

## **DISPOSAL AND APPROPRIATION OF LAND BY LOCAL COUNCILS**

- 1 This note will explain the rules and procedures around the disposal of non-charity land by a local council or a council limiting the use (appropriation) of land that they own (see Legal Topic Note 45A for the Disposal of Charity Land by Local Councils acting as Sole or Managing Trustee). 'Disposal' includes not only an outright sale of the freehold, but also the grant of a lease or assignment of a term of a lease or an exchange of land. Case law includes within the definition of a 'disposal' an option to purchase the freehold, an option to purchase a lease or an option to renew a lease. The disposal of land which is allotment land, open space or otherwise restricted will be specifically explained.

### **General Rules on the Appropriation of Land**

- 2 Section 126(1) of the Local Government Act 1972 (1972 Act) states that any land belonging to a local council which is not required for the purpose for which it was acquired, or has since been appropriated, may be appropriated for any other purpose for which the council can buy land.
- 3 Section 126(2) of the 1972 Act empowers a parish meeting in a parish without a separate council to appropriate land not required for its original purpose, or which has since been appropriated, for some other purpose approved by the Secretary of State.

### **General Rules on the Disposal of Land**

- 4 Section 127(1) of the 1972 Act states that a local council, and the parish trustees of a parish without a council acting with the consent of the parish meeting, may dispose of any land held by them in any manner they wish, subject to certain restrictions (see paragraph 5 below).

Section 270 of the 1972 Act defines 'Land' as 'any interest in land or any easement or right to or over land.' Thus, for example, the grant of a private right of way over council land is treated by section 127(1) of the 1972 Act as a disposal of land. It is

NALC's view that in respect of local authorities in England, a disposal would not however include a licence or permission (written or oral) to use land as these do not give exclusive occupation and if permission is withdrawn, there is no legal interest 'in or over land' or right to remain in occupation. (See LTN 48 The Difference between Leases and Licences). The position is slightly different for local authorities in Wales where an interest in land has been interpreted to extend to a licence.

## **The Restrictions**

- 5 Section 127(2) of the 1972 Act states that land (as defined in paragraph 4 above) must **not** be disposed for consideration less than the best price that can reasonably be obtained. This is normally the open market value of the land or interest in the land. The section provides two exceptions to this rule:
- i. a 'short tenancy' may be granted for less than the best consideration (a 'short tenancy' is the grant of a tenancy for a term not exceeding seven years or the assignment of a term which, at the date of assignment, has less than seven years to run); and
  - ii. the Secretary of State may give his consent for a disposal at less than the best consideration (see paragraphs 6 -12 below).

### *Consent for a Disposal at less than the best consideration - England*

- 6 Section 128 of the 1972 Act allows the Secretary of State to give a general consent in respect of certain land transactions by local authorities in the form of 'The Local Government Act 1972 General Disposal Consent (England) 2003' affects parish councils and parish trustees acting with the consent of the parish meeting.
- 7 The General Disposal Consents allow local authorities in England to dispose of properties at an undervalue where:
- i. the local authority considers that the purpose for which the land is to be disposed is likely to contribute to the promotion or improvement of any one or more of the economic well-being; social well-being; or environmental well-being; of the whole or any part of its area, or of all or any persons resident or present in its area;

**and**

- ii. the difference between the market value of the land and the price obtained is no more than £2,000,000.

The General Disposal Consent aims to give local authorities the autonomy to carry out their statutory duties and functions as they consider necessary or desirable. However, local authorities should remain aware of the need to fulfil their fiduciary duties in a way which is accountable to local people.

- 8 Circular 06/03: 'Disposal of Land for Less Than Best Consideration' - gives guidance on the general consent. The circular clarifies that it is for local authorities to consider whether a proposed disposal meets the criteria set out above or not. If the criteria are not met then they need to apply to the Secretary of State for specific consent. If the authority is uncertain about the need to seek consent, it should obtain legal advice on the matter and keep its appointed auditor informed of any legal advice it receives and the proposed action it wishes to take. The Circular also states:

'In determining whether or not 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.'

Please note that the reference to the "Director of Planning at the Government Office for the relevant Region" in paragraph 11 of ODPM Circular 06/2003 should read "The National Unit for Land Acquisition, Planning and Housing Division, Government Office for London, Riverwalk House, 157-161 Millbank, London SW1P 4RR". Applications for specific consent should be sent to the Secretary of State at that address.

