

Land & Property Protocols- Review

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LAND AND PROPERTY PROTOCOL

OLDHAM COUNCIL CORPORATE PROPERTY WORKING ARRANGEMENTS

GENERAL PROTOCOL

This Protocol forms part of the Council's Constitution.

- **The Executive Director of Economy and Skills will have overall responsibility/authority for the Council's Corporate Land and Property Portfolio.**
- **The Director of Economic Development will be responsible for the management of all Council owned land and property assets as part of the Corporate Landlord function, in addition to delivery of all strategic regeneration projects**
- **When considering future service delivery, Services must seek advice from the Corporate Property Team in order to ensure that property implications are thoroughly understood and potential for corporate efficiencies maximised**
- **This will enable Services to make informed decisions and focus on service delivery and for the potential for land and property assets to support regeneration objectives and aspirations to be maximised.**
- **When considering any proposals regarding the Council's Land & Property Portfolio, due regard will be had to the Council's Co-operative Approach to Use of Council Assets Policy and views of Ward Members.**

1.0 POWERS OF ACQUISITION, APPROPRIATION, HOLDING & DISPOSAL OF LAND

The Council is empowered to acquire, hold, appropriate and dispose of land for its statutory purposes, by a variety of statutes. When preparing an acquisition, disposal or appropriation of land, officers must ensure that the transaction is undertaken using the appropriate powers of the Council for that land and having regard to all legal requirements, including statutory guidance.

Land acquisitions, appropriations and disposals should be identified through the Asset Management process within the governance structure of the Corporate Property Board.

The Capital Strategy should flow through from the asset management process and regeneration programme, as an outcome of reviewing future needs and the asset base/portfolio. It will also reflect proposals to dispose of, acquire or invest in land and property. The Medium Term Property Strategy (formerly Asset Management Plan) and Regeneration Strategy will inform the Capital Strategy, and individual capital actions/projects will be progressed through the governance of the Capital Investment Programme Board.

The authorisation to sign off land and property transactions will be in line with the Council's Constitution. See general protocol.

Property comments will be required in respect of all reports which have land and property implications.

2.0 GENERAL MANAGEMENT PRINCIPLES

The Council has adopted the following key management objectives and principles with regard to its land and property portfolio, which are reflected in the Terms of Reference for the Corporate Property Board:

- I. All land and property will be treated as a corporate resource.
- II. Land and property occupation costs and property utilisation will be managed as part of the Corporate Landlord function and monitored strategically through the Corporate Property Board.

Any assets considered surplus to the Council's requirements will, in the first instance, be reported to the CPB.

- III. Capital Receipts (see definition)
Capital Receipts come from the sale of the Council's assets.

In general capital receipts arising from the disposal of housing assets and for which account is made in the Housing Revenue Account (HRA) are governed by the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003. In summary the regulations require that:

- Receipts arising from Right to Buy (and similar) sales may be retained to cover the cost of transacting the sales and to cover the debt on the properties sold, but a proportion of the remainder must be surrendered to central Government;
- Receipts arising from all other disposals may be retained in full provided they are spent on affordable housing, regeneration or the paying of housing debt.

Where the sale of an asset leads to the requirement to repay grant, the capital receipt will be utilised for this purpose. Once these liabilities have been established and provided for, capital receipts will be available to support the capital programme as a corporate resource.

There will therefore be no ring fencing of capital receipts to specific projects with the exception of;

- Building Schools for the Future programme, where the ring fencing principle has previously been approved as part of project viability;
- Equity Loan Initiative which was established when HMR resources were ring fenced to the HMR programme;
- Saddleworth School as part of the Priority Schools Build Programme.

