

Disposal of assets from Housing Revenue Accounts

**Guidance on Scottish Ministers'
Consent**

**Scottish Government
June 2015**

Introduction

1. This guidance sets out the procedure that councils should follow when seeking consent to dispose of assets from their Housing Revenue Account (HRA) or for transfers between the General Fund and HRA. We have made a significant change so that the majority of disposals can be handled by way of a General Consent rather than needing to apply to Scottish Ministers for consent on an individual basis. Under General Consent, Councils can “self-certify” the consent. In making the change, Scottish Ministers’ aim to reduce the bureaucratic burden on local authorities and give them the freedom to exercise their own judgement and discretion in disposing of HRA assets to best meet local needs and priorities, with a particular focus on enhancing the service provided to current and future council tenants.

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.

Previous Arrangements

3. Up to now councils were required, in most cases, to seek the consent of Scottish Ministers for each disposal. This was done using provisions in the Housing (Scotland) Act 1987. In general, section 12(5) consent is required to dispose of land which forms part of a common or open space, section 12(7) consent is required to dispose of a house or part share (and this subsection has been amended to also require consent for the disposal of land). Section 203(2) consent is required to transfer land/buildings between the HRA and General Fund.

4. Councils are the strategic housing authorities in their areas. Seeking consent from the Scottish Ministers involves duplication of effort as council committees, and possibly full council, will already have considered the matter and agreed to dispose of the asset prior to seeking consent from the Scottish Ministers.

General Consent

5. Scottish Ministers have developed a general consent process for section 12(5) and (7) of the 1987 Act. Councils will already be familiar with the “Disposal of Land by Local Authorities (Scotland) Regulations 2010¹” and the Scottish Ministers have developed an approach in line with those regulations for disposal from the HRA. That way councils can treat General Fund and Housing Revenue Account disposals in a similar manner. Where such General Consent is given, there would be no need to seek separate consent under section 203.

6. In the main, General Consent is granted when two key considerations have been met: that the disposal price is in line with a best consideration valuation performed by someone accredited to the Royal Institution of Chartered Surveyors (RICS) and that an appropriate level of consultation with tenants has taken place. Best consideration is the amount for which an asset could be exchanged between

¹ S.S.I. 2010/160

knowledgeable, willing parties in an arm's-length transaction. Best consideration is the amount that would be paid for an asset in its highest and best use, i.e. market value. In addition, General Consent is also granted for some below market value transactions where the sale or transfer of land or buildings is to an RSL, or transfer of land from the General Fund to HRA, where the end use is social rented housing.

Variance/Disregard

7. The "Disposal of Land by Local Authorities (Scotland) Regulations 2010", apply to disposal of land from HRAs. They allow councils to dispose of land valued under £10k at less than market value, without having to follow the procedure set out in the regulations. Disposals which fall below a value of £10k no longer need to be considered for consent, this will apply to the majority of garden ground type disposals.

8. The regulations also allow councils to dispose of land without having to follow the procedure set out in the regulations where the disposal is at a price that is below market value, as long as the price is more than 75% of the market value. This provision already applies to disposals of land from the HRA, but with an additional requirement for Ministerial consent. General consent will apply to disposals which fit this category i.e. if the disposal price is at least 75% of valuation, General Consent will apply.

9. There will be circumstances where councils consider it appropriate to dispose of land for a consideration less than the best consideration that can reasonably be obtained. Annex D provides some information when considering such a disposal. Unless the disposal relates to the development of social housing, disposals at below market value will continue to require consent of Scottish Ministers and we have developed a new application form to make applying for consent simpler. The application form can be obtained by e-mailing hraconsents@scotland.gsi.gov.uk.

Valuation

10. We have included the market value criterion as a means to help safeguard the integrity of the HRA, in line with the wishes of tenants and tenant groups who have made representation for the continuing involvement of Scottish Ministers in cases of disposals from the HRA at below market value.

11. 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 (Annex A), 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. Councils 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.

Consultation with tenants

12. Councils must take account of council tenants' views and be able to demonstrate that they have taken account of them. This includes views on the use of HRA assets.