- 9 Councils considering disposing of land should familiarise themselves with the General Disposal Consent and accompanying guidance. The General Disposal Consent and the Circular are available from the DCLG and can be accessed on the internet via the following link:

<http://www.communities.gov.uk/publications/planningandbuilding/circularlocalgovernment>

*Consent for a Disposal at less than the best consideration - Wales*

- 10 Section 128 of the 1972 Act allows the Secretary of State to give a general consent in respect of certain land transactions by local authorities in the form of ‘the ‘General Disposal Consent (Wales) 2003’ which came into effect on 31 December 2003.
- 11 The General Disposal Consent allows local authorities in Wales to dispose of properties at an undervalue where:
- i. the local authority considers that the purpose for which the land is to be disposed is likely to contribute to the promotion or improvement of any one or more of the economic well-being; social well-being; or environmental well-being; of the whole or any part of its area, or of all or any persons resident or present in its area;

**and**

- ii. the difference between the market value of the land and the price obtained is no more than £2,000,000 (two million pounds).

The General Disposal Consent aims to give local authorities the autonomy to carry out their statutory duties and functions as they consider necessary or desirable. However, local authorities should remain aware of the need to fulfil their fiduciary duties in a way which is accountable to local people.

- 12 Councils considering disposing of land should familiarise themselves with the General Disposal Consent and accompanying guidance.

The General Consent and the Circular as applicable in Wales is available from the National Assembly in Wales and can be accessed on the internet via the following link:-

<http://gov.wales/pubs/circulars/2003/english/NAFWC41-03-e.pdf?lang=en>

- 13 The Circular issued in respect of the General Disposal Consent (Wales) 2003 also confirms that ‘it is for a [community council] to decide whether a proposed disposal requires the consent of the National Assembly, seeking its own legal or other professional advice as appropriate and to bear responsibility for its decisions.’ In contrast to the position for parish councils stated above, the Circular as applicable in Wales recommends that a community council should confer with their external auditor when seeking to rely on the General Disposal Consent and in any event should notify

its external auditor within 28 days of any decision to dispose of land in reliance upon the General Disposal Consent. Note that the General Disposal Consent for Wales extends the definition of a disposal of an 'interest in land' to 'any licence in or over land.'

### Best consideration

- 14 Before making a disposal a council must in practice get a professional valuation, either from the District Valuer or from a private valuer or surveyor, for a fee. If an application is made to the Secretary of State for consent to dispose at an undervalue, a valuation report must accompany the application.
- 15 The price for a disposal does not have to be money. In *Currie v Misa* (1875) LR App Cas 554, 'some right, interest profit or benefit accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other' was sufficient. Sometimes an exchange of land may be appropriate (with or without a money adjustment); or a lease may be granted for services to be rendered.
- 16 A disposal for less than full price which is not a short tenancy; covered by the General Disposal Consents or where the Secretary of State's consent has been obtained could be investigated by the auditor, and/or be the subject of an objection at audit.
- 17 There is also a general rule, applicable to all local authorities, that decisions taken by them in exercise of their discretion must be 'reasonable'; e.g. authorities must take into account all relevant considerations and disregard all irrelevant ones when coming to a decision. A disposal contrary to this rule (including a sale at an undervalue not sanctioned by law) could be challenged in the High Court by way of judicial review (for more detail regarding judicial review proceedings, please see Legal Topic Note 15 Legal Proceedings).

### Commons

- 18 Section 126(4) of the 1972 Act prohibits the appropriation of any land forming a common, without the consent of the Secretary of State, unless the total area does not exceed 250 square yards and, before appropriation, notice of intention to appropriate, specifying the land in question, is advertised for two consecutive weeks in a local newspaper and any objections received are considered. The rights of other persons in respect of the land are unaffected.

- 19 An appropriation of a common would involve loss of status and normally involves an exchange of land to replace the land appropriated.

