS

When due diligence in accordance with section 11 of this Policy has been completed, there are a number of other steps that can be taken by the consultant valuer to facilitate the disposal process and maximise the value received for the surplus or under-used land/property. The following will be considered:

1. Having regard to legislation and Secretary of State guidance governing the disposal process;
2. Having regard to general guidelines which are applicable, for example, the Crichel Down rules which apply to most disposals by the Council of property acquired using compulsory purchase or under threat of compulsory purchase. Where the rules are applicable, there is an obligation to offer the property back to the original owner before it can be placed on the open market;
3. Carrying out a site inspection to establish what specific issues there are on the ground, for example, drainage, boundary problems or illegal occupiers. It will also assist when instructing legal advisers or other professionals, who may only have seen the property on plans or in photographs. For some disposals, it may be appropriate for the various professionals to undertake a site visit;
4. Producing a sales pack to circulate to interested parties, including title information and replies to standard pre-contract enquiries. The documents referred to in pre-contract enquiries such as copy planning consents, any asbestos surveys etc. should also be enclosed. In the case of large disposals, consider including a full set of standard property searches;
5. Considering the most appropriate pricing structure. In some cases, it may be appropriate to use an overage arrangement whereby the Council receives future payments representing any uplift in value of the land/property once it has been developed or once it has been developed and sold on. Overage provisions and negotiations can be complex, so it would be sensible to discuss the preferred structure with the legal adviser and consultant valuer prior to agreeing terms for the disposal of the land/property. A calculation of the overage that the Council is likely to receive and the likelihood of that sum being correct given changing market conditions will be important pieces of information in assessing the business case for disposal of surplus/under-used land/property.
6. Considering whether the transaction is caught by the public procurement rules.
7. Considering whether the transaction is caught by the State Aid rules.

### **13. REFERENCES**

- (a) A bank reference will be obtained by the consultant valuer in every case where a lease, tenancy or licence is being granted at a rent or fee in excess of any financial limit as may be defined in Financial Regulations and/or Scheme of Delegations to Officers, unless the relevant Director has agreed to dispense with this requirement.
- (b) In every case where a lease, tenancy or licence is to be granted to a limited company at a rent or fee in excess of any financial limit as may be defined in Financial Regulations and/or the Scheme of Delegations to Officers, a guarantor will be required, unless the relevant Director has agreed to dispense with this requirement.

### **14. OPTIONS**

- 14.1 Where the Council wishes to grant an option, or an option holder wishes to exercise their option on land, which the Council holds, the Council will consider whether the consideration for either the grant or exercise of the option results in a discount. In relation to the exercise of an option, this will depend on the consultant valuer's assessment of whether, if the option were to be exercised, the terms would be likely to require the Council to accept less than the best price that could reasonably be obtained for that interest at the time of disposal and, if so, whether that would fall within the terms of the General Consent.
- 14.2 The matters which would need to be considered by the consultant valuer are covered in paragraphs 20 and 21 of the Technical Appendix to Circular 06/2003. If, as a result of the consultant valuer's advice, the Council wishes to seek specific disposal consent, it will provide the Secretary of State with full details of the terms of the option agreement which is to be entered into or implemented.

## APPENDIX 1

### 1. LEGAL POWERS

#### Section 123 - Local Government Act 1972

- 1.1 In general, the Council is required to achieve the **'best consideration reasonably obtainable'** when it is disposing of land<sup>9</sup>. Section 123 imposes a duty on the Council to achieve a particular outcome (namely the best price reasonably obtainable): it is not a duty to conduct a particular process (e.g. to have regard to particular factors).

If the disposal is under the 1972 Act, there is neither express power to include covenants on a disposal, nor a prohibition. Where the disposal is a lease, that lease will contain terms and similarly, on the conveyance/transfer of freehold property or on the assignment of a lease, covenants may likewise be included by virtue of section 111 of the 1972 Act.

Under Section 123(2A), the Council must follow certain statutory requirements to advertise the disposal of land that consists of or forms part of an **open space**.

