

# Property Procedures for Disposals and Lettings

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v1.0	31/05/2014	Baseline Product	Howard Lock	Ann Sutcliffe
v2.0	11/07/2014	Minor change update – 4.1 Step 6 (p) page 17	Howard Lock	Ann Sutcliffe
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v4.0	03/09/2014	G Wilson minor changes & definitions page 21	Howard Lock	Ann Sutcliffe
v5.0	02/10/2014	A Sutcliffe minor changes throughout	Howard Lock	Ann Sutcliffe
v6.0	30/04/2015	Updates following Cabinet (incorporating O&S comments)	Nadir Ahmed	Ann Sutcliffe

## Contents

### 1.0 Introduction

### 2.0 Workflow Diagrams

### 3.0 Procedures for Lettings

### 4.0 Procedure for Disposals

### 5.0 Authority

### 6.0 Definitions

## 1.0 Introduction

### 1.1 Purpose

The purpose of these procedures is to ensure that a standard approach is understood and adopted by Asset Management officers to the disposal and letting of its property holdings.

The procedures apply to all Asset Management officers responsible for implementing the Council's disposals programme and for letting vacant properties. They describe the steps to be taken to declare a property surplus and, subsequently, to dispose of it by sale or on long lease. They also outline the steps to be undertaken when marketing the Council's commercial and community properties using both internal marketing and external agents.

The key steps are described through workflow diagrams (section 2) which identify milestones to support Asset Management officers in managing the processes.

### 1.2 Scope

The Council and all employees and agents are to comply with the Council's Standing Orders, which comprise:

- a. These Property Procedures
- b. The Scheme of Delegations
- c. Financial Regulations
- d. Code of Practice on Local Authority Accounting.
- e. Formal guidance issued by Finance
- f. UK and EU law

In these procedures:

- "Property" shall mean any land or buildings owned by the Council or in which it has a legal interest.
- "Disposal" shall mean the sale of the freehold or the grant of a lease in excess of 25 years.
- "Letting" shall mean the grant of a lease for up to 25 years.
- These procedures will not describe the process for acquisitions.
- These procedures will not describe the process for instructing external agents.
- These procedures will not describe the process for granting way-leaves and easements.
- Land, buildings and property in the ownership of the Housing Revenue Account are included but Right to Buy sales are excluded.

All property is "owned" corporately by the Council in accordance with the recently adopted "Corporate Landlord Model". Any Service occupying property does so in accordance with an Asset Plan prepared jointly by the occupying Service and Asset Management.

These procedures replace all previous procedures and policies and are in accordance with the Cabinet Report, 11 February 2009, (Agenda Item 10.6).