### **Open Space Land**

- 20 Sections 126(4A) and 127(3) of the 1972 Act prohibit the appropriation or disposal of open space land unless the advertising etc. requirements specified in paragraph 18 above are complied with.
- 21 'Open space' is defined in section 336(1) of the Town and Country Planning Act 1990 as 'any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground'. This definition is wide enough to include common land used for recreational purposes and village greens. However, a disposal of a common or a village green does not affect the status of the land; it remains a common or green (unless appropriated before disposal).
- 22 An appropriation or disposal, as above, of land held for the purposes of section 164 of the Public Health Act 1875 (places of public recreation) or section 10 of the Open Spaces Act 1906 (maintenance of open space and burial grounds) frees the land of any trust arising solely by virtue of the land being held for those purposes.

### **Playing Fields - Wales**

- 23 In Wales there are separate requirements for the disposal of a playing field under the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010 and the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Regulations 2015 (2015 Regulations). A playing field is defined as an open space which includes one or more areas which have at any time been marked or otherwise set aside for sport or other similar recreational activity.
- 24 Under the 2015 Regulations as well as advertising the proposed disposal in a local newspaper for two weeks the local council must also place a copy of the notification at or near the land and on its website (if any) for six weeks. The consultation period must be at least six weeks after the first publication of the notice.
- 25 Copies of the notice and details of the proposed disposal must, in addition, be given to:
- (i) any local authority whose area includes any part of, or shares a boundary with any part of, the playing field to which the proposed disposal relates;

- (ii) the Sports Council for Wales;
- (iii) the National Playing Fields Association (operating under the name 'Fields in Trust');
- (iv) those persons as appear to the local authority to represent the interests of persons in the local authority's area, or in the area of a local authority that shares a boundary with any part of the playing field, who make use of the playing field
- (v) any body whose main aims include preserving—:
  - (aa) open spaces throughout Wales; or
  - (bb) play opportunities for children throughout Wales;
- (vi) such other persons as the local authority considers appropriate.

26 The local council must provide (on payment of a reasonable charge if required) a copy of the details of the proposed disposal to any person from whom the local council receives a request during the consultation period.

### **Allotment Land**

27 Land purchased or appropriated for use as allotment gardens (defined by section 22(1) of the Allotments Act 1922 to mean an allotment not exceeding 0.25 of an acre in extent which is wholly or mainly cultivated by the occupier for the production of vegetable or fruit crops for consumption by himself or his family) or any land not exceeding five acres in extent cultivated as a garden or a farm or partly as a garden and partly as a farm may not be sold or otherwise disposed of without the consent of the Secretary of State (England) or the National Assembly for Wales (Wales). The consent may be given unconditionally or subject to such conditions as he/she/it thinks fit, but it shall not be given unless adequate provision is made for allotment holders displaced by the disposal (unless that is unnecessary or not reasonably practicable) (section 8 Allotments Act 1925).

28 In England applications for consent should be addressed to the DCLG:

National Planning Casework Unit

5 St Philips Place

Colmore Row

Birmingham

B3 2PW

Enquiry number: 0303 444 8050

[npcu@communities.gsi.gov.uk](mailto:npcu@communities.gsi.gov.uk)

In Wales, applications for consent are made to:

The National Assembly for Wales

Cardiff Bay

Cardiff

CF99 1NA

- 29 By way of exception, a local council may dispose of field garden allotment land to a county council for the purpose of smallholdings without getting ministerial consent (section 45 Smallholdings and Allotments Act 1908 (1908 Act)). (See Legal Topic Note 52 Temporary Use of Allotment Land for more detail).
- 30 Under section 32 of the 1908 Act where any land acquired for garden allotments is no longer needed, or some more suitable land is available, a local council may sell or let the land or exchange it for more suitable land, and pay or receive money for equality. The proceeds of such a sale and any money received by the council by way of exchange must be used for:
- discharging the debts and liabilities of the council in respect of the allotment land (in any manner);
  - acquiring, adapting, and improving other land for allotments; and
  - any surplus remaining may be used for any purpose for which capital money may be used.
- The interest on the money and any money received from letting the land (may) be used for acquiring other land for allotments; or in the same way as allotments rents may be used.
- 31 Where the land had been acquired on a leasehold basis, the above does not apply to the loss of the land at the end of the lease.
- 32 Special rules apply to fuel and field garden allotments (the latter often being referred to as allotments for the labouring poor) established by or under Inclosure Awards. The appropriation for other purposes is subject to section 126(4) of the 1972 Act (see 20 above). Usually, too, they are charitable and their disposal is subject to the Charities Act 2011 Act (see LTN 45A Disposal of Charity Land).



