

DISPOSAL AND APPROPRIATION OF LAND BY LOCAL COUNCILS

General Rules on the Appropriation of Land

- 1 Section 126(1) of the Local Government Act 1972 provides 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 is authorised by statute to acquire land by agreement.
- 2 S.126(2) 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

- 3 S.127 (1) of the Local Government Act 1972 provides 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, but subject to the restrictions set out below.
- 4 A '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. Caselaw 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.
- 5 Pursuant to s.270 of the 1972 Act, 'Land' is defined 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 s. 127(1) 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. If permission to use land is withdrawn, there is no legal interest in or over land to remain in occupation. The

position is slightly different for local authorities in Wales; an interest in land has been interpreted to extend to a licence. Please see paragraph 12 below.

The Restrictions

6 S. 127(2) provides that land (as defined in paragraph 5 above) must **not** be disposed for consideration less than the best that can reasonably be obtained. The section provides two exceptions to this rule –

- a. a disposal by way of a ‘short tenancy’ may also be for less than the best consideration (see paragraph 7 below); and
- b. the Secretary of State may give his consent for a disposal at less than the best consideration (see paragraphs 8 -15 below).

i Short Tenancies

7 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.

ii Consent for a Disposal at less than the best consideration

8 S.128 of the 1972 Act allows the Secretary of State to make a general consent in respect of certain land transactions by local authorities.

9 Such consent has been made in the form of ‘The Local Government Act 1972 General Disposal Consent (England) 2003’ which came into effect on 4th August 2003. As the name suggests this General Consent applies to England only and affects parish councils and parish trustees acting with the consent of the parish meeting. There is a separate General Disposal Consent (Wales) 2003 which came into effect on 31 December 2003 and this applies to community councils in Wales.

10 The General Disposal Consents allow local authorities in both England and Wales to dispose of properties at an undervalue where:

- a. the local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident or present in its area;
 - i the promotion or improvement of economic well-being;
 - ii the promotion or improvement of social well-being;
 - iii the promotion or improvement of environmental well-being;

and

- b. the difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2,000,000 (two million pounds).'

The General Disposal Consents aim to give local authorities the autonomy to carry out their statutory duties and functions as they consider to be 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.

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

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

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://new.wales.gov.uk/publications/circular/circulars03/NAFWC412003?lang=en>

- 12 Circular 06/03: Disposal of Land for Less Than Best Consideration' - gives guidance on the general consent as applicable in England. The circular clarifies that it is for local authorities to consider whether a proposed disposal meets the criteria set out above or whether they need to apply to the Secretary of State for specific consent

because they cannot meet the criteria. If the authority is uncertain about the need to seek consent, it may wish to seek its own legal advice on the matter and may find it useful to 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 as of 1 April 2008, 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 via this address.

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. With reference to paragraph 5 above, the General Disposal Consent for Wales extends the definition of a disposal of an 'interest in land' to 'any licence in or over land.' This should be noted by community councils in Wales.

- 13 The 'best consideration' is normally the open market value of the land or interest in the land. Before making a disposal a council must in practice seek professional valuation advice, either from the District Valuer or from a private valuer or surveyor, for which it will have to pay 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.

- 14 The ‘consideration’ for a disposal does not have to be exclusively money. In *Currie v Misa* (1875) LR App Cas 554, consideration was defined as ‘some right, interest profit or benefit accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other.’ Sometimes an exchange of land may be appropriate (with or without a money adjustment); or a lease may be granted in consideration of services to be rendered.
- 15 A disposal in breach of the ‘best consideration’ rule, otherwise than in accordance with one of the statutory exceptions would be unlawful in the sense that the matter could be investigated by the auditor, and/or be the subject of an objection at audit; it could also be restrained by the courts (see paragraph 16 below).

