



Disposal of Land by Local Authorities (Scotland) Regulations

General Guidance

May 2010

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DISPOSAL OF LAND BY LOCAL AUTHORITIES (SCOTLAND) REGULATIONS 2010 - ADDITIONAL NON-STATUTORY GUIDANCE

INTRODUCTION

1. The purpose of this guidance is to provide local authorities in Scotland with information that will assist when considering the disposal of land in accordance with section 74 of the Local Government (Scotland) Act 1973 as amended by section 11 of the Local Government in Scotland Act 2003. It supplements the statutory guidance at Annex B.

2. This guidance is not exhaustive and does not purport to be an authoritative interpretation of the law. It remains the responsibility of each local authority to seek 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. Scottish Ministers' aim is to reduce the bureaucratic burden on local authorities and give local authorities the freedom to exercise their own judgment and discretion in disposing of land to best meet local needs and priorities.

3. It is a legal requirement that local authorities sell land for the best consideration that can reasonably be obtained, unless section 74(2A) applies, or the disposal is made in accordance with regulations made under section 74(2C), which are attached at Annex A. The legislation recognises that there may be circumstances where local authorities consider it appropriate to dispose of land for a consideration less than the best consideration that can reasonably be obtained. This non-statutory guidance aims to assist local authorities in applying the Regulations.

CONSULTATION

4. Consultation took place in 2005 and again in 2007, on the draft Regulations, draft statutory "Guidance for Valuers" and non statutory guidance to assist local authorities in applying the Regulations. Local authorities and other interested parties were included in the consultation and all responses have been taken into consideration.

POWERS

Local Government (Scotland) Act 1973: Section 74

5. Local authorities are given power under section 74 of the Local Government (Scotland) Act 1973 (the 1973 Act) to dispose of land^a in any manner they wish, subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to the "best consideration" rules.

6. Section 74 applies to land held by local authorities generally but disposals of land held for housing purposes within the Housing Revenue Account require additional consent from the Scottish Ministers under section 12 of the Housing

^a As defined in section 235(1) of the Local Government (Scotland) Act 1973: "Land includes land covered with water and any interest right or servitude in or over land."

(Scotland) Act 1987. Section 12 consent is not required for houses, which are exempt from section 74 if section 14 of the 1987 Act has effect in relation to them (see section 12(7)).

Local Government in Scotland Act 2003: Section 11

7. Section 11 of the Local Government in Scotland Act 2003 amends section 74 of the 1973 Act and sets out that the Scottish Ministers may, by regulations, provide the circumstances in which local authorities may dispose of land for a consideration less than the best consideration that can reasonably be obtained.

The Disposal of Land by Local Authorities (Scotland) Regulations 2010

8. The Disposal of Land by Local Authorities (Scotland) Regulations 2010 came into force on 1 June 2010. The Regulations are at Annex A.

9. The procedure applies 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. It applies whether the disposal is managed on the open market or by private treaty or dealt with internally or by external consultants.

Local Government (Scotland) Act 1973: Section 74 – statutory guidance

10. In determining the best consideration that can reasonably be obtained, the local authority must obtain a valuation report from a suitably qualified valuer. Statutory Guidance, issued under section 74 of the Local Government (Scotland) Act 1973 (attached at Annex B), provides guidance on what are suitable qualifications for a valuer and what factors are to be taken into account by the valuer in their valuation.

GENERAL CONSIDERATIONS

11. Regulation 4(2) sets out purposes in pursuance of which a decision by a local authority that it is appropriate to dispose of land at less than best consideration that can reasonably be obtained might be justified. The Regulations require that local authorities, before deciding in favour of such disposal, appraise and compare the costs and other disbenefits and benefits of the proposal. In so doing local authorities should undertake an assessment of the proposed disposal taking into account all relevant factors, all available options and all relevant information. It is recommended that local authorities demonstrate that there has been a rigorous evaluation, supported by evidence that makes clear how they have reached their decision.

12. Local authorities are, of course, required to fulfil their statutory duties under Best Value as set out in the Local Government in Scotland Act 2003. The Land Disposal regulations are consistent with this duty to secure Best Value, and relevant aspects of this duty include:

- Making the best use of public resources, including land and property;
- Being open and transparent in transactions;

- Ensuring sound financial controls are in place to minimise the risk of fraud or error;
- Assessing the full financial consequences of decisions at an appropriate level before major financial decisions are taken or commitments entered into;
- Demonstrating responsiveness to the needs of communities, citizens, customers and other stakeholders, where relevant.