- IV. Land and property running costs, including those relating to carbon emissions, will be optimised to ensure expenditure associated with occupation is minimised, in accordance with the Council's Energy Policy.
- V. Land and property users have an obligation to significantly reduce running costs.
- VI. The Council will keep under review the business case to retain investment assets and the estate will be subject to annual review. Performance of the estate will be monitored via regular reporting to CPB by the Unity Partnership, which will include details of current and estimated future income, arrears and rate of return.
- VII. Land and property will be held to support service delivery – this may include being held to generate income to secure services subject to a business case being demonstrated or, for regeneration purposes, as part of a wider regeneration initiative such as education, adult social care, and economic development.
- VIII. The Council will maintain investment into its land and property infrastructure subject to available resources, in accordance with the Building Maintenance Policy The Corporate Landlord will report annually on investment required to maintain the portfolio/corporate estate to minimum standard of repair.
- IX. Partner organisations and particularly those in the public and voluntary sectors will be encouraged to adopt a joined up approach to service delivery and to share accommodation to reduce costs, in line with the Council's Co-operative Council aspirations/objectives, and aligned to the principles of One Public Estate
- X. The Capital Investment Plan will take into account whole life costing. Capital and revenue programmes will make provision for investment into the Borough's property infrastructure. Provision will depend on the financial resources of the Council and will be determined through the capital and revenue budget planning processes. (See definition of Capital Expenditure)
- XI. New buildings will be sustainable, based on whole life cycle costing and not initial capital outlay. All new buildings and those subject to significant refurbishment works must have a Building Research Establishment Environmental Assessment Method (BREEAM) rating of not less than good, and/or in accordance with the Council's Energy Policy.

The Council is committed to the principle of Corporate Landlord.

When considering the future of any property declared surplus to the Council's requirements, due regard will be had to the Council's Community Use of Assets Strategy.

4.0 DETAILED LAND AND PROPERTY PROTOCOL

4.1 Disposal of Land (Best Consideration)

The Local Government Act 1972 Section 123 provides that the Council may dispose of land in any manner it sees fit subject to the constraint that a disposal must be for the best consideration reasonably obtainable unless the consent of the relevant Secretary of State is obtained. A disposal includes a lease of more than 7 years or an assignment of a lease which has more than 7 years to run.

Generally, best consideration will be achieved by offering the land for sale subject to open competition. Section 123 applies to land held for most of the Council's statutory functions subject to certain exceptions such as disposal of land held for housing purposes, which are governed by the Housing Acts and for planning purposes which are governed by planning legislation. In such cases, specific legal advice should be sought at the earliest opportunity.

It is a principle of this protocol that all disposals of Council land will seek to secure the best consideration that can be reasonably obtained. Normally this will require open market sales of land and property, advertised appropriately and leases of land at market value. Any proposed sale that is not based on an open market disposal must be the subject of an EDRS report to justify an alternative disposal route.

4.2 Surplus Property

All land and property, whether held for service use or as part of the investment portfolio, will be subject to regular review. Should services change and consequently assets no longer be required for service delivery or, where a case cannot be made to hold non-operational property, they will be referred to the Corporate Property Board as surplus to the Council's requirements.

The Corporate Landlord will work with Directorates (via DMT's) to ensure earliest possible indications of potential change of direction in service delivery and implications for property needs.

4.3 Disposals of land at less than Best Consideration

It is expected that land will be sold for the best consideration reasonably obtainable. However, it is to be recognised that there will be circumstances where a local authority will consider it appropriate to dispose of land at less than best consideration. This is an opportunity to support the Council in achieving its ambitions as a Co-operative Council.

When considering disposing of land at an undervalue, Members and officers must remain aware of the Council's fiduciary duty to Council Tax payers.

In certain circumstances, the law provides that authorities may dispose of land at less than best consideration. This requires the consent of the relevant Secretary of State, unless a General Disposal Consent (issued by the relevant Secretary of State from time to time) may be relied on. Any decision to dispose of land at less

than best consideration may only be made subject to seeking the consent of the relevant Secretary of State where required.

The General Disposal Consent (England) 2003 provides a general consent removing the requirement for the Council to seek specific approval from the Secretary of State for a wide range of disposals at less than best consideration.

