

# 5

2011

## DISPOSAL OF SURPLUS GOVERNMENT LAND - THE CRICHEL DOWN RULES

# ■ circular

## **Scottish Planning Series**

### **PLANNING CIRCULAR 5 2011**

# **DISPOSAL OF SURPLUS GOVERNMENT LAND - THE CRICHEL DOWN RULES**

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**Circular 5/2011**

**DISPOSAL OF SURPLUS GOVERNMENT LAND - THE CRICHEL DOWN RULES**

This circular supersedes circular 38/1992

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For further information, or if you have questions about the contents of this circular, please contact the Scottish Government's Property Advice Division:

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## **Introduction**

1. This circular sets out the revised non-statutory arrangements known as the 'Crichel Down Rules' (the Rules) under which surplus Government land which was acquired by, or under a threat of, compulsion should be offered back to former owners and their successors (see Rules 12 and 13 below). For the sake of brevity, all bodies to whom any one or more of the Rules apply are referred to as 'departments', which includes UK Government Departments, Scottish Government Directorates, including Executive Agencies (and/or other non-departmental public bodies ("NDPBs")). See paragraphs 3 and 4 below. The Appendix gives more information.
2. These Rules apply to land and property in Scotland (hereafter, for the sake of brevity, referred to as 'land').
3. Detailed guidance on procedures to be followed by departments when disposing of surplus land are set out in the Scottish Public Finance Manual (Disposal of Property, Plant and Equipment) or, where applicable, the NHS Property Transactions Handbook, which are based upon the HM Treasury publication, Managing Public Money.
4. So far as local authorities and statutory undertakers are concerned, it is expected that they follow these Rules. It is recommended that the Rules are applied by bodies in the private sector to which public land holdings have been transferred, for example, on privatisation. Their approach when disposing of surplus land must, however, depend on their particular functions and circumstances. For instance, exception (5) under paragraph 15 below would, in the Scottish Ministers' view, apply to disposals by statutory bodies with specific primary rather than incidental functions to develop or redevelop land, and to disposals by their successor bodies. In such cases, land would only be subject to the Rules where it was without development potential and, therefore, genuinely surplus in relation to the purpose for which it was originally acquired.
5. It is the view of the Scottish Ministers that where land is to be transferred to another body which is to take over some or all of the functions or obligations of the department that currently owns the land, the transfer itself does not constitute a disposal for the purpose of the Rules. Disposals for the purposes of Partnership projects between public and private sector organisations do not fall within the Rules and the position of any land surplus once the project has been completed would be subject to the Partnership contract. Similarly, any disposals of property from legacy PPP/PFI projects do not fall within the Rules and would be subject to the terms of the PPP/PFI project.

## **The Land and property to which the Rules apply**

6. The Rules apply to all land if it was acquired by or under threat of compulsion. A threat of compulsion will be assumed in the case of a voluntary sale if power to acquire the land compulsorily existed at the time i.e. the acquiring department has the power to compulsorily acquire land for that purpose, even if a confirmed Compulsory Purchase Order is not in place. This does not apply if the land was

publicly or privately offered for sale immediately before the negotiations for acquisition.

7. The Rules also apply to land acquired under the blight provisions: Part V of Town and Country Planning (Scotland) Act 1997. The Rules do not apply to land acquired by agreement in advance of any liability under these provisions.

8. The Rules apply to the disposal of all heritable interests in land.

9. Disposal of land acquired under the Small Landholders (Scotland) Acts 1886 to 1931 for land settlement purposes is regulated by statutory provisions. If land is not required for sale to sitting tenants it has to be offered back to the original owner, or his or her successor in title, at a price to be determined, failing agreement, by the Scottish Land Court. Arrangements for such disposals must comply with the statutory provisions which are, generally, more onerous than these Rules.

