

Local Authority Land Disposals: Key issues

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The key issues



- The power to dispose of the land
 - The statutory restrictions on the exercise of that power
 - State aid
 - Other “public law” issues
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The power to dispose of land: General disposal power under LGA 1972



- Section 123 Local Government Act 1972:

“(1) Subject to the following provisions of this section... a principal council may dispose of land held by them in any manner they wish...”

- May not dispose of land (without S/S consent) for “a consideration less than the best that can reasonably be obtained” (ss (2))
- Special duties regarding open space: advertisement and consideration of objections (ss (2A) and nb different provisions for Wales)

The power to dispose of land: land held for planning purposes (1)



- Section 233 Town and Country Planning Act 1990:

“(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order—

(a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or

(b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority.”

The power to dispose of land: land held for planning purposes (2)



- S/S consent required for disposal of common land or disposal for a consideration less than the best that can reasonably be obtained
 - Open space advertisement duties as under LGA 1972
 - Section 123 LGA 1972 excluded where s 233 applies
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Best value/consideration



- Both statutory disposal powers require the “best consideration” unless the S/S consents to the disposal
 - Overlap with common law fiduciary duties (see e.g. Roberts v Hopwood)
 - Overlap with state aid issues (see below)
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Best value/consideration



- Exceptions to duty to obtain best consideration:
 - Short tenancies (less than 7 years)
 - S/S consent:
 - Note general consent in General Disposal Consent 2003 (see Circular 06/2003)
 - Difference in value less than £2m and authority considers will contribute to economic/social/environmental well-being

Valuation



- Note guidance in Circular 06/03
- Need for valuation input from suitably qualified valuer
- Must address the *consideration* as a whole (may include more than price e.g. overage agreements and other terms of disposal)

Monetary value only?



- “When deciding whether ... the best consideration reasonably obtainable has been obtained, the only consideration to which regard may be had is that which consists of those elements of the transaction of commercial or monetary value to the local authority”: ex parte Coker [1999] 4 All ER 1007
- BUT see Standard Commercial Prop v Glasgow CC [2006] 2 AC 572

Challenge to disposals



- Challenge on public law principles only
- Duty to achieve an outcome not conduct a process
 - See e.g. R (Midlands Co-Operative) v Birmingham CC [2012] EWHC 620 (Admin) at [122] ff
- The "Indescon principles":
 - failed to take proper advice or
 - failed to follow proper advice for reasons which cannot be justified or
 - although following proper advice, followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably

Third party protection



- Section 128 LGA 1972
 - But note that it only bites on transfer
 - Questionable relationship with state aid issues

State aid



- Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”):

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”
- Sale of land at under-value may constitute a State Aid: see the Commission Guidance and *C-239/09 Seydaland Vereinnigte Agrarbetriebe*

State aid (2)



- Note Commission Guidance (although nb not law)
- Open Market Sale
 - A sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid
- Independent Valuation
 - If public authorities intend not to use the [unconditional bidding procedure], an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid

State aid (3)



- Aid may be justified or shown to be compatible with the Treaty: is aid justified by “the nature or general scheme”, “nature or structure” or the “logic” of the relevant system?
 - Case 173/73 Italy v Commission [1974] ECR 709
- See principles in Art 107
 - 107(2): aid with a “social character”, or relating to “natural disasters” or “exceptional occurrences”.
 - 107(3): aid relating to economic development, heritage, and “other categories specified by Commission or Council”

Other “public law” issues (1)



- Disposal decisions subject to normal public law principles (e.g. having regard to material considerations)
 - Constitutional issues: does the scheme of delegation permit disposal in the manner proposed?
 - Public sector equality duty and EqIAs
 - Potential public procurement issues if agreement to dispose of land imposes a requirement to carry out works
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Other “public law” issues (2)



- Consultation: no express duty to consult under the statutory disposal powers, but is there a legitimate expectation that consultation will occur?
 - Assets of Community Value and the right to bid
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