13. Ultimately, it will be for councils to decide what level of consultation is appropriate for each disposal. This can vary significantly on an area or case basis, however, we have provided some background to the requirement and some typical case studies in Annex C.

Types of disposal

14. The procedure applies to all types of disposal of an interest in land or buildings including, but not limited to, sale, lease or grant of servitude or other interest over land. It applies whether the disposal is managed on the open market or by a private treaty or dealt with internally or by external consultants.

EC State Aid rules and procurement issues

15. Councils are reminded that all disposals must comply with the European Commission's State aid rules. We have included further information at Annex B and 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.

How to determine whether a disposal will be covered by General Consent

16. The following page shows a flowchart of the process to follow when considering consent. In essence, there are three tests:

- The value of the disposal and whether or not it is in line with the best consideration valuation
- The level of tenant consultation undertaken
- The end use of the land or buildings

16.1 The first test is whether the valuation of the best consideration for the disposal is less than £10,000. If the answer is yes, general consent is granted.

16.2 The second test is whether the disposal price is equal to the valuation or greater than 75% of the valuation of the best consideration that can reasonably be obtained - if it is, the disposal is granted general consent if the consultation test is met.

16.2.1 If the disposal price is 75% of valuation or lower and the end use is not social housing, the council will need to apply for Scottish Ministers' consent irrespective of whether or not a tenant consultation has taken place.

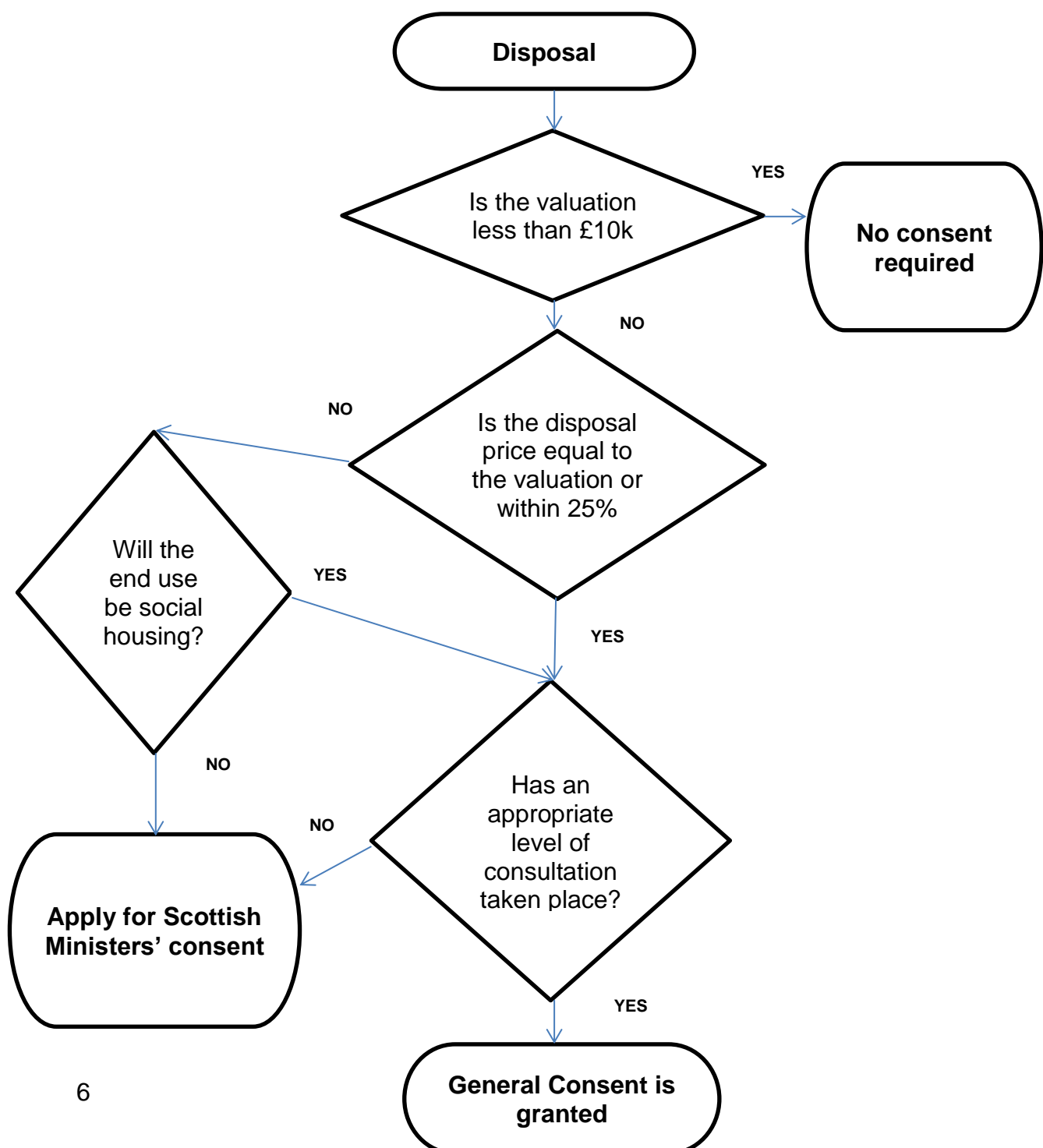
16.2.2 If the disposal price is 75% of valuation or lower and the end use is social housing, the disposal can be considered for General Consent and can move towards the consultation test.