### **The general Rules**

10. Where a department wishes to dispose of land to which the Rules apply, former owners will, as a general principle, be given a first opportunity to repurchase the land previously in their ownership, provided that it has not been materially changed in character since acquisition. The character of land may be considered to have 'materially changed' where, for example, dwellings or offices have been erected on open land, mainly open land has been afforested, where substantial works to an existing building have effectively altered its character or where substantial demolition and site clearance work has been undertaken. The erection of temporary buildings on land, however, is not necessarily a material change. When deciding whether any works have materially altered the character of land, the disposing department should consider the likely cost of restoring the land to its original use. In establishing if there has been material change, it is the physical characteristics of the property which are to be considered and, for example, obtaining an alternative planning consent in respect of the land does not constitute a material change.

11. Where only part of the land for disposal has been materially changed in character, the general obligation to offer back will apply only to the part that has not been changed.

### **Interests qualifying for offer-back**

12. Land is to be offered back to the former owner. If the land was, at the time of acquisition, subject to a long lease and more than 21 years of the term would have remained unexpired at the time of disposal, departments may, at their discretion, offer the heritable interest to the former leaseholder, if the former owner is not interested in buying back the land.

13. In these Rules 'former owner' may, according to the circumstances, mean former heritable proprietor and his or her successor. 'Successor' means the person on whom the property, had it not been acquired, would clearly have devolved under the former owner's will or intestacy; and may include any person who has succeeded,

otherwise than by purchase, to adjoining land from which the land was severed by that acquisition.

### **Time horizon for obligation to offer-back**

14. The general obligation to offer back will not apply to the following types of land:

- i. agricultural land acquired before 1 January 1935;
- ii. agricultural land acquired on or after 30 October 1992 which becomes surplus, and available for disposal more than 25 years after the date of acquisition;
- iii. non-agricultural land which becomes surplus, and available for disposal more than 25 years after the date of acquisition.

The date of acquisition is the date of entry where acquired by conveyance or the date of vesting, if taken under a general vesting declaration.

Note:

The 25 year time limit for the obligation to offer back agricultural land was introduced in circular 38/1992, which was published on 30 October 1992, giving rise to the date cited in Rule 14 (ii).

### **Exceptions from the obligation to offer-back**

15. The following are exceptions to the general obligation to offer back:

1. Where it is decided on specific Ministerial authority that the land is needed by another department i.e. that it is not, in a wider sense, surplus to Government requirements. If, however, following any such transfer, the land, or part thereof, is deemed surplus to requirements then the obligation to offer-back under these Rules must be taken into account prior to any further disposal.
2. Where it is decided on specific Ministerial authority or, in the case of a local authority, where it is decided by a resolution of that local authority or by the exercise of a delegated power, that for reasons of public interest, the land should be disposed of as soon as is practicable to a local authority or other body with compulsory purchase powers. However, transfers of land between bodies with compulsory purchase powers may only be treated as exceptions to the obligation to offer-back if, at the time of transfer, the receiving body could have bought the land compulsorily if it had been in private ownership. Appropriations of land within bodies such as local authorities for purposes different to that for which the land was acquired may be treated as exceptions if the body has compulsory purchase powers to acquire land for the new purpose. If, however, following any such transfer or appropriation, the land, or part thereof, is deemed surplus to requirements then the obligation to offer-back to the original owner under these Rules must be taken into account prior to any further disposal.

3. Where, in the opinion of the disposing body, the area of land is so small that its sale would not be commercially worthwhile.
4. Where it would be mutually advantageous to the department and an adjoining owner to effect minor adjustments in boundaries through an exchange of land.
5. Where it would be inconsistent with the purpose of the original acquisition to offer the land back; as, for example, in the case of:
  - i. land acquired under section 57 of the Agriculture (Scotland) Act 1948;
  - ii. land which was acquired under the Distribution of Industry Acts or the Local Employment Acts, or under any legislation amending or replacing those Acts, and which is resold for private industrial use;
  - iii. where dwellings are bought for onward sale to a Registered Social Landlord (RSL);
  - iv. where sites are purchased for economic development purposes by Scottish Enterprise or Highlands and Islands Enterprise.