The Council have been granted consent in circumstances where:

- (A) the difference between the unrestricted value of the land to be disposed of and the proposed disposal price does not exceed £2million; and**
- (B) the Council considers that the purpose for which the land in question is to be disposed is likely to contribute to the achievement of any one or more of the following objectives 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 the economic well-being;**
 - (ii) the promotion or improvement of social well-being; and**
 - (iii) environmental well-being.**

It must be considered in each case whether a specific proposal to dispose of land at less than best consideration meets these criteria or continues to require specific consent under Section 123 of the Local Government Act 1972, or other legislation. Land held for specific Housing purposes is subject to additional regulation and early legal advice should be sought in such instances.

Any such proposed disposal of land at less than best consideration will need to consider the possibility that the proposed transaction may result in the giving of unlawful State Aid (European Union Treaty article 87(1)).

In determining whether or not to dispose of land for less than best consideration, the Council should obtain the view of a professionally qualified Chartered Surveyor (valuer) to determine the likely amount of the undervalue. Legal advice should also be obtained on the question of whether the disposal is capable of falling within the terms of the specific consent. In certain cases, it may be prudent to consult the District Auditor in relation to any action that is proposed.

In considering the application of the well being criteria under the General Disposal Consent, the Council must have regard to the Council's Corporate Plan, the Oldham Plan and Co-operative Council ambition and reasonably consider, via the Borough Treasurer, the extent, if any, to which the proposed disposal supports the aims and objectives therein.

In considering the financial considerations of any disposal at any undervalue, there must be evidence that the outcome will be equally beneficial as compared to a disposal at market value.

Any proposal to dispose of land at less than best consideration should in the first instance be referred to the Corporate Property Board for consideration of a business case and options appraisal for any transaction.

Following review by the Corporate Property Board, any proposed transactions at less than best consideration shall be approved as follows:

- Where the undervalue is below 80% by the Director of Economic Development, subject to consultation the Executive Director Economy and Skills.
- Where the undervalue is greater than 80% or above, by Cabinet, unless this is £50k or less, in which case it will be delegated to the Cabinet Member for Regeneration and City Region in consultation with the Director of Economic Development .

and in reporting to Cabinet, it is advisable that the following requirements are fulfilled:-

- Confirmation that the disposal will contribute positively to the Council's priorities.
- A statement that the benefits that the Council will derive from the proposed disposal cannot be achieved unless the sale takes place at undervalue and confirming that no reasonable alternative means of funding are available to the purchaser.
- Details of the proposed terms of the transaction which will ensure that the disposal will contribute to the achievement or improvement of the social, economic and environmental well being of the area.

The Cabinet must demonstrate that it has acted reasonably in approving undervalue transactions in order to be in a position to respond to any potential challenge. Regard must therefore be had to the Medium Term Property Strategy, the terms of the Council's Land and Property Protocols and the Council's fiduciary duty. For the avoidance of doubt, delegated decisions will also be subject to the above requirements.

4.4 Freehold Disposals

In order to protect its long term strategic interests there is a presumption that the Council will not enter into any freehold property transactions for non residential properties to a third party unless there are exceptional circumstances.

The preferred route of transfer of a Council property is via grant of a long lease. The long leasehold interest will contain various covenants regulating future use and repair of the property (if applicable).

Examples of exceptional circumstances would include those where:-

- The Council's corporate objectives can only be achieved by way of a freehold disposal.
- The Council does not own or retain any residual interest in any land or property within the immediate vicinity of the subject land or property which may encourage the Council to consider retaining a controlling interest.

In circumstances where the Council does own land or property in the vicinity of the sale property, then the Director of Economic Development is to consider the benefits of retaining any residual controlling interest against the implications of such action which may for example give rise to on-going estate management responsibilities, maintenance obligations or result in continuing financial costs or charges for the Council either at the time of consideration or at some future date.

4.5 Lettings

, No lettings should be carried out by Service Departments but all proposed lettings should be directed to the Director of Economic Development in order to protect the Council's interests and Health & Safety obligations..