Land Subject to Charitable Trusts

- 16 Where land is subject to a charitable or similar trust other restrictions apply as set out in s. 117 to 121 of the Charities Act 2011 and detailed below. 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)
- 17 A disposition of land does not require the consent of the Charity Commission if the following conditions are met-
- a. the disposition is not to a ‘connected person’ (as defined by ss 118 and 350 to 352 of the 2011 Act) e.g., a trustee of the charity; a donor of land to the charity; a child, parent, grandchild, grandparent, brother or sister of such trustee or donor; an officer, agent or employee of the charity; a spouse of any of the foregoing persons; an institution controlled by any such person or two or more of any such persons; a body corporate in which such persons have a substantial interest (in excess of one fifth of the share capital or of the voting power).
 - b. save in the case of a ‘short lease’ (see (3) below), the trustees must, before entering into an agreement for sale, or for a lease or other disposition (e.g. the grant of an easement), of land:

- obtain and consider a written report from a qualified surveyor (e.g. a fellow or professional associate of the Royal Institution of Chartered Surveyors or the Incorporated Society of Valuers and Auctioneers, or a person who satisfies other requirements prescribed by the Secretary of State, and who is reasonably believed by the charity trustees to have ability and experience in valuing the land in question);
- advertise the proposed disposition for such period and in such manner as the surveyor advises in his report (if he so advises);
- decide that they are satisfied, in the light of the surveyor's report, that the terms of the disposition are the best which can reasonably be obtained for the charity.
 - i the information which a surveyor's report must contain is prescribed by the Charities (Qualified Surveyors' Reports) Regulations 1992 (S.I. 1992/2980).

c. where the disposal consists in the granting of a lease for a term not exceeding seven years (other than one granted wholly or partly in consideration of a fine or premium), the trustees must:

- first obtain advice from a person reasonably believed to have the requisite ability and practical experience to provide competent advice (such a person does not have to be a qualified surveyor); and
- having considered that advice, be satisfied that the terms of the disposition are the best which can reasonably be obtained for the charity.

18 Where land is held on charitable trusts which stipulate that it is to be used for the purposes, or any particular purposes, of the charity, the land shall not be sold, leased or otherwise disposed of unless public notice of the proposed disposition of at least one month's duration is given and any representations made within that period are considered by the trustees of the charity. However, this provision does not apply if the disposition is being made with a view to replacing the property with other property to be held on the same trusts, or the disposition is the grant of a lease for not more than two years (other than one granted wholly or partly in consideration of a fine or premium). The Commission may direct that this provision shall not apply if, on application by the trustees, they are satisfied that the interests of the charity would be best served by giving a direction.

- 19 The foregoing restrictions apply notwithstanding anything in the trusts of a charity (e.g., they override any provisions in the charity's governing instrument which provide differently), save as follows –
- a. where the disposition is authorised expressly or generally by or under any Act of Parliament or Scheme made by the Commissioners (provided that the authority is not made expressly subject to the sanction of a court order);
 - b. where a charity disposes of land to another charity at a price less than the best consideration and is authorised to do so by the trusts of the first-mentioned charity; and
 - c. where the trusts of a charity so authorise the grant of a lease to a beneficiary at less than the best rent with the intention of enabling the premises to be occupied for the purpose(s) of the charity.
- 20 Ss. 122 and 123 of the 2011 Act contains detailed provisions requiring all contracts for sale, leases, conveyances, transfers and other instruments relating to charitable land to state that the land is held by or in trust for a charity and requiring the trustees to certify that either the consent of the court or the Charity Commission has been obtained or that they have power under the trusts of the charity to effect the disposition and they have complied with the provisions set out in paragraphs 17 to 19 above as far as they are applicable. Where the trustees so certify, then in favour of a person who acquires an interest in the land for money or money's worth (whether from the charity or afterwards), it shall be conclusively presumed that the facts are as stated in the certificate.
- 21 Ss. 124 to 126 of the 2011 Act make broadly similar provision in relation to the mortgaging of charity land as s. 37 provides for the sale etc. of such land.
- 22 Ss. 127 and 128 of the 2011 Act deal with the release of rent charges, with which few, if any, of the charities with which local councils are connected will be concerned.

