

OLDHAM COUNCIL
ASSET MANAGEMENT WORKING ARRANGEMENTS AND PROPERTY PROTOCOLS

JANUARY 2008

1.0 GENERAL

This Protocol forms part of the Council's Constitution.

Appropriate professional advice, should be sought at an early stage of any proposed land transaction. Advice should always be sought where the transaction will form part of a large or complex project or programme, or where it is proposed to enter into a development agreement or major Section 106 agreement. This is to ensure that all legal, financial, property and other implications of the transaction are identified prior to a report being prepared for decision.

2.0 POWERS OF ACQUISITION, APPROPRIATION, HOLDING AND DISPOSAL OF LAND

The Council is empowered to acquire, hold, appropriate and dispose of land for its statutory purposes, by a variety of statutes. An officer who is preparing an acquisition, disposal or appropriation of land 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.

Directorates will be required to work through the Corporate Asset Management Group in respect of proposals to acquire, appropriate or dispose of land. Land acquisitions, appropriations and disposals should be identified through the Asset Management Plan (AMP) process and be subject to scrutiny by the Corporate Asset Management Group. The Capital Strategy should also reflect proposals to dispose of, or acquire land and property.

For all land with the exception of land and properties held for regeneration purposes, only the Corporate Property Officer will be authorised to take action to acquire, appropriate or dispose of operational and non-operational property.

3.0 GENERAL MANAGEMENT PRINCIPLES

The Council has adopted the following key management objectives and principles:

- All land and property with the exception of the Council housing portfolio, which is managed by First Choice Homes will be treated as a corporate resource.
- Capital receipts will not be earmarked and capital spending will have regard to priorities in the capital programme.
- Land and property running costs will be optimised to ensure expenditure associated with occupation is minimised.
- Land and property users have an obligation to reduce running costs.
- The Council will keep under review the business case to retain non-operational assets and the estate will be subject to annual review.
- Land and property will only 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.

- Executive Directors will be required to account for assets used to deliver services and the Corporate Asset Management Group (CAMG) will challenge ownership requirements from time to time.
- The Council will maintain investment into its land and property infrastructure subject to available resources.
- Partner organisations and particularly those in the public sector will be encouraged to adopt a joined up approach to service delivery and to share accommodation to reduce costs.
- Investment planning will take into account life cycle costs. Capital and revenue programmes will make provision for investment into the Borough's property infrastructure.
- New buildings will be sustainable, based on life cycle costings and not initial capital outlay.
- All new buildings and those subject to significant refurbishment works will have a Building Research Establishment Environmental Assessment Method (BREEAM) rating of not less than good.
- Land and property occupation costs and property utilisation will be monitored through the AMP process.
- The establishment of a new Corporate Property Group (CPG) –introduces the concept of the Council as corporate landlord. The CPG will act as the landlord's agent and directorates will be considered as tenants occupying corporate buildings. The Corporate Asset Management Group will include representation at Executive or Service Director level to ensure the Group has a strategic focus. The Unity Partnership will operate as property consultants to the Council dealing with valuations, sales, feasibility studies and the management of building contracts.
- The CPG will not be responsible for land and property held for regeneration purposes. Regeneration property acquisitions, disposal and management will be the responsibility of the Executive Director of Regeneration. Where land and property is acquired for regeneration purposes, the CPG will also challenge the need to retain the property from time to time.
- Any land and property declared surplus by FCHO will be referred to the CPG for sale.

4.0 THE LAND AND PROPERTY PROTOCOL

4.1 Disposal of Land (Best Consideration)

All land and property whether held for service use or as part of the non-operational portfolio should be subject to annual review and if not required for service delivery or, where a case cannot be made to hold non-operational property, should be declared surplus to enable the Corporate Property Group to dispose of the land/buildings.

With effect from the 1 April 2008, the procedure will be for service directorates to give the earliest possible notice to the CPG that land/buildings are no longer required for service use. This action will enable the CPG to make arrangements for the property to be used by other Council directorates or, to enable the property to be sold. All costs relating to land and property held for service use will continue to be the responsibility of the service directorate for 6 months beginning on the date that the property was vacated or the date that the Corporate Property Group was notified of the vacation, whichever is the latter. After this period, the CPG will take responsibility. The objective of this approach is to encourage building users to give a reasonable amount of notice that land and property will become surplus and to build an incentive for the CPG to dispose of property quickly.

It is a general legal requirement that local authorities must obtain the best consideration reasonably obtainable when disposing of land, 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.

