

Agenda Item	18
Report No	EDI/30/18

HIGHLAND COUNCIL

Committee: Environment, Development and Infrastructure

Date: 17 May 2018

Report Title: Disposals at Below Market Value - Policy

Report By: Director of Development and Infrastructure

1. Purpose/Executive Summary

- 1.1 A Council policy and guidance entitled 'Disposals of land at less than best consideration that can reasonably be obtained' (**Appendix 1**) has been prepared in relation to the Internal Audit - Rental Income Audit 2016 action on 'Rent Waivers/Reduction of Rent'.
- 1.2 The policy and guidance has been approved by Internal Audit (08/11/17) as meeting the requirements of the aforementioned audit action, and by the Asset Management Project Board (AMPB) (29/11/17).
- 1.3 This report seeks the agreement of the Environment, Development and Infrastructure (EDI) Committee that the policy and guidance is accepted as a Council policy on the "Disposals of land for a consideration less than the best that can reasonably be obtained".

2. Recommendations

- 2.1 Members are asked to:
 - i. **note** the policy and guidance (**Appendix 1**) entitled 'Disposals of land for a consideration less than the best that can reasonably be obtained' prepared in respect of the Internal Audit – Rental Income Audit 2016 (Ref: HEE03/001.bf) action for a policy on 'rent waivers/reduction of rent'; and
 - ii. **agree** that the policy and guidance is accepted as a Council policy.

3. Background

- 3.1 The Internal Audit – Rental Income Audit 2016 action plan (HEE03/001.bf) identified an action to produce a Council policy on ‘Rent Waivers/Reduction of Rent’.
- 3.2 In the context of relevant legislation and guidance, a policy for ‘rent waivers/reduction of rent’ is effectively a policy on the disposal of land for ‘a consideration less than the best that can reasonably be obtained’ (‘less than best consideration’), and is attached at **Appendix 1** for consideration and approval by the Committee.
- 3.3 The policy and guidance relate to the disposal by the Council of an interest in land ‘at less than best consideration’, and includes transfers of land at ‘less than best consideration’ under the Community Empowerment (Scotland) Act 2015.
- 3.4 The advice and input into the policy and guidance has been sought and is acknowledged from the Council’s Internal Audit; Property Estates Manager (D&I); Legal Manager-Conveyancing and Commercial (CEO), and the Community and Democratic Engagement Manager (CEO), as well as being approved by the AMPB (29/11/17).
- 3.5 Key notes of the draft policy:
1. If land that the Council has an interest in is under consideration for disposal at ‘less than the best consideration that can reasonably be obtained’ then The Disposal of Land by Local Authorities (Scotland) Regulations 2010 will apply to that disposal.
 2. The Disposal of Land by Local Authorities (Scotland) Regulations 2010 and the general guidance¹ to the regulations produced by the Scottish Government:-
 - i. Set out the ‘**circumstances**’ and the ‘**purposes**’ which the local authority must take into account when considering a disposal of land for a consideration less than the best consideration that can reasonably be obtained, and
 - ii. Apply to every disposal of an interest in land (including but not limited to sale or lease, or grant of a servitude, or other interest over land), whether the disposal is managed on the open market, by private treaty, or dealt with internally or by external consultants.
 - iii. Require that local authorities, before deciding in favour of such disposal, should undertake an assessment of the proposed disposal taking into account all relevant factors, all available options and all relevant information, including an appraisal and comparison of the costs and other dis-benefits and benefits of the proposal.
 - iv. Recommend that local authorities demonstrate that there has been an evaluation, supported by evidence that makes clear how they have reached their decision.
- 3.6 It is an Internal Audit requirement of the above Audit Action (section 3.1) that the policy includes that any proposal to dispose of land at ‘less than best consideration’ shall be progressed by a nominated lead officer (from the Council’s ‘initiating’ or ‘owning’ service) who shall be responsible for managing the proposal through the Council’s governance and disposals process to a satisfactory conclusion (included under

¹ Disposal of Land by Local Authorities (Scotland) Regulations 2010, General Guidance, The Scottish Government, May 2010

'Section 3-Policy Guidelines').