16.3 The third test is whether proportionate consultation with tenants has taken place. It will be up to councils to decide what level of consultation is required for

each disposal. Annex C provides some further information on consultation with tenants.

17. We have provided some clarification to assist in determining General Consent outcome, the case studies in Annex C provide examples of each scenario and General Consent outcome and Annex E provides a general consent grid with General Consent outcomes against disposal type.

Consent Process Flowchart



Recording and Monitoring

18. For audit purposes, councils are already required to record full details of their decision process in relation to disposal of assets. The Scottish Government is not introducing any further monitoring requirements in relation to the General Consent process. Councils are expected to be open, transparent and fair in all their transactions and should be in a position to provide, on request, outline details related to disposals. These requests may come from, but are not limited to, Scottish Ministers or their representatives and tenant groups.

Transfer of land/buildings to RSLs for the provision of social housing

19. Where a Registered Social Landlord (RSL) is undertaking a development of new social housing, a council will often transfer HRA land to it for use in the development. On some occasions the market value test would not be met, however, the council will determine that the transaction does in fact represent “best value” as the supply of social housing in the area is increased and in some cases the council is granted exclusive allocation rights to a proportion of the finished housing. General Consent will apply to the transfer of HRA assets to the RSL.

20. In such cases, we ask that councils self-certify the following as part of their records relating to the transaction:

- That disposal of the site fits with the council’s strategic housing context (i.e. that a below market value disposal can be justified)
- The site value and anticipated disposal value
- That appropriate consultation has taken place

Transfer of land/buildings from General Fund to HRA for the provision of council housing

21. As already mentioned, transactions between the General Fund and the HRA are affected by section 203(2) of the 1987 Act. General Consent for below market value transfer between the General Fund and HRA will also apply to the development of council housing. In their records, councils should self-certify the same three points as in paragraph 19 above.

Residual applications for consent

22. While General Consent will cover the majority of disposals, there will be a small level of disposals that will continue to require Scottish Ministers’ consent, when the market value and/or consultation tests have not been met. For that purpose, a simplified application form has been developed. The application form can be obtained by e-mailing hraconsents@scotland.gsi.gov.uk.

Conditions where consent is not required

23. Section 14 of the Housing (Scotland) Act 1987 sets out two situations where councils do not need to seek the consent of the Scottish Ministers to dispose of houses. One relates to sales to tenants or their family, or as part of a change of landlord. The other, at section 14(2)(b)(ii), relates to properties that the council considers to be either surplus to its requirements or difficult to let. The condition can only be satisfied if the property has been vacant and on unrestricted offer to any applicant on the authority's housing list for a minimum of 3 months immediately before the sale/disposal.