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 a Cabinet report to justify an alternative disposal route.

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.

In considering the disposal of land at less than best consideration, advice must be sought at an early stage about the possibility that the proposed transaction may result in the giving of unlawful State Aid (European Union Treaty article 87(1)), in order to consider what action is appropriate to avoid this.

4.2 Disposals of land at less than 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 except in the case of leases for less than seven years, a disposal must be for the best consideration reasonably obtainable. 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.

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. Any proposed sale that is not based on an open market disposal must be the subject of a Cabinet report.

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

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 the under value does not exceed £2million and where the Council considers that the disposal is likely to contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the whole or any part of the area (the general power of 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.

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 Community Strategy and reasonably consider the extent, if any, to which the proposed disposal supports the aims and objectives in the Strategy.

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 Corporate Property Strategy, the terms of the Council's Land and Property Protocols and the Council's fiduciary duty.

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.

As a general principle, disposal of land at less than best consideration, should take place on an exceptional basis and should not be regarded as the rule.

Local authorities are state aided authorities for the purposes of the European Commission's State Aid Rules. Disposal of land at less than best consideration effectively involves subsidising the purchaser, developer and/or occupier of the land. The Council must therefore ensure that the nature and amount of any subsidy complies with the State Aid Rules and failure to do so would render the provision of any aid unlawful.

Any proposal to dispose of land at less than best consideration should in the first instance be referred to the Corporate Asset Management Group for consideration of a business case and options appraisal.

When any proposed sale is for less than best consideration, the matter must be referred to Cabinet for a decision 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.

4.3 Lettings

All lettings must be arranged through the Corporate Property Group.

Certain leases and assignments 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 indicated in the section on Disposal (Best Consideration) above.

Under this protocol, all lettings will be based on market rents and typically this means the rent that a private sector organisation would be likely to charge for a similar facility. For example a private nursery operating from school premises. Concessionary lettings will not be allowed and directorates will be required to 'sponsor' concessionary arrangements by grant funding to secure full market value rents.

4.4 Application of the EU Public Procurement Regime

Certain disposals of land may fall within the definition of "works" contained in 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 is a developing area of law (at the end of 2007) 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.

4.5 Open Space

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.

Appendix A of this Protocol sets out the Council's protocol on the disposal of open space. Guidance is also appended which does not form part of the Council's Constitution.

4.6 Decision Making

Acquisition, appropriation and disposal of land is an executive function. Decisions may therefore be made by the Cabinet, a Cabinet Committee, an Executive Member or an officer of the Council. This protocol sets out who can make decisions on property transactions.

4.7 Transactions which require the approval of Cabinet

All recommendations to dispose of land of any value for less than the best consideration reasonably obtainable.

All recommendations to compulsorily acquire individual plots of land or properties of any value that have not been approved within a scheme of development or regeneration project.

All recommendations to promote a scheme of development or to undertake a major regeneration project that include proposals to acquire land by agreement and/or using compulsory purchase powers.

All recommendations to acquire by agreement, appropriate or dispose of land valued at more than £350,000 (including individual plots of land included within a development scheme or regeneration project approved by Cabinet).

4.8 Transactions which may be approved by the relevant Executive Director

Subject to paragraph 4.7, the Executive Director of Environmental Services (the Council's Corporate Property Officer) 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 £350,000 or less.

Subject to paragraphs 4.7, the Executive Director of Regeneration 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 £350,000 or less for the purposes of regeneration of the Borough (including the acquisition of individual plots of land identified within a development scheme or regeneration project approved by Cabinet).

4.9 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.

4.10 Content of Reports

Cabinet reports seeking consent to dispose or acquire land should include details of the interest held, appropriate site plans and valuation information provided by either, the Unity Partnership, the District Valuer, the Service Director Partnerships and Corporate Property or other appropriate independent advisor.

Reports seeking to dispose of land at less than best consideration should in addition, address those matters set out in paragraph 4.2.

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.

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.

4.11 Independent Valuations of Land/Property

With regard to those transactions for the disposal 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.
- Any other transaction, which the Council would consider it prudent to obtain independent advice.
- Disposals at less than best consideration reasonably obtainable.

4.12 Open Space

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.

4.13 Instructions to undertake property transactions

All property instructions from directorates in respect of the Council's property estate must be referred through the CPG and specifically all property acquisitions and disposals will be dealt with by the CPG. Legal Services will not accept instructions from other directorates or directly from the Unity Partnership.