6. Where a disposal is in respect of either:

- i. a site for development or redevelopment, which has not materially changed since acquisition, and which comprises two or more previous land holdings; or
- ii. a site which consists partly of land which has been materially changed in character and part which has not

and there is a risk of a fragmented sale of such a site realising substantially less than the best price that can reasonably be obtained for the site as a whole i.e. its market value. In such cases, however, any former owner who has remained in continuous occupation of the whole or part of his or her former property (by virtue of tenancy or licence) will be given a right of first refusal of that property or part of property, as the case may be. In the case of land to which i. above applies, special consideration will be given to a consortium of former owners which has indicated a wish to purchase the land collectively. However, if there are competing bids for a site, it will be disposed of on the open market.

7. Where the market value of land is so uncertain that clawback provisions would be insufficient to safeguard the public purse and where competitive sale is advised by the department's professionally qualified, appointed valuer and specifically agreed by the responsible Minister.

16. Where it is decided that a site does fall within any of the exceptions in Rule 15 or the general exception relating to material change (see Rule 10) the former owner will



be notified of this decision using the same procedures for contacting former owners as indicated in paragraphs 18 – 20 below. (However, there is no requirement for the disposing department to await a response.)

### **Procedures for disposal**

17. Where it is decided that property to be disposed of is, by virtue of these Rules, subject to the obligation to offer back, departments should follow the appropriate procedures described in paragraphs 18 - 25 below.

#### **Where former owner's address is known**

18. Where the address of a former owner is known, a recorded delivery letter will be sent by or on behalf of the disposing department, inviting the former owner to buy the property at the valuation to be undertaken by the department's professionally qualified, appointed valuer. The former owner will be given 2 months from the date of that letter to indicate an intention to purchase. Where there is no response or the former owner does not wish to purchase the property, the disposing department will make arrangements for its disposal, and the former owner will be informed that this step is being taken.

If the former owner wishes to purchase the land there will be a further period of 3 months to agree terms, including price, from the date of receipt of the former owner's notification of intention to purchase. (See Rules 24 and 25 for the process for any resale.)

#### **Where address is unknown**

19. Where the former owner is not readily traceable the disposing department will contact the solicitor or agent who acted for him or her in the original transaction. If a present address is then ascertained the procedure described in Rule 18 above should be followed. If the address is not ascertained, however, the department will attempt to contact the former owner by advertisement, as set out in Rule 20 below, informing the solicitor or agent that this has been done.

20. Advertisements inviting the former owner to contact the disposing department will be placed as follows:

- a. for all land (including houses), in not less than two issues of at least one local newspaper circulating in the area, in the **Edinburgh Gazette and on the disposing department's website**;
- b. In addition, for agricultural land in not less than two issues of the **Scottish Farmer** or such other appropriate publication(s).

Site notices announcing the disposal will be displayed on, or near, the site.

#### **Responses to invitation to purchase where address unknown**

21. Where **no intention to purchase** is indicated by or on behalf of a former owner within 2 months of the date of the latest advertisement which is published as

described in Rule 20 above, the land will be disposed of, following the disposing department's procedures for the disposal of surplus property.

22. Where an **intention to purchase** is expressed by or on behalf of a former owner within 2 months of the date of the latest advertisement, he or she will be invited to agree terms, including price, within the further period, which is described in Rule 18 above. If there is no agreement, the property will be disposed of under the disposing department's procedures for the disposal of surplus land.

### **Special procedure where boundaries of agricultural land have been obliterated**

23. The procedures described in the Annex to these Rules should be followed where changes, such as the obliteration of boundaries, prevent land which is still predominantly agricultural in character from being sold back as agricultural land in its original parcels.

### **Terms of resale**

24. Disposals to former owners under these arrangements will be at market value, as advised by the disposing department's professionally qualified, appointed valuer. The parties will have three months to agree the price. If, at the end of that time, there is no agreement, the matter is to be referred, either jointly or by either party, to an independent expert for determination. Any such expert is to be a suitably qualified and experienced valuer who meets the requirements of the International Valuation Standards (IVS). In the event that agreement is not reached on the appointment of the independent expert, the matter is to be referred to the Chairman of the Royal Institution of Chartered Surveyors in Scotland to make an appointment. The independent expert will offer the parties the opportunity to make representations prior to his determination and will have the discretion to award the costs of his appointment. If the prospective purchaser does not wish to refer the matter to an independent expert for determination, the disposing department may withdraw from the negotiations and seek to dispose of the property under its normal procedures for the disposal of surplus property.