13. All local authorities should have arrangements in place, including schemes of delegation where appropriate, to deal with disposals of land at less than best consideration.

14. Local authorities are expected to be open, transparent and fair in all of their transactions. For example should the local authority hold an open competition for land where they would accept a lower offer for a 'social use', the expectation is that the authority have made reasonable efforts to let potentially interested parties know.

15. Annex C of this guidance provides an example of the criteria local authorities might wish to draw on when assessing a proposed disposal.

VALUATION

16. For the purposes of assessing the value of a sale, lease or other disposal, local authorities are required to have regard to the Statutory Guidance on the duty to appoint and instruct a suitably qualified valuer. 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.

OTHER CONSIDERATIONS

EC State Aid rules and procurement issues

17. Local authorities are reminded that all disposals must 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.

18. 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.

Example

19. If local authorities decide that the best way to deliver their services is by using arms-length external organisations, for example a trust or a Charitable Company Limited by Guarantee (CCLG), they would need to strike a careful balance between potentially conflicting requirements associated with European Union (EU) procurement; principles of charity law; issues associated with State aid; and the need to demonstrate that there would be a supply of services by the arms length organisation to the authority for VAT purposes.

Key principles

20. It is considered that there are two strands of EU law by reference to which the arrangements relating to the supply of services by a CCLG to an authority could be regarded as outwith the scope of EU procurement requirements:

- The principles arising from the Altmark case – as relating to the provision of services of general economic interest; and
- The principles established through the Teckal case – which allow a contracting authority to enter into arrangements for the supply of services by a body controlled by that authority, providing certain requirements are met.

IMPORTANT: This is only intended as useful general guidance and is not of any legal effect. Local authorities will need to obtain their own legal advice on these issues if this is required, for the particular circumstances involved.

21. 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.**

Crichel Down Rules

22. If the land has been acquired by or in the shadow of compulsory purchase powers The Crichel Down Rules^a (which the Government has commended to Councils) state that the asset has to be offered back to the owner at market value (best price reasonably obtainable, including any special value^b from a person with a special interest, such as a former owner).

Housing Revenue Account

23. It should be noted land or other assets held on the Housing Revenue Account (HRA) will still require the consent of the Scottish Ministers under section 12 of the

^a The Crichel Down Rules apply to land which was acquired by, or under a threat of, compulsion by government departments. Any surplus property is to be initially offered to the former owner at open market value in advance of open marketing. The Government has commended these rules to councils [See *Circular 38/1992: Disposal Of Surplus Government Land - The Crichel Down Rules*].

^b Special Value – an amount above the market value that reflects particular attributes of an asset that are only of value to a special purchaser

Housing (Scotland) Act 1987, though as set out in paragraph 6 disposals of houses are treated differently in that section 74 does not apply to them. Applications seeking Ministerial consent for disposals held on the HRA should be sent to the Scottish Government, Housing and Regeneration Division, Social Housing, Area 1-H South, Victoria Quay, Edinburgh, EH6 6QQ.

Annex A

SCOTTISH STATUTORY INSTRUMENTS

2010 No. 160

LOCAL GOVERNMENT

**The Disposal of Land by Local Authorities (Scotland) Regulations
2010**

Made-----20th April 2010

Laid before the Scottish Parliament----- 21 April 2010

Coming into force----- 1 June 2010

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 74(2B), (2C) and (2D) of the Local Government (Scotland) Act 1973(a) and all other powers enabling them to do so.

In accordance with section 74(2H) of that Act, they have consulted with such associations of local authorities and such other persons as they have thought fit.

Citation, commencement and interpretation

1. These Regulations may be cited as the Disposal of Land by Local Authorities (Scotland) Regulations 2010 and shall come into force on 1st June 2010.

Threshold amount and marginal amount

2.—(1) The threshold amount for the purposes of section 74(2A)(a) of the Local Government (Scotland) Act 1973 is £10,000.

(2) The marginal amount for the purposes of section 74(2A)(b) of that Act is 25% of the best consideration that can reasonably be obtained.