## Burial Grounds

### *i Unconsecrated*

- 33 A disused burial ground is included in the definition of 'open space' set out in paragraph 21 above for the purposes of appropriation and disposal. If there are monuments etc. in a burial ground, they cannot lawfully be removed until the procedures laid down in Article 16 and Schedule 3 of the Local Authorities Cemeteries Order 1977 have been complied with. Effectively, therefore, an appropriation or disposal cannot take place until those procedures are completed.
- 34 Land which is an unused part of a burial ground may be appropriated or disposed of without restriction, but subject to any trust etc. which may exist.

### *ii Consecrated*

- 35 Consecrated land is land which has been consecrated according to the rites of the Church of England. Consecration or blessing by other religious denominations does not normally restrict appropriation or disposal of the land (unless the council has bound itself by covenant or agreement with the denominational body concerned).
- 36 Consecration brings the land within the jurisdiction of the Ordinary (in effect, the bishop), and his permission, or faculty, is required before any alterations to the land can take place (e.g. removal of monuments from a churchyard).
- 37 The appropriation or use of consecrated land for other purposes requires a faculty. (The law on this subject is complicated and cannot be dealt with in this Note. Specific advice from a lawyer experienced in ecclesiastical law should be obtained).

## Land subject to a trust, covenant or agreement

- 38 Section 131(1) of the 1972 Act prohibits the disposal of land by a local authority or by parish trustees in breach of any trust, covenant or agreement which is binding upon the authority or the trustees (except in relation to certain open space land – see 20-22 above).

## Protection of Purchasers

Section 128(2)(a) of the 1972 Act provides that a disposal of land by a local authority (including parish trustees) is not invalid because of the absence of Ministerial consent or of failure to advertise and consider objections. Section 128(2)(b) provides that a person dealing with the authority (or with parish trustees) or claiming under the authority does not have to see or to check that any consent has been obtained or that advertising etc. has been carried out. The result is that the purchaser of the land gets a good title even if there are defects in the local council process.

## Procedures for Appropriation and Disposal of Land

- 39 Appropriation requires simply the adoption of a formal resolution to appropriate the land in question for a specified purpose or purposes.
- 40 The initial decision to dispose of land will normally be by resolution as well. However, negotiations with a prospective purchaser or tenant may take time and a formal decision to proceed with a disposal may not be made until negotiations are completed. When discussing the disposal of land, and possibly its appropriation, a council may properly resolve to exclude the public from the relevant part of the meeting(s). Details of the terms of a disposal, especially the price, should normally remain confidential until an agreement has been reached with a purchaser or tenant.
- 41 Correspondence with potential purchasers etc. should always be headed 'subject to contract'. This will avoid the possibility of a legally binding contract coming into existence before the formal contract documents are signed and exchanged. Once terms are provisionally agreed, a council should engage a local solicitor to undertake the conveyancing procedures. The Law Society can provide information on suitable solicitors - <http://solicitors.lawsociety.org.uk/?Pro=True>

## Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
28	Basic Charity Law	Deals with obligations of charity trustees and potential conflicts of interests in decisions related to land held on charitable trusts.
45A	Disposal of Charity Land by Local Councils acting as Sole or Managing Trustee	Explain the rules and procedures around the disposal of land by a local council which is the sole or managing trustee of a charity

47	Easements	Describes the nature and different types of easements.
48	The Difference between Leases and Licences	Explains why the legal differences between leases and licences are important.
49	Business tenancies	In respect of a disposal of land by grant of lease (or assignment), considers the protections conferred by the Landlord and Tenant Act 1954.
50	The Agricultural Tenancies Act 1995	In respect of a disposal of land by grant of lease, explains farm business tenancies.
52	Temporary use of Allotment Land	Details consents required to use of allotment land for any other purpose.
57	Easements over Common Land and Village Greens	Sets out the powers of local councils to grant easements over common land and village greens.
68	Negligence	Explains the need for tenants and occupiers of premises to have sufficient insurance cover (e.g. public liability) in place.
75	Lease Negotiations	In respect of a disposal of land by grant of lease (or assignment), explains the process of negotiating them. Also defines and gives guidance on important lease terms.
76	Energy Performance requirements	These are relevant in freehold and leasehold sale transactions.
82	Compulsory Purchase Orders	Sets out the procedure for local councils to compulsorily purchase land.

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