25. As a general rule, departments should obtain planning consent before disposing of properties which have potential for development. But where it would not be practicable or appropriate for departments to take action to establish the planning position at the time of disposal; or where it seems that the likelihood of obtaining planning permission (including a more valuable permission) is not adequately reflected in the market value, the terms of sale should include clawback provisions in order to fulfil the Government's obligation to the taxpayer to obtain the best price. The precise terms of clawback will be a matter for negotiation in each case.

### **Resource implications for local authorities**

26. Local authority disposals are carried out under a number of different statutory powers, some of which require authorities to obtain consent for a particular type of transaction; for example, a disposal of land held on the Housing Revenue Account under section 12(7) Housing (Scotland) Act 1987. Where local land values for the type of property in question are reasonably stable, it should not be difficult for

authorities to offer land back at its market value, as described in these Rules, and comply with the statutory requirement to dispose of land for the best consideration that can reasonably be obtained, or follow the appropriate procedures for disposals at less than the best consideration that may reasonably be obtained.

**ANNEX 1** (see *Rule 23*)

**Special procedures where boundaries of agricultural land have been obliterated**

- a. Each former owner will be asked whether he or she wishes to acquire any land.
- b. Where former owners express interest in doing so, disposing departments will, subject to what is stated in c. to e. below, make every effort to offer them parcels which correspond, as nearly as is reasonably practicable, in size and situation to their former land.
- c. In large and complex cases, or where there is little or no room for choice between different methods of dividing the land into lots, it may be necessary to show former owners a plan indicating definite lots. This might be appropriate where, for example, the character of the land has altered; where there are existing tenancies; or where departments might otherwise be left with unsellable lots.
- d. Where more than one former owner is interested in the same parcel of land it may be necessary to give priority to the person who owned most of the parcel; or, in the case of near equality, to ask for tenders from interested former owners. Departments should, however, make every effort to offer each interested former owner at least one lot.
- e. If attempts to come to a satisfactory solution by dealing with former owners end in complete deadlock, departments will sell the land by public auction in the most convenient parcels and will inform the former owners of the date of the auction sale.

## **APPENDIX** (see paragraph 1 of the Rules)

### **GUIDANCE FOR DEPARTMENTS CHANGES FROM THE 1992 RULES**

1. Several changes have been made to the Rules.
2. Substantive changes have been made to the following Rules:-

**Rule 2** a new Rule to set out the territorial application of the revised Rules;

**Rule 3** updated references to guidance on the general procedures to be followed when disposing of surplus land;

**Rule 4** revision of the former Rules 3 and 4 dealing with the application of the Rules to local authorities, statutory bodies and certain bodies in the private sector;

**Rule 5** a new rule dealing with land transfers from public bodies to other bodies, PFI/PPP projects;

**Rule 6** clarifying the circumstances under which the threat of compulsion would be assumed;

**Rule 7** formerly Rule 6, dealing with land acquired under blight provisions;

**Rule 8** clarification on the land interests to which the Rules apply;

**Rule 10** formerly Rule 9, the references to ‘agricultural land’ and ‘urban site’ have been deleted and added further clarification on the definition of ‘material change’;

**Rule 12** formerly Rule 11, clarification of the arrangements for offering back land that at the time of acquisition was subject to a long lease;

**Rule 14** formerly Rule 13, defines the date of acquisition as the date of entry if under a conveyance or date of vesting if under a general vesting declaration;

**Rule 15** formerly Rule 14, clarifies the handling of transfers of land between bodies with compulsory purchase powers, the treatment of small areas of land, provides examples where the offer back would be inconsistent with purpose of the original acquisition, the treatment of consortia and competing bids;

**Rule 16** new Rule dealing with the notification of former owners if any of the exceptions to the Rules apply;

**Rule 18** revises the time given to agree terms, including price, to 3 months and refers to Rules 24 and 25 for the process for negotiating the resale;

**Rule 20** revises the arrangements for advertisements;

**Rule 24** removes any confusion on whether the market value is to be determined or negotiated and introduces a mechanism to refer dispute on price to an independent third party for determination.