No lettings shall be proposed without due regard having been had to the Council's Co-operative use of Council Assets – Policy and Procedure.

The taking of or the granting, renewal, assignment, transfer, surrender, taking of surrenders, review, variation or termination of any leases, licences, easements or wayleaves at considerations up to a maximum of £500,000 per annum or in return for a premium of up to £500,000 will be within the delegated authority of the Director of Economic Development in consultation with the Executive Director Economy and Skills, and in consultation with the relevant Cabinet Member where the decision is a key decision. Such transactions up to a maximum value of £250,000 will be within the delegated authority of the Head of Asset Management and Estates, in consultation with the Director of Economic Development and in consultation with the relevant Cabinet Member where the decision is a key decision. All delegated decisions to be made in conjunction with the Director of Finance and Director of Legal Services. The taking of or the granting, renewal, assignment, transfer, surrender, taking of surrenders, review, variation or termination of any leases, licences, easements or wayleaves at considerations of over £500,000 per annum or in return for a premium of over £500,000 shall be referred to Cabinet for approval.

Leases of over 7 years and assignments of leases with over 7 years to run, are defined in law as disposals. This means that the general requirement to dispose at the best consideration reasonably obtainable will apply to them. Any proposal to dispose at less than best consideration should be dealt with as outlined in the section on Disposal (Best Consideration) above.

Under this protocol, the terms of any proposed letting will be considered by reference to the asset category;

- a) Investment Portfolio** (including all surplus assets, and land and property held for Development/ Regeneration purposes) – the lettings will be based on commercial open market terms, at full market value provided that the Director of Economic Development may in consultation the Director of Finance and the Director of Legal Services authorise a short term let at below-market value where this has commercial justification, for example, to cover running costs prior to redevelopment.
- b) Operational Assets:**
- Private sector tenant – commercial open market terms, full market value
 - Public sector tenant/commissioning partner delivering public sector services – lettings will be at cost
 - Community sector tenant – terms of letting may range from at cost to free (dependent on structure of organisation, and with reference to the Council's Social Value Framework)

Concessionary lettings within the Investment Portfolio are not permitted and should Directorates wish to support such an arrangement it will be required to 'sponsor' / fund the concessionary rent through alternative funding to the level of full market rent. Flexibility will be provided in respect of schemes /initiatives specifically directed at supporting businesses, provided that a full business case is in place and the views of the Director of Economic Development are sought regarding such schemes.

With regard to commercial lettings, tenants should not commence occupation of premises in advance of either legal completion of lease or having sufficient legal measures in place to protect the Council's interest.

Rent collection and treatment of arrears should be in accordance with the Council's Protocol

4.6 Application of the EU Public Procurement Regime

Certain disposals of land may fall within the definition of "works" contained within the Public Contracts Regulations 2006, which give effect to European law on public procurement. This will need to be considered, for example, where the Council is providing land within a development scheme or is imposing obligations on a developer in order to meet its regeneration objectives, whether through the use of a Section 106 agreement or development agreement.

This remains a complex area of law and legal advice should be sought at an early stage to determine whether any proposed disposal to a developer should be advertised under the Public Contracts Regulations.

4.7 Decision Making

The disposal, acquisition or appropriation of land, including open space, is an executive decision. The Council's Constitution provides for executive decisions relating to land to be made as set out in this document.

A disposal of land that will either generate a capital receipt over £250,000, or result in loss/generation of income over £250,000 p.a. will be a key decision and will need to be publicised on the Key Decision Document prior to being submitted to the decision maker. (Full definition of 'Key Decision' within Constitution)

All decisions may be referred to Cabinet if the Chief Executive or the Executive Director in consultation with the relevant Cabinet Member, consider that a delegated decision should be referred to Cabinet.