24. In some cases, council houses can become difficult to let and surplus to requirements (and will have been continuously available for 3 months prior to being deemed difficult to let/surplus to requirements), however, rather than selling the properties immediately, the council will have removed them from the housing list prior to making a decision on what to do with them. In such cases, the council would need to seek consent to dispose as the delay would prevent section 14 applying.

25. The Scottish Government intends, when it next has an opportunity to include provision in an appropriate Bill in the Scottish Parliament, to change the provision to make it more relevant in the current landscape. In such cases, the Scottish Government would propose that section 14(2)(b)(ii) only require that the property should have been continuously available for 3 months since becoming empty. It should not matter when the house is deemed to be difficult to let/surplus to requirements. The analysis of current applications has suggested that this change would only be relevant to a relatively small number of cases and, as such, the Scottish Government would not regard it as a high priority.

Conclusion

26. We hope that Councils find this change to the consent process helpful in streamlining asset disposals. The changes will be kept under review and we would be pleased to receive any feedback from councils – this should be sent to hraconsents@scotland.gsi.gov.uk

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 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 that 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.

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.

Best Consideration

Best consideration is the amount for which an asset could be exchanged between knowledgeable, willing parties in an arm's-length transaction. Best consideration is the amount that would be paid for an asset in its highest and best use, i.e. market value.

2. A suitably qualified valuer

2.1 When determining the best consideration that can reasonably be obtained for land or buildings local authorities should appoint and instruct a valuer who is 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/building or interest in land/building, the valuer, should

take into account the requirements of the latest edition of the RICS Valuation Standards ("The Red Book").

EC State Aid Rules and procurement issues

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.

1. 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.
2. 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 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

3. If Local Authorities decide that the best way to deliver their services is by using arms-length external organisation, 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 the 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 arm's length organisation to the authority for VAT purposes.

Key principles

4. It is considered that there are two strands of EU law by reference to which the arrangements related to the supply of services by a CCLG to an authority could be regarded as outwith the scope of EU procurement requirements:
5. The principles arising from the Altmark Case – as related to the services of general economic interest; and
6. 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.

Further guidance

7. 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.

Consultation with tenants on disposal of HRA assets

Background

1. The statutory basis for tenants becoming involved in decision making processes of councils (and RSLs) dates back to the Housing (Scotland) Act 2001. The “Scottish Social Housing Charter” and the “Guidance on the Operation of Councils Housing Revenue Accounts” sets out the level of consultation that Scottish Government expects social landlords to have with their tenants.
2. Section 8 (Landlord-tenant discussions on financial transparency within the HRA) is the relevant section of the Guidance on Operation of Councils’ Housing Revenue Accounts is relevant plus Charter outcomes 2, 3 plus 14 and 15.
3. Outcome 3 (Participation) of the Charter states that social landlords manage their business so that “Tenants and other customers find it easy to participate in and influence their landlords’ decisions at a level they feel comfortable with. This outcome describes what landlords should achieve by meeting their statutory duties on tenant participation. It covers how social landlords gather and take account of the views and priorities of their tenants; how they shape their services to reflect these views; and how they help tenants and other customers to become more capable of involvement.”
4. Outcome 14-15 of the Charter states that “Tenants get clear information on how rent and other money is spent, including any details of individual items of expenditure above thresholds agreed between landlords and tenants.”

Implications for disposals

5. Councils must take account of council tenants’ views and be able to demonstrate that they have taken account of them in reaching their decisions.
6. Consideration of alternative options for assets must, where significant, involve the views of tenants as early in the process as possible. The definition of “significant” will be for the local authority to determine and the appetite of local tenants to be involved will vary. The degree to which tenants should be involved should therefore be determined between each local authority and its Regional Tenant Organisations in line with outcome 3 (Participation) of the Charter. Both parties must decide how tenants will be involved in making decisions about particular assets and what structure this involvement will take.
7. Local authorities and tenants should agree operating principles on the types and values of assets which are significant enough to matter to tenants or their representatives. The Scottish Government does not envisage that tenants will be involved in decisions on small or relatively low value assets. In such cases, and unless the asset had some special significance, the particulars of smaller disposals may not require discussion. Councils and tenants must agree how disposals or transfers in relation to both small pieces of land or single, low market value assets will be dealt with.