4. Implications

- 4.1 Resource – There are no additional resource implications arising from this report.
- 4.2 Legal, Community (Equality, Poverty and Rural), Climate Change/Carbon Clever, Risk and Gaelic - There are no implications arising from this report.

Designation: Director of Development and Infrastructure

Date: 10 April 2018

Author: Graham Bull, Corporate Property Asset Manager

Background Papers: Asset Management Project Board Report (Item 4.1) – Disposal or Lease at less than best policy, 29 November 2017

The Highland Council

Policy

**Disposal of land for a consideration less than
the best that can reasonably be obtained**

May 2018

Table of Contents

	Page
1. Policy	3
2. Background	4
3. Policy Guidelines	4
Appendices	
1. Process map for Disposal of land at less than best consideration	10
2. Extract from the Disposal of Land by Local Authorities (Scotland) Regulations 2010: General Guidance	11
3. Additional Information	13

1. Policy

If land¹ that the Council has an interest in is under consideration for disposal 'at less than the best consideration that can reasonably be obtained' ('less than best consideration') then **The Disposal of Land by Local Authorities (Scotland) Regulations 2010** will apply to that disposal.

Local authorities can only dispose of land at 'less than best consideration' where such a proposal meets the requirements of the Disposal of Land by Local Authorities (Scotland) Regulations 2010, ie:-

1. the value of the land (best consideration) is less than £10,000 (the 'threshold amount'), or
2. the difference between the best consideration and proposed consideration (the 'marginal amount') is 25% or less of the best consideration, or
3. the local authority must follow the 'procedure' set out in the Disposal of Land Regulations (2010) which requires that the local authority must:-
 - a. Appraise and compare the costs and other dis-benefits and benefits of the proposal, and
 - b. Determine that the 'circumstances' set out in Regulation 4 are met

The Disposal of Land by Local Authorities (Scotland) Regulations 2010 ('2010 Regulations') apply to every disposal of a Council interest in land, including but not limited to sale or lease, or grant of a servitude, or other interest over land. It applies whether the disposal is managed on the open market, or by private treaty, or dealt with internally or by external consultants.

This policy and guidance relate to the disposal by the Council of an interest in land for 'a consideration less than the best that can reasonably be obtained', and includes transfers of land, at 'less than best consideration' under the Community Empowerment (Scotland) Act 2015.

This policy is applicable either after the land in question has been formally declared surplus to the Council's requirements and which is then available for disposal, or where an asset (that may not have been declared surplus) is under consideration for transfer under the Community Empowerment (Scotland) Act 2015, at 'less than best consideration'.

It should be noted that the disposal of land that is held within the Housing Revenue Account, or within Common Good Funds, is subject to specific legislative, guidance and governance requirements² that must be adhered to in order to be able to either, declare such a land interest as being surplus to the Council's requirements before being eligible for consideration for

¹ <http://www.gov.scot/Publications/2010/07/26124543/7>; Disposal of Land by Local Authorities (Scotland) Regulations: General Guidance. The interpretation of "land" in the Local Government (Scotland) Act 1973 (Section 235(1)) is that it includes land covered with water and any interest, right or servitude in or over land. In law, land also includes buildings and any other structure on the land, such as a bridge, wall or pier.

² This includes separate guidelines and requirements that must be followed in relation to disposals of land held within the Housing Revenue Account (HRA) at less than market value, and any disposal of HRA land under a Community Asset Transfer Request would be conditional on following the relevant HRA land disposal process.

disposal, or in order to progress a transfer of such land under the Community Empowerment (Scotland) Act 2015.

2. **Background**

All relevant public authorities (in Scotland) have a **statutory duty to secure “Best Value”** in their operations and, as such, are expected to demonstrate sound governance at a strategic, financial and operational level, including the disposal of land.