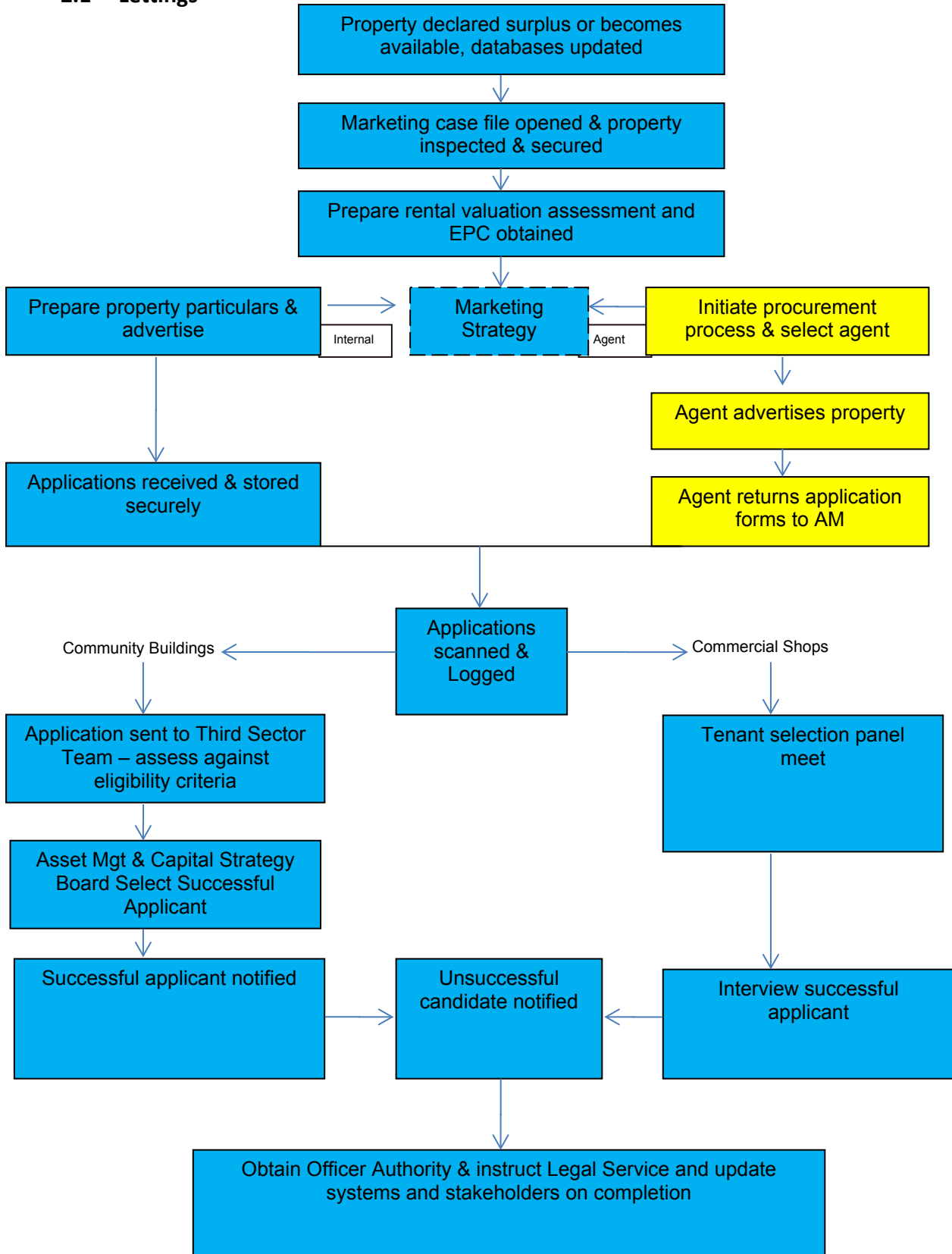
### 1.3 Roles

The table below describes the roles and the functions of the officers involved in the letting and disposal process.

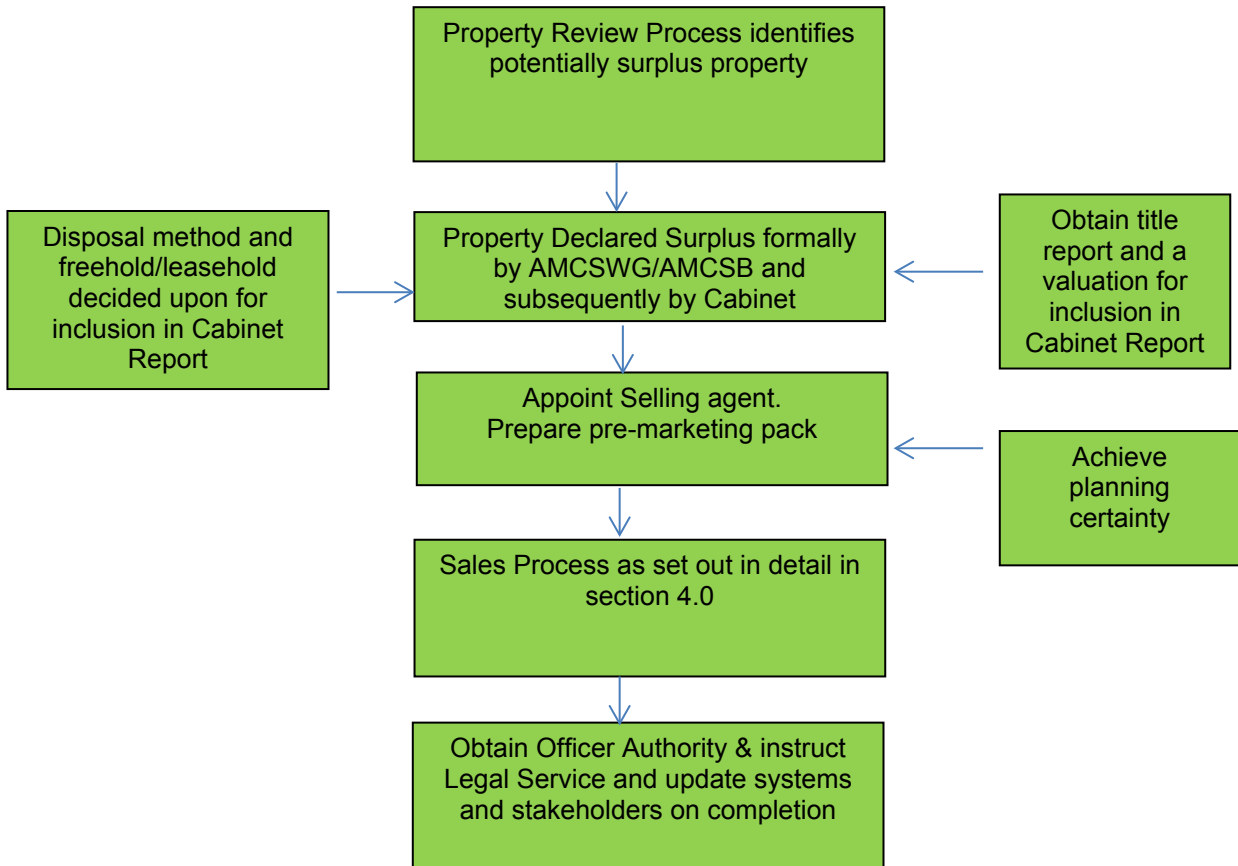
<b>Role</b>	<b>Function</b>
Head of Asset Management (HAM)	Responsible for providing overall direction, the HAM has the ultimate responsibility and accountability to ensure that the Council's surplus commercial properties are let or disposed of in a timely manner.
Principal Asset Manager (PAM) And Asset Managers (AM)	Responsible for declaring the property surplus and instructing external agents to market the property. The PAM ensures that the marketing is completed in accordance with these procedures and has overall responsibility for the day to day management of the disposal.
Property Support Officer (PSO)	Responsible for certain tasks associated with marketing the council's commercial and community properties for letting. The PSO will act under the supervision of the PAM or the AM.
Business Support (BS) Team	Responsible for administrative tasks as instructed by the PAM or the AM, and updating the relevant Asset Management service's database.