**Rule 26** updated to reflect current legislation and guidance.

### **BODIES TO WHICH THESE RULES APPLY (RULE 2)**

3. These Rules apply to all UK Government Departments, Scottish Government Directorates, executive agencies and NDPBs in Scotland and other organisations in Scotland which are subject to a power of direction by a Minister.

## **APPLICATION OF THE RULES BY LOCAL AUTHORITIES AND STATUTORY BODIES (RULE 4)**

4. Local authorities and other statutory bodies which are not subject to a Ministerial power of direction (for example, statutory undertakers) but who have powers of compulsory purchase, or who hold land which has been compulsorily purchased, are expected to follow the Rules. The previous practice amongst such authorities has been very variable, but the Government would like there to be a high level of compliance. Former owners of surplus land will be likely to see as inequitable a system which requires Government Departments and others to offer back surplus land but not local authorities. A typical example would be on road schemes, where those who had lost land to a trunk road scheme would have surplus land offered back, while those who had lost land to a local road scheme might not.

5. The approach of these bodies when disposing of surplus land must, however, depend on their particular functions and circumstances. For example, in the case of exceptions to the Rules which depend upon Ministerial authority (Rules 15(1), 15(2) and 15(7)) local authorities will have to rely on the decision reached by resolution of that local authority or by exercise of a delegated power. For other statutory bodies the decision will rest with the Chairman. For disposals at the end of Partnership or PPP/PFI agreements, departments may wish to seek legal advice in order to take account of the Rules.

## **THE THREAT OF COMPULSION (RULE 6)**

6. A 'threat of compulsion' should be assumed in the case of a voluntary sale if the power to acquire the land compulsorily existed at the time. This means that the acquiring department did not need to have instituted compulsory purchase procedures or even to have actively 'threatened' to use them for this Rule to apply. It is enough for the acquiring authority to have statutory powers available if it wished to invoke them. For example, land acquired by a roads authority for the purposes of building a road is acquired under the threat of compulsion because such an authority could use its powers under the Roads (Scotland) Act 1984 to make a CPO. The only exception is where the land was publicly or privately offered for sale immediately before the negotiations for acquisition.

## **WHAT CONSTITUTES A DISPOSAL? (RULE 8)**

7. Disposals for the purposes of granting PFI/PPP projects do not fall within the Rules, see Rule 5. The Scottish Public Finance Manual makes it clear that sale is normally preferable to lease but there may be cases where a short-term lease is appropriate if there is little prospect of an early sale.

## **WHAT IS A MATERIAL CHANGE OF CHARACTER? (RULE 10)**

8. The Rules refer to a 'material change in character' to the land available for disposal. In the original Commons debate on the Crichel Down case in 1954, 'material change' was envisaged as relating to agricultural land and was illustrated by the example of an airfield having been built with concrete runways and buildings and where the original ownership boundaries have been lost. However, other examples of a material change of character could include the erection of buildings on bare, open land (although it should be noted that the erection of temporary buildings is not necessarily a material change); the afforestation of open land; or the

undertaking of substantial works to an existing building, the demolition of a building or the installation of underground infrastructure or services to a site.

#### **LAND SUBJECT TO A LONG LEASE (RULE 12)**

9. The property should always be offered back to the former owner first. However, this Rule gives the option of offering to the former long leaseholder if the former owner does not wish to reacquire. If neither party is interested in purchasing, then the property should be disposed of.