Local authorities in Scotland are required to fulfil their statutory duties under Best Value as set out in the Local Government in Scotland Act 2003. However, it has long been recognised that “Best Value” does not always mean the highest price, and relevant authorities can sell, or lease land at less than market value where there are demonstrable wider public benefits that can be gained from such a transaction. In determining the best consideration that can reasonably be obtained, the local authority must obtain a valuation report from a suitably qualified valuer.³

Any decision by a local authority to dispose, or lease, land at ‘less than best consideration’ must represent good use of public resources, and the authority will need to take account of whether the proposed ‘benefits’ to be delivered by the proposal justify the proposed discount.

Officers will also need to take into consideration, in the context of the achievement of Best Value, that the Highland Council agreed a financial approach⁴ that seeks to identify proposals to reduce expenditure and/or raise additional income in order to meet its legal requirement to deliver a balanced annual budget and continue to deliver its services. This approach may have a bearing on the Council’s ability/decision to dispose of land at ‘less than best consideration’.

In addition to the national regulatory framework and requirements which must be followed, the Council also has its own specific internal governance, policies and approval procedures (eg. Financial Regulations; Contract Standing Orders) that will also need to be followed, as appropriate to the disposal of land under consideration.

3. **Policy Guidelines**

The diagram (Appendix 1) outlines the internal Council process for seeking a decision to dispose of land at ‘less than best consideration’. Any such proposal to dispose of land ‘at less than best consideration’ shall be progressed by a nominated lead officer (from the Council’s ‘initiating’ or ‘owning’ service) who shall be responsible for managing the proposal through the Council’s governance and disposals process to a satisfactory and agreed conclusion.

3.1 **Step 1 – Disposal at Below Market Value**

The Disposal of Land by Local Authorities (Scotland) Regulations 2010 will apply to any land disposal that is under consideration for disposal at ‘less than best consideration’, and the lead officer shall liaise with the Development and Infrastructure – Estates Team for advice/guidance in relation to progressing such a land disposal through the Council’s disposals process.

³ See Appendix A3.1 – Valuation

⁴ Highland Council, Thursday 7th September 2017, Item 14 Financial Approach 2018-2023

3.2 Step 2 – Business Case/Justification

Unless the value of the land (best consideration) is less than £10,000 (the 'threshold amount'), or the difference between the best consideration and proposed consideration (the 'marginal amount') is 25% or less of the best consideration, then the local authority must follow the 'procedure' set out in the Disposal of Land Regulations (2010) which requires that the local authority must:-

- a) Appraise and compare the costs and other dis-benefits and benefits of the proposal, and
- b) Determine that the 'circumstances' set out in Regulation 4 are met.

The 'circumstances' in which a local authority may dispose of land for a consideration less than the best that can be reasonably be obtained are that:-

- a) The local authority is satisfied that the disposal for that consideration is reasonable, and
- b) The disposal is likely to contribute to any of the 'purposes' set out within the Regulations (in respect of the whole or any part of the area of the local authority or any persons resident or present in its area).

These 'purposes', which the local authority must consider, include the promotion or improvement of following types of benefit:

- a) Economic development
- b) Regeneration
- c) Public Health
- d) Social Wellbeing⁵
- e) Environmental Wellbeing⁶

The Community Empowerment (Scotland) Act 2015⁶ introduces the following additional types of benefit that must also be taken into consideration when assessing whether an asset transfer under these Regulations, at less than best consideration, is justified:-

- a) Reducing inequalities of outcome from socio-economic disadvantage
- b) Any other benefits that might arise through the alternative use of the asset

The lead officer shall arrange for a business justification/evaluation to be prepared (including input from the interested party if external to the Council) that demonstrates how the proposal meets the requirements of the Disposal of Land by Local Authorities (Scotland) Regulations 2010, and Community Empowerment (Scotland) Act 2015 (if applicable), having regard to the following:-

1. The business justification/evaluation will need to take account of whether/not the proposed 'benefits' to be delivered by the proposal justify the proposed level of discount sought.