## 2.0 Workflow Diagrams

### 2.1 Lettings



## 2.2 Disposals



## 3.0 Procedures for Lettings

### 3.1 Identification of Surplus Property

#### Step 1

A property will be identified as being surplus to the Council's requirements through a process of ongoing property review in which it has been identified by Asset Management and the occupying Service as being unused, under used or not offering value for money (because, for example, as a result of individual property review, the costs of maintenance may be prohibitive such that it is no longer cost effective to retain them).

Any decision confirming a property as surplus to operational requirements will need to be cleared by the Asset Management and Capital Strategy Working Group (AMCSWG) and by the Asset Management and Capital Strategy Board (AMCSB).

After clearance by AMCSB but prior to a decision by Cabinet, appropriate Cabinet members and Directors will be consulted on the proposal and their comments, if any, included in the Cabinet report.

#### Step 2

Once a Council-owned commercial or community property becomes available, the PAM will assign the case to an AM officer.

The AM will create a marketing folder in the Asset Management electronic filing structure and notify the BS Team who will add the property to the Asset Management "vacant property schedule" and update the Technology Forge database.

### 3.2 Property Inspection

#### Step 1

The AM will instruct a PSO who will inspect the property to ensure it is secure in order to prevent the risks of:

- Squatters and unauthorised entry
- Fire hazards
- Flooding risks (by turning off the main water pipe)

The inspection should include:

- An Inventory
- A Measurement of floor space
- Meter readings

## Step 2

The inspection findings will be discussed with the AM. The following actions are required to be completed:

- Advise utility companies
- Decide whether electricity is still required
- Arrange any necessary clearance
- Consider any works required to secure a letting
- Advise the Insurance Section that the property is vacant
- Notify the rates department that the property is vacant
- Notify the rental collection department that the property is vacant
- Consider whether a schedule of conditions is required

NB: In deciding whether to discontinue a utility service it is relevant to consider the likely period before re-letting, the cost of re-connection and the amount of natural light available to undertake a viewing without electricity.

## Step 3

Before the property is marketed, the AM will carry out an assessment of the rental value for prior approval by the HAM.

## Step 4

The AM will request an Energy Performance Certificate.

### 3.3 Property Marketed by Asset Management

#### Step 1

The AM will allocate the marketing of the property to a PSO to produce the property particulars. The particulars will include the following details:

- Photographs
- The address including postcode
- The location plan of the property
- A brief description of the property and the area
- Rental required
- Length of lease being offered including the standard form of lease
- A floor plan to scale
- Energy Performance Certificate
- Block viewing dates and contact details
- Deadline for applications and name and address of the AM to whom they should be sent.

#### Step 2

The AM will agree the property particulars with the PAM before publication. The minimum publicity should include:

- Council's Web Page



➤ East End Life

Any other form of marketing should be approved by the HAM. The property should be marketed for a six to eight week period. Interested parties are only to view the premises by prior arrangement with Asset Management or on one of the block viewing dates. The officer undertaking the viewings will keep a record of those who attend.

Step 3

The AM will notify the BS Team of the publication details to ensure that they can answer telephone enquiries from the public in a knowledgeable manner.

Step 4

The application forms will be received and collated by the AM, dated and stored securely in a hardcopy folder. All electronic applications received by email will be printed and stored accordingly. All bids will be kept in soft copy (electronic) format on a password protected file on the Asset Management drive. The Asset Manager responsible for the marketing of the property will be responsible for the receipt and logging of application forms.