#### **WHO IS A SUCCESSOR? (RULE 13)**

10. A successor under a will includes those who would have succeeded by means of a second or subsequent will or intestacy. The qualification 'otherwise than by purchase' may be relaxed if the successor to adjoining land acquired it by means of transfer within a family trust, including a transfer for monetary consideration.

#### **WHEN IS THE DATE OF ACQUISITION? (RULE 14)**

11. Rule 14 says that the date of acquisition is the date of entry where acquire by conveyance, or the date of vesting if taken under a general vesting declaration. Problems may arise where land has been requisitioned several (sometimes 10 or more) years before the title has transferred. Difficulties can be caused where the two dates straddle a time horizon, so that a disposal would fall within the Rules if the date of transfer was used, but not if the date of requisition was. To avoid these difficulties the date of acquisition is therefore taken to be the date of entry or date of vesting.

#### **WHAT ARE 'REASONS OF PUBLIC INTEREST'? (RULE 15(2))**

12. The courts have held that rule 15(2) (formerly 14(2)) does not require these to be matters where life or limb are at risk. In practice, this exception may be invoked where the body to which the land is to be sold could have made a compulsory purchase order to obtain it had it been owned by a third party (See *R-v-Secretary of State for the Environment, Transport and the Regions ex p. Wheeler*, The Times 4 August 2000).

#### **SMALL AREAS OF LAND (RULE 15(3))**

13. This exception provides departments with discretion as to whether to offer land back when the administrative costs in seeking to offer land back are out of proportion to the value of the land. It will also cover cases where there is a disposal of a small area of land without a sale.

#### **WHEN IS IT INCONSISTENT WITH THE PURPOSE OF THE ORIGINAL ACQUISITION TO OFFER LAND BACK? (RULE 15(5))**

14. The sections of the Agriculture Act 1948 referred to in this Rule deal with the dispossession of owners or occupiers on grounds of bad estate management and the acquisition and retention of land to ensure the full and efficient use of the land for agriculture. In addition to the statutory examples quoted, the general rule is that land purchased with the intention of passing it on to another body for a specific purpose is not surplus and therefore not subject to the Rules. Typical examples would be sites of special scientific interest (SSSIs) purchased for management reasons; a listed building purchased for restorations; properties purchased by a local authority for redevelopment which are sold to a private developer partner; or land purchased by

Scottish Enterprise or Highlands and Islands Enterprise and sold for economic development purposes and redevelopment. This exception will apply to disposals by statutory bodies with specific primary rather than incidental functions to develop or redevelop land, and to disposals by their successor bodies. In such cases, land would only be subject to the Rules where it was without development potential and, therefore, genuinely surplus in relation to the purpose for which it was originally acquired.

#### **TRANSFER TO THE PRIVATE SECTOR**

15. Rule 14(6) of the 1992 Rules, (which would have been Rule 15(6) in these Rules) has been deleted as such transfers are now dealt with by Rule 5, which makes it clear that land transferred to another body for the same functions is not surplus.

#### **DEFINITION OF PROFESSIONALLY QUALIFIED APPOINTED VALUER (RULE 15(7), 18 AND 24)**

For the purposes of these rules a professionally qualified valuer is someone who meets the requirements of International Valuation Standards (IVS).

#### **PROCEDURES FOR DISPOSAL (RULES 18-23)**

17. The Rules specify various time limits in the procedures for disposal. However, to assist in the speedy disposal of sites, departments are encouraged to discuss with the former owner all aspects of the sale from the outset of negotiations.

#### **MARKET VALUE AND THE DATE OF VALUATION (RULE 24)**

18. For the purposes of the Rules, 'market value' means the definition of 'market value' in the International Valuation Standards (IVS) as published from time to time by the International Valuation Standards Committee. (This is reproduced in European Valuation Standards (EVS) and the RICS Valuation Standards – Global and UK (the 'Red Book')), but including any 'Special Value' (i.e. any additional amount which is or might reasonably be expected to be available from a purchaser with a special interest like a former owner). Full guidance is available in the Scottish Public Finance Manual. The date at which the market value is to be assessed is the date of the receipt by the disposing department of the notification of the former owner's intention to purchase.





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