#### General Consent

- 1.2 If the Council seeks to dispose of land or buildings at less than the market value, then it has to obtain the consent of the Secretary of State for Communities and Local Government. However, the Secretary of State has issued a number of 'general consents' i.e. a set of conditions which, if they apply to a particular transfer, means that the Council does not need to obtain specific permission to transfer at an 'undervalue'. However, the undervalue itself still needs to comply with 'normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer'<sup>10</sup>.

The most important of these consents is the General Disposal Consent 2003<sup>11</sup> ('the General Consent') which permits the Council to dispose of land at less than its market value<sup>12</sup>, without the need to seek specific permission from the Secretary of State, provided that:

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<sup>9</sup> For the purposes of Section 123, the only consideration to which regard may be had is that which consists of those elements of the transaction of commercial or monetary value, capable of being assessed by valuers: *R v Pembrokeshire CC ex p Coker* [1999] 4 All ER 1007; *R v Hackney LBC ex p Lemon Land* [2001] EWHC Admin 346 [2002] JPL 405

<sup>10</sup> Circular 06/2003

<sup>11</sup> Annexed to Circular 06/2003

<sup>12</sup> 'Market value' means 'the best price reasonably obtainable for the property'. This is equivalent to the definition of 'market value' in the RICS Appraisal and Valuation Manual (the 'Red Book'), but including any 'Special Value' (i.e. any additional amount which is or might reasonably be expected to be available from a purchaser with a special interest like a former owner)."

- the purpose for which the land is to be transferred is likely to contribute to the 'promotion or improvement' of the economic, social, or environmental well-being of the area; and
- the difference between the market value of the land and the actual price paid for the disposal (if any), is not more than £2,000,000.

The General Consent has been issued to provide 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. The General Consent does not require the Council to undertake a tendering process i.e. to market test a disposal. However, when disposing of land at an undervalue, the Council remains aware of the need to fulfil its fiduciary duty in a way which is accountable to local people. The Council will not divest itself of valuable public assets, unless it is satisfied that the circumstances warrant such action.

In justifying a disposal of land/property at undervalue, the Council will have regard to the following:

- what community benefits will be realised by the disposal;
- how the interests of local people will be better served by the disposal;
- the financial viability of the Council's plans for the land;
- the State Aid implications of the disposal;
- the Council's future plans for the land;
- the market value of the land and the difference between that and the proposed disposal value.

### **Allotment Acts 1908 to 1950**

- 1.3 For disposal of land held under these Acts, the Council must obtain the consent of the Secretary of State for disposal other than for use as allotments.

### **Charities Act 2011**

- 1.4 The Council is trustee of charitable land and property originally gifted to it under the terms of a trust deed. Here, the Council has additional responsibilities which arise from its role as trustee and will be subject to the more onerous disposal requirements set out in the Charities Act 2011.

It is for the Deed, Trust and Obligations Committee to consider whether charitable land/property is surplus to requirements/under-used in accordance with the requirements of the legislation, any directions issued by the Charity Commission and professional advice. The Committee must operate in a way which is in the best interests of the charities.

### **Housing Act 1985 (as amended)**

- 1.5 Under s32 the local authority has the power to dispose of land and dwellings held for housing purposes. Secretary of State consent will be required unless the disposal is covered by one of the General Consents relating to the disposal of:



- vacant dwellings for owner occupation;
- occupied dwelling houses to secure tenants;
- dwellings to tenants who have the right to buy acquiring with others;
- dwellings on shared ownership terms;
- housing authority land; and
- reversionary interest in houses and flats.

Disposals are to be at market value, but discounts may be applicable to qualifying applicants.

### **Local Government Act 1988 – Section 25**

1.6 The Council may provide a Registered Social Landlord with any financial assistance or gratuitous benefit of land for development as housing accommodation. This includes:

- land for development or access, easements and rights;
- dwelling houses for refurbishment;
- financial assistance for prevention of homelessness; and
- loans to RSLs.

The aggregate value of financial assistance or gratuitous benefit provided by the disposal or grant must not exceed £10 million.