If the form is hand delivered, the PSO who receives the form will note the date and time it was delivered on the envelope and return it to the AM. A standard acknowledgement letter will be issued with the officer's name, original signature and date.

The information from the forms will be logged under the following headings:

- Date received
- Method of delivery (i.e. post, email or hand delivered)
- Applicant(s) name
- Applicant(s) address
- Rent offered
- Lease term required/offered
- Property use proposed

The scanned forms will be saved under the relevant property folder and the original forms will be passed on to the AM.

### 3.4 Property Marketed by External Agent

Step 1

Where possible it is preferable to market vacant properties locally and without an external agent in order to attract local people and to promote entrepreneurship within the community. This will also save agents' fees. However, on some occasions, a property may be advertised through external agents if there is a potential to generate higher rental income and/or wider coverage is required.

#### Step 2

If it is decided by the HAM that external agents will be used, the AM must satisfy the requirements and conditions of the Council's procurement code in appointing an agent.

#### Step 3

The agent will market the property for a six to eight week period and will conduct all viewings.

#### Step 4

The returned application forms will be received by the AM and stored securely in a hardcopy folder. After the expiry of the application deadline, the PSO will log and scan the application forms.

The information from the forms will be logged as above (Step 4) and saved under the relevant property folder and the original forms will be passed on to the AM.

### 3.5 Selecting a Tenant for a Community Building

#### Step 1

The AM will forward the application forms to the Council's Third Sector Team for assessment against the Gateway Eligibility Criteria.

It will be the responsibility of the Third Sector Team to manage the following process as described and agreed in the Cabinet Report, 04 August 2010, (Agenda Item 7.5):

- Officers from the Third Sector Team (including accountancy support) assess whether applicants have met the Stage 1 Gateway Eligibility Criteria. Successful applicants will be put forward to Stage 2 of the Assessment process
- The Officer Evaluation Panel convenes comprising of Officers from the Third Sector Team.
- The Officer Evaluation Panel assess and evaluate applications using the Stage 2 Assessment Criteria, and will submit a Recommendation Report to the Asset Management and Capital Strategy Board signed off by Finance and Legal Services at Service Head Level.
- The Asset Management and Capital Strategy Board will consider the recommendations and decide upon a successful applicant.
- The Third Sector Team will notify the successful applicant as soon as possible. Feedback will also be offered to the unsuccessful applicants.

#### Step 2

The Third Sector Team will notify the AM of the successful tenant and the AM will instruct Legal Services to commence the legal process.

### 3.6 Selecting a Commercial Tenant

#### Step 1

After the expiry of the application deadline the PSO will log and scan the application forms on a scoring matrix excel format.

#### Step 2

The AM will arrange a panel meeting to select the preferred tenant. The panel will comprise three officers from with Asset Management including the AM.

Applications will be considered and scored on the information provided within the application form.

The following factors will be taken into account when selecting a new tenant:

- Rental value offered
- Suitability of use proposed
- Ability to pay
- Lease term requested/offered
- Business experience
- Business plan
- Cash flow forecast
- Benefit to the parade (if a shop) and community generally

The panel will consider the applications using the Asset Management scoring matrix.

Due to the relatively low rental income for the majority of Council owned shops it is not practical to seek expert advice on the quality of a cash flow or business plan and it is accepted that officers take a 'common sense' approach when assessing these criteria.

It is noted that that there is a general presumption against A3 and A5 uses, however the use will be considered in the context of the viability of the parade and existing level of provision locally.

#### Step 3

As part of the assessment process, the preferred applicant will be invited for an interview to discuss the heads of terms and lease arrangements. If the outcome of the interview is successful, the AM will proceed with the legal process.

If after interview the outcome is not positive, the AM Service will invite the second-placed applicant to an interview.

### 3.7 Instructing Legal Services

#### Step 1

The AM will produce the Heads of Terms and obtain an Officer Authority.

#### Step 2

The AM will instruct Legal Services to prepare the draft new lease and copy the BS Team. The BS Team will populate the 'legal instruction schedule' for monitoring purposes.

#### Step 3

Once the signed lease and deposit agreement is received, Legal Services notify the AM by sending the case closure notification. They will send a copy of the signed counterpart lease to the CAPS Manager to file in CAPS. The data stored on the CAPS will be updated by BS.

#### Step 4

The AM will notify all other stakeholders, including:

- Finance Section
- Insurance Section
- Any other relevant departments or parties

#### Step 5

The BS Team will update the 'empty property schedule' and add the property to the 'occupied shops inspections schedule'.

## 4.0 Procedure for Disposals

### 4.1 Key Steps

#### Step 1 Identification of Surplus Property

A property will be identified as being surplus to the Council's requirements through a process of ongoing property review in which it has been identified by Asset Management and the occupying Service as being unused, under used or not offering value for money (because, for example, as a result of individual property review, the costs of maintenance may be prohibitive such that it is no longer cost effective to retain them).