⁵ In The 2010 Regulations, references to 'wellbeing' are to be construed as for the purposes of section 20 of the Local Government in Scotland Act 2003.

⁶ See Appendix A3.2 - The Community Empowerment (Scotland) Act 2015

2. The business justification/evaluation will need to include an assessment of the proposed disposal taking into account all relevant factors, all available options and all relevant information, and demonstrates that an evaluation, supported by evidence, that makes clear how the decision has been reached.
3. The benefits of such a proposal should be proportionate to the value of the asset and the level of discount being proposed, with an appropriate level of information to support the business justification/evaluation.

Disposal of Land by Local Authorities (Scotland) Regulations, General Guidance, The Scottish Government, May 2010

The Scottish Government has produced non-statutory guidance that aims to assist local authorities in applying the '2010 Regulations'. However, it should be noted that this guidance is not exhaustive and does not purport to be an authoritative interpretation of the law. Each local authority remains responsible for seeking their own legal or other professional advice as appropriate and to remain aware of their need to fulfil their fiduciary duty in a way which is accountable to local people.

Annex C of the above Guidance (reproduced at Appendix 2) provides some criteria/guidance that the local authority should follow in drawing up its assessment of a proposed disposal at 'less than best consideration'. These criteria should be followed in the preparation of a business justification/evaluation (but are for guidance purposes only) and the Council will need to determine, as part of its own evaluation, what is appropriate and proportionate in each case.

EC State Aid rules and procurement issues⁷ - When disposing of land at 'less than best consideration', local authorities are viewed to be providing a subsidy to the owner, developer and/or the occupier of the land and property, depending on the nature of the development. Where this occurs, the authority must ensure that the nature and amount of subsidy complies with the State Aid Rules.

3.3 Step 3 – Scheme of Delegation⁸

The disposal of land that the Council has a legal interest in at 'less than best consideration' is a matter for consideration by The Council, unless covered by its Scheme of Delegation and Administration. Lead officers, seeking to progress a disposal at less than best consideration, will need to seek the advice/guidance of the Development and Infrastructure – Estates Team whether/not such a proposal can be progressed under the Council's Scheme of Delegation.

If 'Yes', then the Estate Team will advise the lead officer of the information required to progress a decision under the Scheme of Delegation and will manage the proposal through the Scheme of Delegation process, including, following approval, through the Council's disposals process. The Estates Team will seek to homologate the disposal decision at the next appropriate Strategic Committee.

⁷ See Appendix A3.3 - EC State Aid rules and procurement issues

⁸ The Highland Council - Scheme of Delegation and Administration to Committees and Sub-Committees and to Officers; See Appendix A3.4

If **'No'**, then the lead officer will be required to submit a business justification/evaluation, complete with a covering report/recommendation, to the Asset Management Project Board for consideration.

3.4 Step 4 – Asset Management Project Board (AMPB)

The AMPB will consider a proposal (ie. a report, business justification/evaluation and recommendations) in support of a disposal at 'less than best consideration' and will make a recommendation to 'support', 'defer' (pending additional information being provided), or 'decline' the proposal based upon the information provided.

If **'supported'**, the lead officer will liaise with the Development and Infrastructure – Estates Team to submit a report and recommendations to the relevant strategic committee for consideration for approval by elected Members.

If **'deferred'**, the lead officer will review the additional information requirements with view to resubmitting a completed business justification/evaluation to the AMPB at a future date.

If **'declined'**, the lead officer will inform the interested party(ies), together with reasons, of the AMPB's decision.

3.5 Step 5 – Strategic Committee - consideration for approval

If a disposal at 'less than best consideration' proposal has been recommended by the AMPB (or a Service Director) to be brought to strategic committee for consideration, the lead officer will liaise with the Development and Infrastructure – Estates Team to submit a report and recommendations to the relevant strategic committee for consideration for approval by elected Members.