The exception to this provision of the protocol is that the Regeneration Directorate is authorised to instruct Legal Services directly in respect of land to be acquired, appropriated or disposed of for regeneration purposes.

The Regeneration Directorate is not authorised to instruct Legal Services on behalf of other directorates of the Council unless authorised to do so through the CAMG.

4.14 Office Moves

To bring a degree of corporate control over office moves and the acquisition of external leases, all office moves and the acquisition of new accommodation must be supported by the CAMG and approved by the Council's Corporate Property Officer.

Moves will only be authorised if there is a sound business case. Specifically the Council will be endeavouring to reduce the amount of leasehold accommodation currently held to provide services.

To ensure a corporate approach to the delivery of the target to reduce the amount of office space held by the Council by 25% over a 5-year period, all planned moves and relocations will be subject to review by the CAMG and authorisation to relocate will be through the Corporate Property Officer.

4.15 Service Review

The Service Director, Partnerships and Corporate Property and the Group Manager Corporate Property will establish regular service meetings with individual directorate teams to ensure that operational requirements are addressed.

4.16 Member Notification

Properties that are identified as being surplus to requirements should be referred to the Cabinet with a recommendation that they are declared surplus to requirements and the Ward Members should be notified before Cabinet considers the report.

Peter Ridley	Corporate Property
Steve Cooper	Corporate Property
John Mitchell/Paul White	Regeneration
Shamim Lindsay	Legal Services

Peter Ridley
12 February 2008

DEFINITIONS

In this protocol:

- “Land” includes land which has buildings built upon it.
- “The Council” means Oldham Metropolitan Borough Council. It does not refer to the Full Council as a decision making body.
- “Housing land” means land acquired or held for the purposes of local authority housing.
- “Lettings” – where possible the Council will enter into leasing with rent charges rather than license arrangements.

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. Please read the **background notes** which accompany this protocol.

Title Investigation

Where the Council is considering disposal of land a title investigation should be sought from Legal Services prior to seeking a decision on disposal of the land. A title investigation is necessary even where the land is registered since official copies of entries on the Land Registry refer to, but do not contain, all relevant details relating to the land that may affect its disposal. Open space is not specifically dealt with on official copies but may be included in the Council's own records.

However, the Council's records may not be conclusive as to whether the land is open space and it is often through discussion between Legal Services and the surveyor that open space is identified. Therefore, a site visit is likely to be needed to determine conclusively whether or not the land should be dealt with as open space.

Site Visit

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) and the Open Spaces Act 1906 (**see below**). If he/she considers that the definition may apply, the procedure for disposal contained in Section 123 of the Local Government Act 1972 or in Section 233 of the TCPA 1990 should be followed.

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, Policy) in the form of a memorandum giving the following information:

- cost code
- 4 plans of the land
- measurements of the land
- intended use 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.

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.

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

The disposal of land, including open space, is an executive decision. **The Land and Property Protocol** in the Council's Constitution provides for executive decisions relating to land to be made by Cabinet or by an Executive Director depending on the value of the land.

A disposal of land that will bring in significant income to the Council will be a key decision and will need to be publicised on the Forward Plan prior to being submitted to the decision maker.

A decision to dispose of open space must not be taken until the disposal has been advertised and the time for making objections has expired.

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

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

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.

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 9 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.

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

BACKGROUND NOTES ON DISPOSAL OF PUBLIC OPEN SPACE

This note summarises the law relating to the disposal by local authorities of open space.

The disposal of open space is governed by:

- (a) the Local Government Act (LGA) 1972 Section 123, which is a general power of disposal of surplus land; and
- (b) the Town and Country Planning Act 1990 (TCPA) Section 233, which is the specific power of disposal of land which has been acquired or appropriated for planning purposes under the TCPA, including land compulsorily acquired for planning purposes.

The purpose of these provisions is to ensure that the Council carries out consultation prior to disposal of open space and considers any objections made to the disposal.

Legal Requirements for disposal of open space

Section 123 LGA and Section 233 TCPA are powers to dispose of land. The powers of disposal are subject to the provision that a local authority may not dispose of any land consisting or forming part of an open space unless before disposing of the land the authority:

- gives notice of the intention to dispose of the land, specifying the land in question, in two consecutive weeks in a newspaper circulating in the area in which the land is situated; and
- considers any objections to the proposed disposal which may be made.