Procedure

3.—(1) The procedure for a disposal of land for a consideration less than the best that can reasonably be obtained is as follows.

(2) The local authority must –

- (a) appraise and compare the costs and other disbenefits and the benefits of the proposal; and
- (b) determine that the circumstances set out in regulation 4 are met.

Circumstances

4.—(1) The circumstances in which a local authority may dispose of land for a consideration less than the best that can reasonably be obtained are that–

- (a) the local authority is satisfied that the disposal for that consideration is reasonable, and

(^a) 1973 c.65; subsections 2(A) to (2H) were inserted by the Local Government in Scotland Act 2003 asp 1, section 11(1)(b)

Disposal of Land by Local Authorities (Scotland) Regulations 2010 – Guidance

- (b) the disposal is likely to contribute to any of the purposes set out in paragraph (2), in respect of the whole or any part of the area of the local authority or any persons resident or present in its area.
- (2) Those purposes are the promotion or improvement of–
- (a) economic development or regeneration;
 - (b) health;
 - (c) social well-being; or
 - (d) environmental well-being.
- (3) In this regulation, references to ‘well being’ are to be construed as for the purposes of section 20 of the Local Government in Scotland Act 2003(a).

JOHN SWINNEY

A member of the Scottish Executive

St Andrew’s House,
Edinburgh
20TH April 2010

(a) 2003 asp 1

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision in relation to the disposal by local authorities of land, for a consideration less than the best that can reasonably be obtained.

Under section 74 of the Local Government (Scotland) Act 1973 (“the 1973 Act”) in its original form, a local authority required the consent of the Scottish Ministers (formerly of the Secretary of State) to dispose of land for a consideration less than the best that can reasonably be obtained.

The interpretation of “land” in the 1973 Act is that it includes land covered with water and any interest, right or servitude in or over land.

Section 74(2A), permits disposals at less than best consideration where either the best consideration that can reasonably be obtained is less than the threshold amount, or the difference between that consideration and the proposed consideration is less than the marginal amount. Regulation 2 sets the threshold amount at £10,000 and marginal amounts at 25% of the best consideration.

Regulation 3 provides that a disposal for a consideration less than the best that can reasonably be obtained may take place where the local authority has carried out an appraisal of the proposed disposal, and the circumstances in Regulation 4 are met.

Regulation 4 provides that the disposal may take place if the local authority is satisfied that the disposal is reasonable and that the disposal contributes to one or more of a list of purposes in paragraph (2).

Annex B

Statutory Guidance on the Duty to Appoint a Suitable Qualified Valuer

LOCAL GOVERNMENT SCOTLAND ACT 1973 – SECTION 74 DISPOSAL OF LAND BY LOCAL AUTHORITIES (SCOTLAND) REGULATIONS 2010

The Guidance

Statutory Guidance issued under section 74 of the Local Government (Scotland) Act 1973, as amended by section 11 of the Local Government in Scotland Act 2003.

The duty to appoint and instruct a suitably qualified valuer to determine the value of best consideration for land and the factors to be taken into account, or not to be taken into account, in undertaking that valuation.

1. Introduction

1.1 This guidance is issued by Scottish Ministers under section 74 of the Local Government (Scotland) Act 1973, as amended by section 11 of the Local Government in Scotland Act 2003. It is the duty of a local authority to have regard to this guidance in appointing and instructing a suitably qualified valuer for the purposes of assessing the best consideration that can reasonably be obtained by a local authority. This provides guidance on what are suitable qualifications for a valuer and what factors are to be (or not to be) taken into account by the valuer in assessing the consideration.

1.2 The Guidance and Regulations issued under section 74 (as amended) are relevant to local authorities, i.e. councils constituted under section 2 of the Local Government etc (Scotland) Act 1994.

2. A Suitably Qualified Valuer

2.1 When determining the best consideration that can reasonably be obtained for land that may be disposed of for less than best consideration local authorities should appoint and instruct a valuer who is a chartered Member of, or is authorised to practice by, the Royal Institution of Chartered Surveyors (RICS). The valuer should be suitably experienced in the valuation of the type of property concerned and with a reasonable knowledge of the locality concerned.

3. Factors to be taken into account when assessing best consideration

3.1 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 RICS Valuation Standards (“The Red Book”).

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 arms 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.