In order to improve transparency, all property acquisitions will be reported to the Capital Investment Programme Board quarterly on a cumulative portfolio basis.

a) Transactions Subject to Cabinet Approval

1. All recommendations to dispose of land for less than the best consideration reasonably obtainable where the likely undervalue is greater than 80%
2. All recommendations to acquire individual plots of land, compulsorily or by agreement, or properties of any value that have not been approved within a scheme of development or regeneration project.
3. All recommendations to acquire by agreement, appropriate or dispose of land or property valued in excess of £500,000.

b) Transactions Delegated to the Executive Director, Economy and Skills, for Approval

Subject to paragraph 4.7 a) the Executive Director, Economy and Skills, is authorised, (in consultation with the relevant Cabinet Member where the decision is a key decision), to approve property acquisitions, appropriations and disposals of land valued between £250,000 and £500,000.

c) Transactions Delegated to the Director of Economic Development

Subject to paragraph 4.7 a) the Director of Economic Development, is authorised (in consultation with the relevant Cabinet Member where the decision is a key decision) to approve property acquisitions, appropriations and disposals of land valued at less than £250,000.

Member Notification

Ward Members will be consulted on any proposed land and property disposals, and their views will be recorded as part of the decision making process. Details of potential lease arrangements e.g. in terms of use, will be provided to Members at District Partnership level.

Delegated Decision Recording

Delegated decisions will be recorded in a standard format, a draft template is available.

4.8 Compulsory Acquisition of Land

Cabinet approval is required for any acquisition of land (or programme of acquisition) where it is proposed to use the Council's powers of compulsory acquisition. Any approval to acquire the same land by agreement should be sought from Cabinet at the same time as the approval to use compulsory powers.

4.9 Content of Reports

Cabinet reports seeking consent to dispose of or acquire land should include details of the interest held, appropriate site plans and valuation information provided by an appropriately qualified source.

Reports seeking to dispose of land at less than best consideration should in addition, address those matters set out in paragraph 4.3.

Reports should demonstrate that all relevant legal issues have been considered and addressed and that there is no legal barrier to prevent a decision from being taken.

All reports and business cases should incorporate Finance, Legal and Property comments.

Where approval is sought for a development scheme or regeneration project, a plan showing the individual properties whose acquisition it is proposed to seek under the scheme or project must be included in the report which seeks approval for the scheme.

4.10 Independent Valuations of Land/Property

With regard to those transactions for the disposal and acquisition of property that have not been exposed to the open market an independent valuation will be obtained in the following instances:

- Transactions involving the Council's Joint Venture Companies.
- Those transactions involving property of a specialist nature (where in house capability is not available).
- Any other transaction, which the Council would consider it prudent to obtain independent advice.
- Disposals at less than best consideration reasonably obtainable (with a potential undervalue of over 80%).

In order to ensure compliance with Section 123, it is recommended that all independent valuations should be carried out by qualified RICS surveyors from reputable surveying organisations or the District Valuation office.

4.12 Instructions to undertake property transactions

- For the avoidance of doubt, Legal Services will not accept instructions relating to property transactions from service directorates.
- Only transactions correctly approved as set out in paragraph 4.7 will be accepted.
- All instructions to Legal Services will be via the Council's property and asset management system (currently Concerto)

4.13 Office Moves

The Director of Economic Development will be responsible for all office accommodation as part of the wider Corporate Landlord function.

It should be noted that due to the significant long term investment involved, express written approval from the Director of Economic Development is required before considering the installation of IT Hubs in Council property.

4.14 Service Review

The Corporate Landlord will work with Divisional Management Teams across Services to ensure that strategic and operational property requirements are addressed

Definitions

Capital Expenditure

Section 16 of the Local Government Act 2003 + Regulation 29A of the Capital Financing Regulations (England) 2003 define capital expenditure as;

1. Expenditure that results in the acquisition, construction, or enhancement of a Fixed Asset
2. Expenditure where the Secretary of State has made a direction that it can be treated as capital expenditure e.g. exceptional items which would otherwise place an unreasonable strain on revenue budgets.