### **Town and Country Planning Act 1990 – Section 233**

1.7 The disposal of land **held for planning purposes**, follow principles similar to those of s123 of the Local Government Act 1972 and its requirement to obtain best consideration reasonably obtainable. However, it must be noted that the General Consent does not apply and a specific consent from the Secretary of State will be required if the Council is considering disposal at an undervalue.

Under s233(2), the Council must obtain the consent of the Secretary of State to dispose of **common land**, which may involve the requirement to provide land in exchange.

### **State Aid**

1.8 All land/property disposals need to comply with the European Commission's State Aid rules<sup>13</sup>. When disposing of land 'at less than best consideration', depending on the nature of the transaction, the Council may be 'subsidising' the purchaser. Where this occurs, the Council must ensure that the nature and amount of subsidy complies with the State Aid rules, particularly if there is no element of competition in the disposal process. Failure to comply with the rules

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<sup>13</sup> European Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03) - Describes "a simple procedure that allows Member States to handle sales of land and buildings [by public authorities] in a way that automatically precludes the existence of State aid"

means that the aid is unlawful, and may result in the benefit, with interest, being recovered by the Member State (the UK) from the recipient.

## **Public Procurement**

- 1.9 A straightforward disposal of land/property for a market value price will not be caught by the Public Contracts Regulations 2006 rules. However, when disposing of land the Council is involved in determining the scope of the future development of its land and its intention is to impose on the purchaser certain obligations as to the nature of the development and also perhaps the standards to which the works must be constructed (usually through a development agreement or grant of a lease associated with the disposal), then where the values involved trigger the EU threshold, it is likely that such an arrangement may be construed as a public works contract triggering the need for an EU tendering

The applicability or otherwise of the public procurement rules will depend on the particular nature of the transaction, how it is structured and its detailed provisions. As a general rule, the risk will be higher the more the Council specifies its requirements for any full development and conversely will be lower the more the Council is willing to take a 'hands off' approach. The Council must therefore give due consideration to the possibility of public procurement rules applying to any particular disposal of land and obtain case-specific legal advice before entering into any agreement.

## APPENDIX 2

### AMENITY LAND DISPOSAL

1. Approaches from private individuals to buy Council owned amenity land to benefit their *existing* residential property will be considered where:
  - there is a broader community benefit to the disposal e.g. a rationalisation of small parcels of ‘backland’ open space, either rarely used or often misused; or
  - there are management/financial issues for the Council e.g. the land is costly to maintain; or
  - the applicant has extenuating circumstances e.g. there are health grounds in relation to the applicant and/or their family and the sale of the land would improve their quality of life and would not adversely affect the quality of life of others in the neighbourhood – (the applicant will need to provide evidence to support and justify the application to purchase).

#### 2. Is it Council owned land?

Before applying to purchase land in accordance with section 11 below, please check that the land is owned by the Council. You can do this by contacting the Valuation Department on 01322 343434 or email [valuation@dartford.gov.uk](mailto:valuation@dartford.gov.uk)

#### 3. Sale price

- 3.1 The Council is obliged by law to obtain the best price for any property, or parcel of land, which it sells.
- 3.2 The sale price is dependent on a number of factors. The price will be negotiated through the Council’s consultant valuer. You may seek your own independent advice. If you do so, please let us have the contact details of your appointed agent.
- 3.3 Even if one or more of the criteria in section 1 above apply, there may be other restrictions imposed on the land (such as restrictive covenants or planning policies) which result in the Council making a decision not to sell.
- 3.4 Where open space land is concerned, it may also be necessary for the proposals to be advertised and any objections considered.
- 3.5 Before any sale is approved, the Council’s strategic priorities and planning policies will be considered and a recommendation to proceed will only be made if the sale has no adverse impact on the Council’s priorities, policies etc.

#### 4. **Fees and other charges**

- 4.1 Following the initial internal consultation process, should your application progress to the next stage, before we can start work on your application, you will need to pay the consultant valuer's fee to offset the costs in processing your application e.g. inspection of the site, consideration of any restrictive covenants, Council policies and historical background, valuation of the site and production of a report.