Section 123 is the appropriate disposal power for surplus land held by the Council which is not held for planning or housing purposes. Section 233 is the appropriate power for land held for planning purposes.

The Council has been advised that the procedure in Section 123 LGA should also be followed where the land is being disposed of under a power which does not specifically require advertising, e.g. land which was formerly housing land.

Definition of Open Space

Open space is defined in two statutes, the TCPA and the Open Spaces Act 1906 (OSA). For the purposes of deciding whether a piece of land should be advertised as open space prior to disposal, the Council has been advised by Counsel that both definitions should be treated as relevant to the disposal of open space. The OSA definition is wide and includes that contained in the TCPA.

The safest course of action for the Council is to follow the disposal of open space procedures for all land falling within the OSA definition.

Open Spaces Act 1906 Section 20: “any land, whether enclosed or not, on which there are no buildings or of which not more than one twentieth part is covered with buildings and the whole or the remainder of which is laid out as a garden, or is used for the purposes of recreation, or lies waste and unoccupied.”

TCPA 1990 Section 336: “any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground.”

Use of the land by the public does not have to be as of right, as long as it is lawful (R v Doncaster MBC ex parte Brain (1986) 858 LGR 233.)

Open Space in the Unitary Development Plan

Inclusion or exclusion of land as open space in the Unitary Development Plan is not conclusive as to whether the land should be treated as open space when it is being disposed of. Land not included in the Unitary Development Plan should be treated as open space if it falls within the OSA definition.

Buildings

Land falls outside the OSA definition of open space if more than 5% of its area is covered by buildings.

“Building” includes any temporary or moveable building” (OSA Section 20).

“ Building” does not include structures such as patios or verandas, or areas laid out as car parking which are adjacent to a building. A piece of land wholly laid out as a car park is however unlikely to fall within the definition of open space.

Cleared Sites

The Council has been advised by Counsel that there is no time requirement in case law or statute specifying when land becomes open space after any buildings (assuming the buildings occupied more than 5% of the land prior to demolition) have been demolished.

The Council has been advised that the wide definition in OSA 1906, means there is little the Council can do to prevent cleared sites becoming subject to the requirements for disposal of open space.

Once buildings have been demolished, the risk starts to increase that the Council could be challenged if it does not advertise disposal of the land as open space. A risk assessment will be required in each case and legal advice should be sought.

Single Disposal of Multiple Sites

It may be the case that the Council is seeking to dispose of a number of pieces of land to a single buyer. If all the sites clearly fall within the OSA definition, all must be advertised.

If some of the land has buildings on it, a view must be taken as to whether any of the sites could be parcelled together with other sites. It may be helpful here to consider how land might be packaged for the purposes of a planning application. This can produce unexpected results.

For example, the Council wishes to dispose of 2 sites, A and B, together. Site A has on it a building covering 10% of its area. On the face of it, Site A is not open space. Site B is entirely open space. Sites A and B are separated only by a public highway, and it would not be unusual for a single planning application to be made in respect of both sites.

The Council must follow the open space procedure in respect of Site B in all circumstances. However, it is also reasonable that Sites A and B could be treated as one area of land. If the building on Site A covers 5% or less of the area of Sites A and B, the safest course of action would be to follow the open space procedure in respect of both sites.

There may be more than one reasonable way of grouping land together which may lead to different conclusions as to whether multiple sites should be treated as one area of open space.

The key consideration is that if any reasonable argument could be made before a court that the land is open space, then the safest course of action is to follow the open space procedure prior to disposal.

Timing of Advertisement

The open space procedure should be initiated once the Council has identified its plans for the land and in particular its future use and potential purchasers. (R (on the application of Isle Lodge Amenity Committee) v Kettering BC [2002] EWHC 1132 (Admin)).

Depending on the above, it may be possible to advertise the disposal of land as open space at the same time as a planning application relating to the land is publicised. The relevant statutory procedures for each process should be followed.

Failure to Follow Procedures

The procedures for disposal of open space are a matter of public law and are subject therefore to challenge by judicial review. Judicial review of a decision may result in delay to or even prevent a proposed disposal (the Council's decision to dispose of open space must be a reasonable one and the court could quash it and require it to be reconsidered). For this reason, the safest course of action will be to follow the open space procedure for **any land falling within the OSA 1906 definition of open space**.

A report proposing to dispose of open space without following the disposal procedure would have to be reported to the Council's monitoring officer since approval of the decision would potentially put the Council at risk of legal challenge.