8. In larger or more complex land or property cases, tenants may feel entitled to a fuller say on the future of the asset. Local authorities must consider how they evidence that their views are properly considered and take this into account when reaching final decisions about these assets.

9. There may be circumstances where wider service or corporate priorities require the council to consider a different course of action than that recommended by the tenants. The local authority must balance its legal and financial responsibility for the asset with its responsibilities to be accountable to its tenants. Such cases should also be dealt with transparently and in line with outcomes 2 and 3 of the Charter.

10. Ultimately, it will be for councils to decide, in conjunction with their Regional Tenant Organisations and others, the level of consultation appropriate for different types of disposal. As this is in line with the charter and existing guidance, these discussions should already be taking place and we do not expect the general consent for disposals to create any additional work in this area.

Case studies

In order to aid discussion, we have created a number of typical case studies, based on actual applications for consent, where we discuss a likely level of consultation that could be deemed appropriate.

Case Study 1 – Garden Ground

Description of asset

Small piece of redundant land which a homeowner wishes to add to their garden to create off street parking. The land has been valued by the council's valuer at £1,250 which the purchaser will pay together with the council's legal costs.

Disposal allowed under general consent

Yes. It is below the £10k disregard and the sale is for the best consideration that can reasonably be obtained.

Consultation

Such a disposal would have a negligible impact on tenants and we would see any consultation as informal and limited to neighbouring properties only.

Case Study 2 – Lease of a shop

Description of asset

A commercial space located in a parade of shops with flats above. The rent has been valued at £9,000 per annum which the leaser will pay together with the councils legal costs.

Disposal allowed under general consent

Yes. Although the annual rent is below the £10,000 disregard, it is the capital value of the asset that is relevant – this will be above £10,000. As the rent is in line with the valuation General Consent will apply.

Consultation

Such a disposal would have a negligible impact on tenants and we would see any consultation as informal and limited to neighbouring properties only.

Case Study 3 – Sale of a single unit of residential accommodation

Description of asset

A first floor 2 bedroom flat that is the last unit of council owned stock in a block where other units have been purchased through Right to Buy. The Home Report has valued the property at £65,000 which the purchaser will pay.

Disposal allowed under general consent

Yes

Consultation

Such a disposal would have a negligible impact on tenants and we would not envisage a need for consultation.

Case Study 4 – Lease of a shop to a charity for a peppercorn rent

Description of asset

A commercial space located in a parade of shops with flats above. The rent has been valued at £4,000 per annum, however, the council propose allowing a charity the use of the premises to run a food-bank for a rent of £1 per annum.

Disposal allowed under general consent

No. Although the annual rent is below the £10,000 disregard, it is the capital valuation of the asset that is relevant, which will be above £10,000. As the rent is below 75% of valuation, Scottish Ministers' consent will be required.

Consultation

While council tenants could benefit from the enterprise, it could also benefit the wider community. Council tenants could therefore see the disposal as being subsidised by their rent to the level of £3,999 per year. We would expect council tenants to be consulted over this disposal and their views taken into account. The council could

also consider transferring the asset to the General Fund where the subsidy would come from all council tax payers in the council area and not just council tenants.

Case Study 5 – Lease of a piece of land to a charity for the creation of a community woodland

Description of asset

Open space which is not developable due to its geography, it is currently costing the HRA maintenance to cut grass and undertake weed control. The rent has been valued at £900 per annum, however, the council proposes leasing the land for £1 per annum to a charity to create and manage a community woodland.

Disposal allowed under general consent

Yes. Although the annual rent is below the £10,000 disregard, it is the capital value of the asset that is relevant. In this case the land is valued at £9,000 due to the fact that it can't be developed. Although the rental price is well below 75% of valuation, General Consent will apply as the capital valuation is below £10,000.