Commons

- 23 S. 126(4) of the Local Government Act 1972 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 do so, specifying the land in question, is advertised for two consecutive weeks in a local newspaper and any objections received are considered. An appropriation by virtue of

s. 126(4) is subject to the rights of other persons in, over or in respect of the land appropriated (e.g. those rights are unaffected).

- 24 An appropriation of a common would involve loss of status and (save as indicated in 23 above) normally involves the provision of exchange land.

Open Space Land

- 25 S. 126 (4A) of the LGA 1972 prohibits the appropriation of land forming open space unless the advertising etc. requirements specified in paragraph 23 are complied with.
- 26 S. 127(3) of the LGA 1972 applies s. 123 (2A) so that a disposal of open space land is prohibited unless the advertising etc. requirements specified in paragraph 23 above are complied with.
- 27 'Open space' is defined in s. 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 under the foregoing procedures before disposal).
- 28 An appropriation or disposal in accordance with the foregoing procedures of land held for the purposes of s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906 frees the land of any trust arising solely by virtue of the land being held for those purposes.

Allotment Land

- 29 Land purchased or appropriated for use as allotment gardens (defined by s.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 5 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 or the National Assembly for Wales (in Wales). Such consent may be given unconditionally or subject to such conditions as he thinks fit, but shall not be given

unless adequate provision is made for allotment holders displaced by the disposal or that such provision is unnecessary or not reasonably practicable (s. 8 Allotments Act 1925).

- 30 Applications for consent were previously made to the appropriate Regional Government Office. They were abolished by the Coalition Government in 2011. Applications should now 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

In Wales, applications for consent are made to the National Assembly.

- 31 By way of exception, a local council may dispose of field garden allotment land to a county council for the purpose of smallholdings without ministerial consent (s. 45 Smallholdings and Allotments Act 1908). See Legal Topic Note 52 for more detail.
- 32 Under section 32 of the Small Holdings and Allotments Act 1908 where any land acquired for field 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 of exchange. The proceeds of such a sale and any money received by the council by way of equality of exchange must be used for:
- discharging, either by way of a sinking fund or otherwise, the debts and liabilities of the council in respect of the allotment land;
 - 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 must be used for acquiring other land for allotments; or in the same way as allotments rents may be used.

- 33 Where the land had been acquired on a leasehold basis, the above provisions do not apply to the loss of the land at the end of the lease.
- 34 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 s. 126(4) of the LGA 1972. Usually, too, they are charitable and their disposal is subject to the Charities Act 1993 (as outlined above).

Burial Grounds

i Unconsecrated

- 35 A disused burial ground is included in the definition of 'open space' set out in paragraph 28 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.
- 36 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

- 37 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).
- 38 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).
- 39 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 should be sought about cases involving consecrated land).

Land subject to a trust, covenant or agreement

- 40 S. 131(1) of the LGA 1972 provides that, inter alia, s. 127 of the Act shall not authorise 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 para 29 above).
- 41 The foregoing restrictions are cumulative so that, for example, the disposal of open space land subject to a charitable trust must be advertised and the relevant provisions of the Charities Act 1993 must be complied with.

Protection of Purchasers

- 42 S. 128(2) (a) of the LGA 1972 provides that a disposal of land by a local authority (including parish trustees) shall not be invalid because of the absence of Ministerial consent or of failure to advertise and consider objections. S. 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.
- 43 These savings do not apply to disposals of land subject to charitable trusts. Such disposals are governed by the Charities Act 2011.

Procedures for Appropriation and Disposal of Land

- 44 Appropriation requires simply the adoption of a formal resolution to appropriate the land in question for a specified purpose or purposes.
- 45 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.
- 46 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.

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.
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 Order	Sets out the procedure for local councils to compulsorily purchase land.