The HAM will then consult other Service departments and partners to establish whether the property could meet their current or future service needs.

Any decision confirming a property as surplus to operational requirements will need to be cleared by the Asset Management and Capital Strategy Working Group (AMCSWG) and by the Asset Management and Capital Strategy Board (AMCSB).

After clearance by AMCSB but prior to a decision by Cabinet, appropriate Cabinet members and Directors will be consulted on the proposal and their comments, if any, included in the Cabinet report.

The Cabinet report will seek approval to dispose without further referral and will seek delegation for the Service Head, Corporate Property and Capital Delivery to accept an offer and to negotiate further if necessary and to enter into the legal documentation necessary to complete the disposal.

The Cabinet report will recommend whether the sale should be leasehold or freehold and will include an assessment of the value and the impact on value, if any, of the respective methods of sale. It will also advise on the timing of the disposal and when the property should be brought forward.

The Cabinet report will include the comments of the Chief Finance Officer including, for example, capital, revenue or VAT implications and also of the Chief Legal Officer which may include the effect of any covenants, restrictions or other legal implications and the need for any statutory consents.

Property disposals will generally be reported in the open part of the agenda to ensure transparency and openness for the public.

Following approval of Cabinet the AM will create a marketing folder, ask BS to add the property to the Asset Management service's 'empty property schedule' and update the CAPS database accordingly.

#### Step 2 Deciding on the Method of Disposal

The methods of disposal that may be used are (subject to the below):

- (a) Informal tender
- (b) Formal tender
- (c) Auction
- (d) Sale by Negotiation

The Service Head, Corporate Property and Capital Delivery, will determine the most appropriate method of sale. This will be a matter of professional judgement based on the type and location of the property and the prevailing property market and will always be subject to the Council meeting its legal requirements. For example, where a disposal requires outputs such as social housing or community benefit it may be governed by Public Procurement Regulations rather than a straight land sale.

The general presumption is that the method of sale should require the open invitation of competitive bids unless the Service Head, Corporate Property and Capital Delivery, considers that an alternative method of disposal would be appropriate.

Sales by **Formal Tender** and **Auction** (see definitions) are largely regulated by the process that needs to be followed to achieve a legally binding contract and are not described in these procedures.

Sales by **Negotiation** are likely to involve a “special purchaser” (see definitions) and examples are:

- (i) Sale to a sitting tenant.
- (ii) Sale of an access which would enable a purchaser to release development value locked up in other property.
- (iii) Sale to an adjoining owner or sale of a part-interest in a property where amalgamation of interests could enable “marriage value” to be realised.
- (iv) Sale to a public body (e.g. an RSL) at less than market value where other benefits are offered to the Council, provided that such sale is within the General Disposal Consent (England) 2003, or receives Secretary of State Consent and subject to European legislative requirements relating to State Aid.

These examples are given on the basis that the Service Head, Corporate Property and Capital Delivery considers that negotiations with one party would produce a higher figure or, alternatively that non-financial considerations that fall within the Council’s “well-being” powers justify a sale (see definition). In all such cases where the value of the property to be disposed of is over £50,000, a valuation must be provided by external consultants.

The AM will obtain a title report from Legal Services to ascertain any issues that may have an effect on the method of sale.

### Step 3 **Tenure – Deciding on whether to sell the Freehold or Leasehold**

Whether to sell freehold or via long leasehold needs to be considered on a case by case basis. However, the Council has a general preference to dispose of land via long leasehold.

As part of the report to Cabinet recommending a property being declared surplus, the Service Head, Corporate Property and Capital Delivery, will recommend whether the sale should be leasehold or freehold. This will include an assessment of the value and the impact on value, if any, of the respective methods of sale.

Examples where a freehold sale may be considered appropriate are:

(a) Where the level of capital receipt, over and above a leasehold disposal, exceeds the perceived benefit of a leasehold disposal (i.e. so that a leasehold disposal could not be reasonably justified).

(b) For commercial transactions, where a developer or funder's reasonable requirements require a freehold transfer to facilitate a sale or regeneration.

(c) Where it is necessary to sell a freehold to release additional value from a transaction (e.g. marriage value through bringing sites into single ownership).

This list is not exhaustive and other circumstances could apply. Because of the potential effect on value the Council needs to ensure that each case is considered on its merits.

#### **Step 4 Obtaining Planning Certainty**

Prior to sale, the Service Head, Corporate Property and Capital Delivery will consider what level of certainty of planning is required to maximise value. Greater planning certainty will both crystallise value and increase the Council's chances of achieving a quicker, unconditional sale. Planning certainty can be achieved through obtaining planning permission (outline or full) or alternatively, and to a lesser degree, by preparing a Planning Brief or a Planning Advice Note.

