

APPENDIX 2 DISPOSAL OF LAND/PROPERTY – SUMMARY OF LEGAL ADVICE

Advice

This note covers a disposal of land by a local authority exercising its powers under [section 123](#) of the [Local Government Act 1972](#) (LGA 1972).

Power of sale

A principal council cannot dispose of its land for a consideration less than the best that can be reasonably obtained in the market, except with the express consent of the Secretary of State ([section 123\(1\), LGA 1972](#)). Each element of [section 123](#) is discussed in the note.

What is a disposal?

[Section 123](#) of the LGA 1972 refers to a “disposal”. Disposal of land includes:

- A sale of the freehold interest
- Granting a lease (unless for less than 7 years)
- Assigning any unexpired term of a lease
- Granting an easement
- An option to purchase the freehold
- An option to purchase a lease

What constitutes consideration less than the best that can reasonably be obtained?

In determining “best consideration reasonably obtainable”, the only consideration that can be taken into account is that which has commercial or monetary value to the local authority.

The commercial value of the transaction to the local authority is that which is capable of being assessed by a qualified valuer.

The following principles have emerged from case law:

- What is reasonable in any particular case depends entirely on the facts of the transaction.
- The duty to obtain the best price does not require the highest offer to be accepted, regardless of who makes it and when it is made, but each case will depend on its facts and factors such as the level of detail and evaluated legitimacy of the bid will be relevant.
- When considering the best price that can reasonably be obtained, a local authority may have regard to ethical as well as commercial considerations. However, although such considerations may be a factor in deciding to sell at a certain price, they must be in balance. Therefore, it would be unreasonable and unlawful if a local authority, for reasons only of beneficence or goodwill, sold land to a purchaser at a price less than that reasonably obtainable.
- A local authority should take reasonable steps to investigate how far opposing bidders would go to commit themselves to the highest offer they are prepared to make.
- The terms on which the land is disposed are material to the assessment of the consideration. Therefore, if the purchaser of the land assumes onerous obligations, such as a restrictive covenant that reduces the value of the consideration, the sale is likely to be at an undervalue.
- A court is not entitled to substitute its own view on the facts and merits for that of the local authority. It may only interfere if there was no material upon which the authority’s decision could have been reached or, if in reaching the decision, the local authority disregarded

matters that it ought to have taken into consideration or if it took into account matters that were irrelevant or if its decision was irrational.

- Section 123(2) of the LGA 1972 does not mandate the authority to have regard to any particular factors.
- There is no need for the local authority's decision-making process to refer to section 123(2) explicitly, provided that the court is able to see that the duty has been performed in substance.
- A court is only likely to find a breach of [section 123\(2\)](#) of the LGA 1972 if a council:
 - failed to take proper advice;
 - failed to follow the advice that it received for reasons that it could not justify; or
 - had followed advice that was so erroneous that in accepting it the local authority must have known it was acting unreasonably.
- Local authorities cannot justify a disposal on the ground that non-monetary consideration was being provided. In challenges to disposals of land by local authorities, the courts have held that when deciding whether, for the purposes of [section 123](#), the best consideration reasonably obtainable had been obtained, the following cannot be taken into account:
 - An undertaking by the tenant purchaser to create a number of jobs for people in the area.
 - The desirability of the proposed use of the land disposed of.
 - The desire to retain a particular use that would create jobs for the area.

Best practice when disposing of land

The Council should ensure that it complies with usual and commercial best practice and should:

- Ensure that it complies with any other procedural requirements that may be necessary to dispose of a particular area of land, such as those required on a disposal of open space land.
- Remember that it will only be able to demonstrate that it achieved the best consideration possible by:
 - marketing the property;
 - obtaining an appropriate independent valuation; or
 - both of the above.
- This applies even for disposals by means of formal tender, sealed bids or auction and irrespective of whether the authority considers it necessary to obtain the Secretary of State's consent.
- However, in order to discharge the duty under section 123(2) there is no absolute requirement to market the land being disposed of, or to obtain an independent valuation.
- Ensure that any legal advice that is obtained on the disposal is considered, followed or both. Any decision to take a lower price than the one offered must be capable of justification.
- Satisfy itself that the land is held under powers that permit the land to be disposed of under the LGA 1972. Land that consists of, or forms part of, a common and is held or managed by the local authority in accordance with a local Act cannot be disposed of under [section 233\(2\)](#) of the TCPA 1990 without the Secretary of State's consent.

- When determining whether or not to dispose of land for less than the best consideration reasonably obtainable, obtain the views of a professionally qualified valuer as to the likely amount of any undervalue.
- Remember that all disposals need to comply with the European Commission's state aid rules. A disposal at less than best consideration means that the authority is providing a subsidy to the owner, developer or occupier of the land and property.
- Be aware that where the consideration received from a contractor is to carry out specific works, the issue may be caught by the public procurement regime.

Need for disposal at less than best consideration to comply with state aid rules

If publicly owned land is disposed of at less than best consideration, the local authority is providing a subsidy to the purchaser. The sale may be investigated by the European Commission to ensure that it does not breach state aid rules. A disposal must be notified to the Commission where the undervalue is not de minimis.

If the Council wishes to justify the price that the land has been sold for, it must be able to provide evidence showing that its decision to carry out the transaction was taken based on an economic evaluation comparable to that which a rational market economy operator would have taken into account. These issues would need to be considered carefully – and external advice almost certainly sought – in cases where the Council was wishing to apply itself to a disposal for less than best value.