Payment of the fee will not guarantee that your application is approved.

- 4.2 If the consultant valuer agrees to the disposal and you wish to proceed, you will need to pay the Council's legal fees in advance of any legal work on your application.
- 4.3 As fees are reviewed on 1<sup>st</sup> April each year, please check the Council's fees and charges schedule on the website [www.dartford.gov.uk](http://www.dartford.gov.uk) for the applicable fee or contact the Finance Department on 01322 343434 or email [finance@dartford.gov.uk](mailto:finance@dartford.gov.uk)
- 4.4 Any costs associated with making an application to the Secretary of State for consent and where applicable, advertisement costs, may be charged to you.
- 4.5 Fees and other costs must be paid in advance and are non – refundable. If the sale proceeds, on the completion date, you will also have to pay the agreed purchase price.
- 4.6 There are no exemptions to the payment of fees and ancillary costs. You will be provided with an invoice detailing the payment method.

#### 5. **Open market sale**

The Council is obliged by law to sell land for the best price reasonably obtainable. This means that in some cases if the consultant valuer considers that the land you have asked to purchase could be of interest to other parties or could be sold for development land, the Council must advertise it for sale on the open market. In such circumstances, you will be sent sales details once prepared and will be able to make an offer for the land along with any other interested party. Costs will be recovered from the eventual purchaser.

#### 6. **'Right to buy' rules**

The 'right to buy' rules only apply to Council house tenants who wish to purchase their Council house. These rules cannot be used to purchase additional parcels of land.

## 7. **Legal advice**

The Council's Legal Services cannot provide you with legal advice. We advise you to seek independent legal advice on your proposals. If you do so, please let us have your legal adviser's contact details. If you appoint a legal adviser, we will then deal with them direct. You are responsible for your legal adviser's fees.

## 8. **Planning, building regulations and restrictive covenants**

8.1 Planning consent may be required for change of use or development of the land, or for other matters such as fencing and boundary treatment. . It is likely that land not previously used for garden purposes, building extensions or parking etc. will need planning consent for a change of use. You are responsible for finding out if planning consent is required and you should make your own enquiries about this aspect of your proposals with Development Control, by contacting Planning Admin on 01322 343434 or email [planning.admin@dartford.gov.uk](mailto:planning.admin@dartford.gov.uk)

8.2 It is your responsibility to ensure that any consents required are obtained at your cost. Should you submit a planning application to include the Council's land, you must serve the appropriate notice addressed to Valuation Services, Dartford Borough Council, Civic Centre, Home Gardens, Dartford, Kent DA1 1DR. Please note that the Council's role as land owner is different to that of its role as local planning authority. Therefore, although you may be granted planning consent, this does not guarantee that your application to purchase Council owned land will be approved by the Council (as landowner).

8.3 When carrying out work on buildings, there are two issues that need to be considered - whether planning permission is required and whether building regulations consent is required. Work on buildings requiring building regulations consent may also require planning permission. Similarly, applications requiring planning permission may also require building regulations consent. You can do this by contacting Building Control Admin on 01322 343434 or email [buildingadmin@dartford.gov.uk](mailto:buildingadmin@dartford.gov.uk)

8.4 Any decision by the Council to sell the land to you is separate from any decision by the Council on your planning or full plan or building notice application. You must not assume that planning permission or building regulations consent will be granted automatically if for example you are intending to change the use of the land. It is your responsibility to check the planning status of the land and building regulations.

8.5 Planning and building control regulation fees are payable by you and are in addition to the Council's consultant valuer's and Legal Services fees and other applicable costs charged under this Policy.

8.6 We will disclose any restrictive covenants relating to the land you wish to purchase.

## 9. Vehicular access

If you are proposing to access the land across the highway, please consult Kent County Council Highways [www.kent.gov.uk](http://www.kent.gov.uk)

## 10. Complaints

- 10.1 There is no appeals procedure against a decision to refuse to sell you the land. However, if you feel that you have additional information, or justification to support your application that has not already been considered, or if you amend your application in some way, we may be able to process your application again, based on the new information. Please note that we reserve the right to charge further fees.
- 10.2 If you consider that the Council has not followed its procedures, you may raise a complaint through the Council's Corporate Complaints Procedure details of which are on the Council's website [www.dartford.gov.uk](http://www.dartford.gov.uk) If you remain dissatisfied with the response, you may complain to the Local Government and Social Care Ombudsman.