If the proposal is **'approved'** by the relevant strategic committee, the lead officer will liaise with the Development and Infrastructure – Estates Team/Legal Services Teams to progress the approved disposal at 'less than best consideration' through the Council's disposals process to a satisfactory conclusion based on the terms and conditions agreed by the strategic committee, and, where delegated by the strategic committee, by the relevant Service Director.

If the proposal is **'rejected'** by the strategic committee, the lead officer will inform the interested party(ies), together with reasons, of the Council's decision.

In the event that the proposal is **'deferred'** by the strategic committee, the lead officer will review the additional information requirements with a view to resubmitting a completed business case/justification back through the AMPB, or to the strategic committee directly (as appropriate/directed).

3.6 Step 6 – Financial arrangements, collection of rent, and/or other payments due

Once approval to dispose of land at 'less than best consideration' has been obtained, either via strategic committee or via the delegated approval process, the lead officer will be responsible for:-

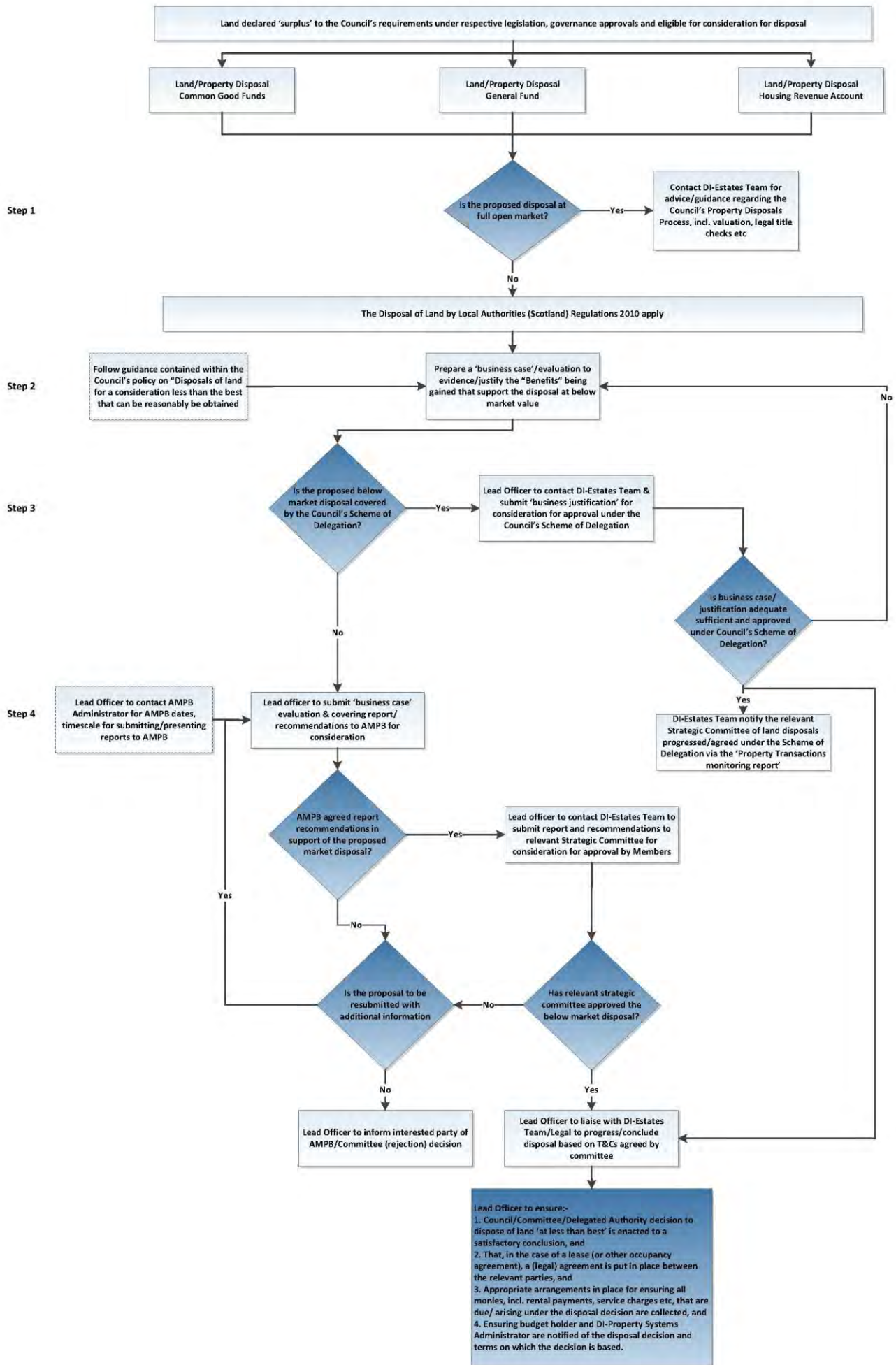
- a. Ensuring that the approved disposal is progressed through the Council's disposals process (in conjunction with the Development and Infrastructure – Estates Team/Legal Services Teams) to a satisfactory conclusion (based on the terms and conditions⁹ agreed by the strategic committee, and/or, where delegated by the strategic committee, by the relevant Service Director), and
- b. Ensuring that appropriate arrangements are put in place for making sure that any financial recompense, or other arrangements, arising, or due, under the approval decision are collected by the Council; including:-
 - i) In the case of a lease (or other occupancy agreement), that a (legal) agreement is put in place between the relevant parties, and
 - ii) Arrangements are put in place for the collection of rental payments, as well as any other relevant property costs (as appropriate), that arise/fall due under the property agreement
- c. For ensuring that the Budget Holder (and Development and Infrastructure-Property Systems Administrator) is notified of the disposal of land, the terms upon which the disposal has been agreed, and the arrangements in place for the collection of rents and other property costs due under the agreement.