At a site specific level, Planning and Development Briefs provide a valuable vehicle to establish clear principles for the future development of a site, to shape both the form and nature of uses.

A Planning Brief is more appropriate for large sites which may have been the subject of public consultation and its adoption as Council policy by the Cabinet provides a guide to a potential developer, officers and the appropriate Development Committee, of the Council's expectations for the future use of the site.

For smaller sites a Planning Advice Note may be appropriate. Save for transactions under £50,000 in value no property will be valued or marketed without such an Advice Note as a minimum.

All marketing information relating to disposals (except those under statutory powers) will include the relevant Planning Advice Note.

It is acknowledged however that no such documents can fetter the discretion of the development control process in determining a subsequent planning application. Officers will ensure that clear boundaries will be maintained to ensure that the Council exercising its disposal powers as landowner does not fetter its duties as Local Planning Authority.

#### **Step 5 Preparation of Pre-marketing Pack**

The AM will collate an information pack which will differ according to the type of property being sold but generally will include the following:

- Photographs
- The address including postcode
- The location and site plans
- Full responses to pre-contact enquiries
- Energy Performance Certificate
- Condition surveys
- Services and utilities plans
- Asbestos reports
- Planning Advice Note or details of planning permission
- Form of lease or transfer

#### **Step 6 The Sales Process for Sale by Informal Tender**

When a property is to be sold by informal tender the Council will ensure that the appointed agent widely and openly markets the property. It will also ensure that the highest levels of probity and confidentiality are maintained during the sales process.

The following process will be followed by the AM and the appointed agent to ensure the Council's interests are protected:

- (a) The property must be advertised nationally and locally and a board erected on site.
- (b) The agent will market the property for a six to eight week period, conduct all viewings and maintain a log of those viewings.
- (c) All offers are to be submitted in a prescribed pro-forma.
- (d) Offers will be submitted by a fixed time and date.
- (e) Offers must be returned to the Council's Service Head, Corporate Property and Capital Delivery in a plain sealed envelope marked 'OFFER' and identifying the property but not the identity of the bidder. NB Facilities Management and Business Support must not open the bid envelopes and should be instructed accordingly in advance.
- (f) The envelopes are to be date and time stamped on receipt and issued with a receipt number or a sequential number to indicate the order in which offers had been received by the Service Head, Corporate Property and Capital Delivery.
- (g) All offers should be held in a secure place by Asset Management until opening.
- (h) Offers should be opened by the Service Head, Corporate Property and Capital Delivery in the presence of the agent and at least two other officers, including legal representation.  
An officer must initial each offer and recorded it in a formal Schedule, in the form of a book, maintained for this purpose by the Corporate Director and the Schedule must be signed and dated by all present when all the offers have been recorded. The Schedule must be kept securely in a locked cabinet in the office of the Service Head, Corporate Property and Capital Delivery.
- (i) Officers will consider and record the following key information:
  - Details of the bidder
  - the financial standing of bidders
  - the level of offer
  - the bidders' track record
  - any conditions attached to the offer



- details of funding
  - the proposed use
  - any other relevant information
- (j) Failure to meet any of the pre-conditions or processes required by the Council may invalidate an offer.
- (k) Officers will rank the offers in accordance of acceptability.
- (l) Following evaluation all offers will be scanned to a secure drive and held by the Service Head, Corporate Property and Capital Delivery who will ensure they are kept securely in a locked cabinet in his/her office. They will also be sent to the agent for full analysis and subsequent detailed reporting to include, amongst other things, a clear recommendation on which bids to progress, whether to enter into a further bid stage and whether to interview.
- (m) Each and every discussion or negotiation with bidders is to be formally written up and notes placed on the file. Any negotiations for a land transaction above £250,000 should involve two members of staff, one of whom should be the Service Head, Corporate Property and Capital Delivery or his/her named representative. A file note recording each and every discussion should be placed on the relevant file.
- (n) Generally, pre-contract enquiries and a standard form of lease/transfer will be made available to bidders as part of the marketing process. Bidders will be required to exchange contracts within a prescribed number of days from the date of being provided with a contract. If exchange does not occur within the prescribed timescale, the offer may be deemed to be withdrawn and the Council may accept an offer from the second ranked bidder
- (o) An overall Register should be kept for all bids received for all asset disposals in addition to the Schedule of bids for a particular disposal.
- (p) Bidders must be informed that bids can, and may, be subject to scrutiny by Overview & Scrutiny Committee and therefore, they will need to identify information that they believe is commercially sensitive and note that after a time period it will no longer be deemed to be commercially sensitive.