## 11. How to apply

- 11.1 You can either complete an application form (see [www.dartford.gov.uk](http://www.dartford.gov.uk)) or write to the Council. Your application must be accompanied by a sketch plan identifying the area of land you wish to purchase. Please detail as much information as possible, including the approximate dimensions of the land.

The requirement for applications to be submitted in writing, must be read in conjunction with the Equality Act 2010 and the requirement on the Council to make reasonable adjustments. An example of this would be in assisting you if you have a disability that prevents you from making your application in writing. In such cases, the Council may need to transcribe a verbal application and then produce a written copy for your approval.

The Council will also consider what support should be made available to you, where English is not your first language.

- 11.2 On receipt of your application, the Council will decide if it wishes to dispose of or keep the land/property you have requested to purchase. This involves an internal process of consultation with Council Officers before a decision is made and before any negotiations can take place. If at this stage, a decision is taken not to sell you the land/property, you will be notified in writing, with reasons.

If, following the initial internal consultation stage, the matter goes forward to the next stage, the consultant valuer will ask you to pay a non-refundable fee plus VAT before he/she can start any work on your application. Your

application will not be progressed, until the consultant valuer's fees have been paid.

11.3 Address your application to:

Head of Legal Services  
Dartford Borough Council  
Civic Centre  
Home Gardens  
Dartford  
Kent DA 1 1DR

Or

email your application to: [Management.PAs@dartford.gov.uk](mailto:Management.PAs@dartford.gov.uk)

11.4 If you need assistance to complete your application, please contact Customer Services on 01322 343434 or NGT Relay.

## 12. Consultant valuer's decision

12.1 Providing your application meets the criteria referred to in section 1 above and the consultant valuer's fees are paid in advance, within three months of receipt of the consultant valuer's fee, the consultant valuer will:

- (a) undertake any due diligence checks, inspect the site and value the land;
- (b) write to you or your appointed agent, confirming whether the disposal is approved; and
- (c) if approved, detail the terms for the disposal of the land and the price payable.

If the timescale cannot be met, the consultant valuer will notify you.

12.2 If the disposal is approved by the consultant valuer, it is for you to form a view on any restrictive covenants, the planning/building regulations position and the suitability of the land for your intended purposes. You proceed at your own risk.

12.3 If the disposal is not approved by the consultant valuer, you will be notified of the decision in writing with reasons.

## 13. Land transfer process

13.1 Your acceptance of the consultant valuer's terms and price payable for the land need to be confirmed in writing, addressed to the Head of Legal Services with payment in advance, of the Council's legal fees. The land transfer process will not be started, until the legal fees are paid. The Council's legal fees are in addition to any fees your solicitor may ask you to pay. Your solicitor's fees are your responsibility.

- 13.2 The transfer documentation will be prepared by the Council's Legal Services. Providing you have paid the Council's legal fees, the date for completion of the sale will vary depending upon the complexity of the matter and the type of searches and enquiries that are made by you or on your behalf but the process may take up to approximately 3 months from the date you notify the Council in writing, that you accept the terms and price to be paid for the land. If we require longer to process the transfer documentation, we will notify you.
- 13.3 Generally, the sale of the land is completed with no prior contract or deposit payment. You will pay the purchase price on completion.
- 13.4 Completion of the sale of the land ends the Council's involvement in the process. You will however need to deal with land registry registration and SDLT (stamp duty land tax) post completion.

Adopted by Cabinet 4 December 2014 - Min.No.78

Amended to include Equality Act 2010 requirements - 25.5.2016

Amended pursuant to Managing Director's delegations – 14.03.2017

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Amended pursuant to Directors' delegated authority – 29 June 2020