⁹ This will include consideration of the use of conditions deemed applicable/appropriate to 'protect' the discount agreed.

Appendix 1

Process map for Disposal of land at less than best consideration

DRAFT



Appendix 2

Extract from the Disposal of Land by Local Authorities (Scotland) Regulations 2010: General Guidance:

“Annex C: Example of the criteria for consideration when making an assessment of a proposal to dispose of land for less than best consideration that can reasonably be obtained.

Under Best Value obligations, local authorities are expected to demonstrate sound governance at a strategic, financial and operational level. The following criteria may be of help to a local authority in drawing up their assessment of a proposed disposal at less than the best consideration that can reasonably be obtained. This is a guide only and the local authority will want to determine what is appropriate and proportionate in each case.

1. A plan and/or written description of the site and buildings, its physical characteristics, location and surroundings.
2. Details of the current use of the land.
3. The best consideration that can reasonably be obtained for the interest as assessed by a qualified valuer (i.e. a chartered Member of, or is authorised to practice by, the Royal Institution of Chartered Surveyors) and the date that this assessment was obtained.
4. Details (where applicable) of the key terms and any restrictions imposed by the authority regarding the disposal, including any clawback provisions.
5. Details about the purchaser: name of the person or organisation, aims and objectives, Board or governance structure, how it is funded and whether charitable status is held etc.
6. An outline of what the purchaser intends to do with the land and whether there has been involvement of local people/service users.
7. A copy of the most recent accounts (if available) or written evidence that the purchaser is financially able to maintain, renovate, etc. the land to be disposed of or leased.
8. Details of the options appraisal and cost benefit analysis carried out by the local authority including any alternative use for the land, (e.g. a copy of the options appraisal report and Committee/Council decision/Minute).
9. Details of the inclusion of the proposed land disposal within the authority’s asset management plan.
10. Details of how the disposal at less than best consideration that can reasonably be obtained, will contribute to one or more of the purposes set out in Regulation 4(2) of the Regulations.
11. An indication of the local demand for these services and details of any known opposition or support for the proposal and the measures (if applicable) taken by the authority to deal with the opposition.
12. Confirmation the disposal complies with the European Commission’s State Aid Rules.