#### **Step 7 Instructing Legal Services**

The PAM will produce the heads of terms and obtain an Officer Authority to instruct Legal Services. The PAM will then instruct Legal Services to prepare the sale documents and copy BS who will populate the 'legal instruction schedule' for monitoring purposes.

Once the sale process has completed Legal Services notify the AM by sending the case closure notification. They will send a copy of the signed transfer to the CAPS Manager to file in CAPS. The data stored on the CAPS will be updated by BS.

The AM will notify all other stakeholders, including:

- Finance Section
- Insurance Section
- The Client department
- Any other relevant departments or parties

BS will update the 'empty property schedule' as necessary.

## 4.2 Other Offers

Any offer which, on the evidence available, is considered to be incomplete, insubstantial or in any other way defective, mischievous or frivolous shall be rejected by the Service Head, Corporate Property & Capital Delivery, after consultation with the Director of Law, Probity and Governance.

Late Offers are to be accepted at the discretion of the Service Head, Corporate Property & Capital Delivery, after consultation with the Director of Law, Probity and Governance who must ensure that details of the offers already received on time have been secured so that no other officer or person has had access to the offers before they are finally opened. This is to ensure that late bids are only considered provided the bids already received have not been opened. Guidance from The Local Government Ombudsman recognises the difficulties facing Councils if a higher offer is received by the Council after another offer has been accepted subject to contract, particularly in view of the obligation for Councils to achieve best consideration. Such difficulties will be less likely to occur if Councils ensure that exchange of contracts takes place quickly after the decision has been made to whom to sell the property.

Where it is clear that a private “auction” is developing, it is recommended that potential purchasers are given a specific date and time to reconsider and submit their highest and final offer. If the Council wishes to impose any conditions upon acceptance, i.e. completion date, this should be made clear. It is also recommended that potential purchasers are informed that the successful bidder would be given a specific period in which to exchange contracts.

## 4.3 Transactions at less than Market Value

Approval must be obtained from, or on behalf of the Cabinet to disposals or lettings which are proposed to be less than the unrestricted value as defined by the General Disposal Consent (England) 2003 and/or where State Aid issues may arise. The Service Head, Corporate Property & Capital Delivery, shall seek the agreement of Cabinet by submitting a report to accept a disposal at an under-value. The report shall make the level of under-value explicit and will need to set out the well-being benefits to be derived and provide a statement that the well-being “value” matches or exceeds the value foregone.

The Council only has powers derived from the Housing Act 1985 to dispose of land to Registered Social Landlords at less than market value or under the terms of the Local Government Act 1972: General Disposal Consent (England) 2003. Other than these generally consented powers, the Council has to seek the consent of the Secretary of State to sell its assets at less than best consideration.

The Council must be able to demonstrate that it has acted reasonably in agreeing a sale at less than market value; that there was an appropriate decision making process and that regard has been had to the Council’s statutory and fiduciary duties (see definitions). Decisions must be robust and defensible and the monetary or benefit assessment of impacts will require detailed individual assessment in every case.

The Service Head, Corporate Property & Capital Delivery, will establish and keep under review a timetable for each disposal and will advise the AM&CSB. The Service Head, Corporate Property & Capital Delivery, shall provide a detailed report on an agreed basis to the Chief Finance Officer on the progress of disposals for financial planning purposes.

## 5.0 Authority

Disposal of surplus property will be dealt with through Cabinet. Any report to Cabinet will provide a recommendation from the Service Head, Corporate Property & Capital Delivery, about the proposed method of sale and whether the sale should be freehold or long leasehold.

Cabinet will be asked to delegate all matters relating to the sale to officers without referring offers back to Cabinet for final approval.

In all dealings with property matters it is essential that the highest levels of probity and confidentiality are maintained to ensure that best consideration is achieved under the Council's statutory duty.

Members have a both a fiduciary duty and statutory duty under S.123 of the Local Government Act 1972 to the residents of the Borough to obtain best consideration.

## 6.0 Definitions

### **"Auction"**

An auction quickly concludes completion and identifies the successful bidder who will sign a binding contract at the sale and exchange a 10% deposit. It is particularly suitable for properties for which there is likely to be keen competition from a wide market of potential cash purchasers, or for properties of an unusual nature but for which there is likely to be a ready market. However, it is often inappropriate for properties where the majority of purchasers will prefer to submit offers subject to contract and to minimise the risk of abortive costs, such as development land, housing sites, etc.

### **"Fiduciary duty"**

Fiduciary duty has been described as a duty to act in "a fairly business-like manner with reasonable skill and caution". The relevant principles established from case law can be summarised as follows:

- (a) Local Authorities are under a special duty in the exercise of all their powers to consider the financial consequences for the Rates and Council Tax payers. This duty is proportionate and equivalent to the fiduciary duty owed by a person in the position of trustee.
- (b) In considering the financial consequences of a decision, an Authority is required to conduct a balancing exercise between the interests of those who will benefit from the proposed measure and the cost to Rates and Council Tax payers.
- (c) Failure to have proper regard to their fiduciary duty renders a Local Authority decision liable to challenge on the grounds of illegality.
- (d) The fact that an Authority may have an electoral mandate for their decision is irrelevant to the question of whether the act is ultra vires.