Capital Receipt

Section 9 (1) of the Local Government Act 2003

"a sum received by the authority in respect of the disposal by it of an interest in a capital asset"

Section 9 (2) defines a capital asset as:

"An asset is a capital asset if, at the time of the disposal, expenditure on the acquisition of the asset would be capital expenditure"

Capital receipts are restricted to use for

- Financing new capital investment
- Reducing borrowing under the Prudential Framework
- To pay a premium charged in relation to any amounts borrowed

- To meet any liability in respect of credit arrangements
- To meet disposal costs (not exceeding 4% of the receipt)

PROTOCOL ON DISPOSAL OF OPEN SPACE

Identify Open Space at an Early Stage

The key issue is to make sure that open space (sometimes referred to as public open space) is identified at the earliest possible stage of the disposal process.

Site Visit

Open space is not specifically dealt with in official copies on the Land Registry therefore, if there is uncertainty, a site visit is likely to be needed to determine conclusively whether or not the land should be dealt with as open space.

The surveyor making the site visit to the land should consider whether the land falls within the definition of open space contained in the Town and Country Planning Act 1990 (TCPA)

Advertisement of Open Space

Instructions to advertise a disposal of open space should be sent by the surveyor (email or paper copy) to Legal Services (fao Group Lawyer, -Corporate Group in the form of a memorandum giving the following information:

- cost code
- 4 plans of the land
- measurements of the land
- a copy of the decision to advertise the land
- name of the person/directorate to receive objections. This should be the instructing officer or other person in the instructing directorate.
any other relevant information.
- (if applicable) confirmation of whether the purpose of the disposal is to be specified in the notice (and, if it is, the description of the purpose to be included in the notice)

(The default position will be that the purpose of the disposal will not be specified (as this is not required by law) unless Legal Services are instructed to the contrary)

The instructions will be allocated to an officer in Legal Services who will draft the notice and arrange for it to be placed in a local newspaper for two (2) consecutive weeks.

Notices will follow standard format, the use of the word 'disposal' will be fully explained and (only if the purpose is to be specified in the notice – see above) the purpose of the 'disposal' will be clarified.

Twenty Eight (28) days will be allowed from the date of the final advertisement for objections to be made to the relevant Executive Director. 28 days is generally considered to be a reasonable minimum length of time for objections.

Decision Making

Decisions to dispose of open space must be made in two stages. The first stage report is to recommend disposal of the land in principle, subject to the advertising of the proposed disposal and allowing time for objections.

The second report will make recommendations for disposal or retention of the land having regard to any objections, which have been received to the proposed disposal.

Consideration of the objections and the decision to dispose of the open space should be referred to Cabinet; to the Executive Director Economy and Skills, or to the Director of Economic Development in accordance with the Land and Property Protocol.

Communication with Developers

In communicating with potential purchasers of open space, care must be taken to ensure that officers and/or members do not give the impression, either deliberately or inadvertently, that the need to advertise open space and consider objections is merely an administrative process which will be “rubber stamped”.

The decision is a public law decision and must be made in accordance with the principles of public law. In particular it must be reasonable to dispose of the land having considered objections and there must be no pre-determination of the decision.

Potential purchasers should understand that the Council is not able to make any commitment to enter into a contract for sale unless and until a proper decision to dispose of the land has been taken.

Careful consideration must always be given to whether in all the circumstances the purpose of the disposal is to be stated in the notice and if it is considered appropriate that it should clear instructions should be given to Legal Services (see above).

Timescale

The length of time that should be allowed for completion of the open space disposal procedure will vary depending on whether Cabinet or an Executive Director will consider the objections and make the decision as to disposal.

Instructing officers should allow at least 6 weeks between receipt of instructions by Legal Services and the end of the period for objections. Add on to this the time required to prepare and submit a report for decision.

Acquisition and Appropriation

Acquisitions (including compulsory acquisitions) and appropriations of open space to other purposes must apply the appropriate legal powers and duties for the purposes for which the open space is being acquired.

Legal advice should be sought before any proposed departure from this protocol.

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