13. When using arm's length organisations to deliver services, information on the reviews and option appraisals taking account of the COSLA/Accounts Commission Code of Guidance on Funding External Bodies and Following the Public Pound.

DRAFT

Appendix 3 – Additional Information

A3.1 Valuation

For the purposes of assessing the value of a sale, lease or other disposal, including when determining the best consideration that can reasonably be obtained for land that may be disposed of for less than best consideration, local authorities are required to have regard to the Statutory Guidance on the duty to appoint and instruct a suitably qualified valuer.

When assessing best consideration that can reasonably be obtained in respect of the relevant land or interest in land the valuer should take into account the requirements of the latest edition of The Royal Institution of Chartered Surveyors (RICS) Valuation Standards (“The Red Book”).

Local authorities should consider whether or not it would be prudent, particularly in high value cases, to seek an independent valuation to provide an additional level of assurance.

A3.2 Community Empowerment (Scotland) Act 2015

The Community Empowerment (Scotland) Act 2015 (the ‘2015 Act’) introduces a right for community bodies to make an asset transfer request to local authorities for any land or buildings they feel they could make better use of¹⁰.

Community bodies can request ownership, lease or other rights, as they wish, in relation to any land which is owned or leased by the relevant authority. The ‘2015 Act’ requires the relevant authority to assess requests transparently against a specified list of criteria, and to agree the request unless there are reasonable grounds for refusal.

The Act does not say how much should be paid to purchase an asset or in rent, whether it should be at market value, or at a discount. The community transfer body has to state in its asset transfer request how much they are prepared to pay, alongside the benefits the project will deliver, and the relevant authority then has to decide whether to accept that price, in line with the duty to secure Best Value and the requirements of this policy.

When the price offered in an asset transfer request is less than the market value of the property, the local authority will need to consider whether the proposed benefits to be delivered by the community transfer body justify the proposed discount (which will be accounted for as a “gift”).

In reaching its decision the authority must consider the reasons for the request and the information provided in the request and in support of the request and compare the benefits of the community transfer body’s proposals with the benefits that might arise from ‘any alternative proposal’.

Alternative proposals may be another asset transfer request, or another proposal made by the authority, or by any other person. If the relevant authority does not consider the property to be surplus, continuing the existing use would be treated as an alternative proposal. If the

¹⁰ Asset Transfer under the Community Empowerment (Scotland) Act 2015, Guidance for Relevant Authorities. January 2017

property has been identified as surplus for disposal, disposal on the open market could be an alternative proposal.

A3.3 EC State Aid rules and procurement issues

Local authorities need to ensure that all disposals of land comply with the European Commission's State Aid Rules. The Commission's Communication on State Aid elements in sales of land and buildings by public authorities (97/C 209/03) provides general guidance on this issue.

When disposing of land at less than "best consideration that can reasonably be obtained", local authorities are viewed to be providing a subsidy to the owner, developer and/or the occupier of the land and property, depending on the nature of the development. Where this occurs, authorities 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 means that the aid granted is viewed as unlawful and may result in the benefit being recovered with interest from the aid recipient.

Scottish local authorities may obtain general advice and guidance on Procurement Procedures and EC State Aid Rules by contacting the Scottish Government's Procurement Policy & Best Practice Team, or the State Aid Unit.

A3.4 Scheme of Delegation⁹

The disposal, or leasing, of land and property assets that the Council has a legal interest in at 'less than best consideration' is a matter for consideration by The Council unless covered by its Scheme of Delegation and Administration.

The Council's "Scheme of Delegation and Administration" sets out the terms of reference of business of the Council's Committees and Sub-Committees, and provides the framework and guidance, and the powers and duties, given to Committees, Sub-Committees and to Officers, as well as defining the decisions, subject to limitations and conditions, which Committees, Sub-Committees and Officers can make without any further reference to Committees, or to the Council.

The Council makes and reviews its Scheme of Delegation each year, normally in September, under Section 56 of the Local Government (Scotland) Act 1973.