### **“Formal Tender”**

This method of disposal creates contractual certainty as, at the final stage, if an offer is accepted it constitutes a legally binding contract. As with an informal tender, the sale will be advertised with a deadline by which prospective purchasers must submit their bid. Each tender document from the bidders must include the full legal contract for sale and a bankers draft as a deposit on the contract. As soon as the “best bid” is selected, the bankers draft is accepted and contracts are automatically exchanged. The successful bidder is then committed to the contract and will have to complete the sale on the appointed date. This form of sale is generally rarely used due to its complexity.

### **“Informal tender”**

This is a flexible method of securing offers of interest in property since it does not bind either party until completion of negotiations. Property is openly marketed and all offers have to be submitted by a fixed closing date. It does not preclude the purchaser or vendor from seeking to renegotiate more advantageous terms even when the sale is at a fairly advanced stage to take account of any changes in circumstances.

Any risks inherent in this can be partly overcome by stipulating time limits for exchanging contracts. This method allows the Council to view a number of competing proposals on a site where the Council has no fixed policy as to exactly what is required or wanted and where consideration can be given to a number of options without contractual obligations to the parties involved.

### **“Market Value”**

The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

### **“Special purchaser”**

A purchaser to whom a particular asset has special value because of advantages arising from its ownership that would not be available to general purchasers in the market.

### **“Well-being powers”**

The Council will need to meet its obligations in relation to the disposal of assets under Local Government Act 1972 and the General Disposal Consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained (“the Consent”).

Under the Consent a Local Authority has discretion to sell at an “undervalue” of up to £2,000,000. Undervalue is defined as “the difference between the unrestricted value of the interest to be disposed of and the consideration accepted”.

Where an under-value of less than £2,000,000 exists an Authority can dispose at less than market value in pursuance of its “well-being” powers. The full definition from the Consent is:

“(a) the Local Authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident or present in its area;

- i) the promotion or improvement of economic well-being;
- ii) the promotion or improvement of social well-being;
- iii) the promotion or improvement of environmental well-being; and

(b) the difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2,000,000 (two million pounds)".

These are often referred to as the Council's "well-being powers".

Where an Authority intends to dispose of land where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted ("the undervalue") is more than £2,000,000 (two million pounds) the requirement is for Authorities to seek specific consent from the Deputy Prime Minister and First Secretary of State ("the Secretary of State").

In determining whether or not to dispose of land for less than the best consideration reasonably obtainable, and whether or not any specific proposal to take such action falls within the terms of the Consent, the Authority should ensure that it complies with normal and prudent commercial practices, including obtaining the view of a professionally qualified valuer as to the likely amount of the undervalue.

It will be for the local authority to decide whether any proposed disposal requires specific consent under the 1972 Act, since the Secretary of State has no statutory powers to advise authorities that consent is needed in any particular case. Once an application for a specific consent is submitted, the Secretary of State is obliged to make a decision on the proposed disposal on its merits. However, if he is of the opinion that his consent is not required (ie the sale is not at an undervalue), or if he believes that the case falls within the terms of the Consent, his statutory function to give specific consent will not arise. Where an authority is uncertain about the need to seek consent, it may wish to seek its own legal advice on the matter. An authority may find it useful to keep its appointed auditor informed of any legal advice it receives and the proposed action it wishes to take. An auditor has a duty to consider whether the authority is acting lawfully.

Applications for specific consent should be sent to the Secretary of State via the Director of Planning at the Government Office for the relevant Region. The Secretary of State will require the following information:

- i)** a written description of the site and buildings, its physical characteristics, location and surroundings together with a plan which should be accurate enough to allow it to be used to identify the land in the Secretary of State's decision in cases where consent is given;
- ii)** a written description of the authority's tenure and a summary of the details of any leases, encumbrances, such as easements etc, to which it is subject. Details should be given of the purpose(s) for which the authority holds the land. Normally land is held for the purposes of the power under which it was acquired, or taken on lease, unless it has since been formally appropriated to another purpose;
- iii)** a written description of the existing use(s), current planning consents and alternative planning uses(s) that are likely to be permitted;
- iv)** a summary of the proposed transaction, noting the reasons for disposing at an undervalue, the key terms and any restrictions to be imposed by the authority; and
- v)** a detailed Valuation Report covering the matters listed in the Technical Appendix, and signed by a qualified valuer (a member of the RICS). The Department would normally expect the valuation to have been undertaken no earlier than six months before the submission.