Consultation

While council tenants could benefit from the woodland, it could also benefit the wider community. Council tenants could therefore see the disposal as being subsidised by their rent to the level of £999 per year, however, this should be off-set by the reduction in maintenance costs. We would expect council tenants to be consulted over this disposal and their views taken into account. In doing so, the council could stress the benefits to the HRA in terms of not having to maintain the ground. The council could also consider transferring the asset to the General Fund where the subsidy would come from all council tax payers in the council area and not just council tenants.

Case Study 6 – Transfer of a large piece of ground from the General Fund to Housing Revenue Account for the creation of new HRA housing

Description of asset

Large piece of ground which has become available after the demolition of an old school. As there is a large demand for housing in the area the council has decided to transfer the ground to the HRA for the development of social housing. The land has an open market valuation of £500,000, however, the council has decided that the transfer will be at nil value.

Disposal allowed under general consent

Yes – end use is social housing.

Consultation

The guidance states that transfers both out of and into the Housing Revenue Account should be made at market value, however, the decision is ultimately one for the council to make. The new supply of social housing could benefit both current and future tenants, however, as the transfer from the General Fund is being made at zero value, wider council tax payers are being asked to subsidise the transfer. On

this occasion a full consultation will be required and should include not just council tenants but all council tax payers.

Case Study 7 – Transfer of a large piece of ground from the HRA to a local RSL for the creation of new RSL delivered social housing

Description of asset

Large piece of ground which has become available after the demolition of obsolete high rise council flats. As there is a continuing demand for housing in the area the council has decided to transfer the ground to a local RSL for the development of social housing. The land has an open market valuation of £350,000, however, the council has decided that the transfer will be at nil value.

Disposal allowed under general consent

Yes – end use is social housing.

Consultation

The new supply of social housing could benefit both current and future council tenants, however, as the transfer from the HRA is being made at zero value, current council tenants are being asked to subsidise the transfer. On this occasion a full consultation will be required with council tenants.

EXAMPLE OF THE CRITERIA FOR CONSIDERATION WHEN MAKING AN ASSESSMENT OF A PROPOSAL TO DISPOSE OF LAND OR BUILDINGS FOR LESS THAN BEST CONSIDERATION THAT CAN REASONABLY BE OBTAINED

This Annex has been copied from the General Guidance for the Disposal of Land by Local Authorities (Scotland) Regulations 2010.

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 the promotion or improvement of one or more of the following purposes:

- Economic development or regeneration;
- Health;
- Social well-being; or
- Environmental well-being.

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 arm's 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.

General Consent Grid

Disposal includes sale, lease, transfer right of way, access or servitudes over HRA buildings and land. In all cases, proportionate consultation with tenants should have taken place. Market value means unrestricted value - the best price reasonably obtainable for the property and should be expressed in capital terms. When assessing unrestricted value, the valuer must ignore the reduction in value caused by any voluntary condition imposed by the authority.

Type of Disposal	Consent Required	General Consent	Specific consent
Land/building valued at less than £10,000	No		
Land/building at market value	Yes	Yes	Not required
Land/building within 75% of market value (non social housing use)	Yes	Yes	Not required
Land/building below 75% of market value (non social housing use)	Yes	No	Yes, apply for Scottish Minister consent
Land/building within 75% of market value (social housing use)	Yes	Yes	Not required
Land/building below 75% of market value (social housing use)	Yes	Yes	Not required
Transfer of land/building from general fund to HRA at market value, or within 75% of market value, for social housing use	Yes	Yes	Not required
Transfer of land/building from general fund to HRA at below 75% of market value, for social housing use	Yes	Yes	Not required
Transfer of land/building from general fund to HRA at market value, or within 75% of market value, for non social housing use	Yes	Yes	Not required
Transfer of land/building from general fund to HRA at below 75% of market value, for non social housing use	Yes	No	Yes, apply for Scottish Minister consent
Transfer of land/building from HRA to general fund at market value or within 75% of market value for non social housing use	Yes	Yes	Not required
Transfer of land/building from HRA to general fund at below 75% of market value for non social housing use	Yes	No	Yes, apply for Scottish Minister consent