

REPORT REFERENCE NO.	DSFRA/20/13
MEETING	DEVON & SOMERSET FIRE & RESCUE AUTHORITY
DATE OF MEETING	23 OCTOBER 2020
SUBJECT OF REPORT	PROPOSED POLICY ON DISPOSAL OF LAND
LEAD OFFICER	Director of Governance & Digital Services
RECOMMENDATIONS	<p><i>That, given the issues outlined in this report, the Authority determines that its policy on disposal of land will be:</i></p> <p><i>(a). as a general rule, to seek to obtain the best consideration (price) that can reasonably be obtained; and</i></p> <p><i>(b). that the discretionary power to dispose of land at less than the consideration that can reasonably be obtained will be exercised only in exceptional circumstances and must always be subject to:</i></p> <p><i>(i) independent assessment, prior to the sale process commencing, of the value to the Authority of any terms or conditions which might be attached by the Authority to the sale; and</i></p> <p><i>(ii) any terms and conditions to be imposed by the Authority being consistent with its functions.</i></p>
EXECUTIVE SUMMARY	This report addresses legal issues relating to the disposal of land and recommends that the Authority sets a clear policy for this.
RESOURCE IMPLICATIONS	Nil.
EQUALITY RISKS AND BENEFITS ANALYSIS	Not applicable
APPENDICES	Nil.
BACKGROUND PAPERS	<p>The Local Government Act 1972</p> <p>The Devon & Somerset Fire & Rescue Authority (Combination Scheme) Order 2006 (as amended)</p> <p>The Local Government Act 2000</p> <p>The General Consent (England) 2003</p> <p>Circular 06/03: Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained.</p>

1. BACKGROUND

- 1.1. In 2019, the Authority undertook an extensive public consultation linked to its wish to introduce a new Service Delivery Operating Model (SDOM) to address those risks identified in its approved Integrated Risk Management Plan (IRMP) by better aligning resources to risk and prioritising prevention and protection activity. One of the proposals in this consultation involved the closure of the Budleigh Salterton Fire & Rescue Station (“the station”).
- 1.2. The consultation ran from 3 July to 22 September 2019. The outcomes of the consultation were considered at an extraordinary Authority meeting on 10 January 2020 when, having considered the responses submitted to the consultation, the decision was taken, amongst other things, to close the station, with affected firefighters allowed to respond from Exmouth Fire & Rescue Station.
- 1.3. The Covid-19 pandemic and associated social distancing measures has, however, impacted upon normal arrangements both for Service delivery and governance issues. On 3 July 2020 a decision was taken using the Urgency procedures of the Authority’s Standing Orders to approve the disposal of the station on the most economically advantageous terms for the Authority, in accordance with legislative requirements. This decision was taken in light of the previous Authority decision for closure of the station and as it was felt that awaiting the next formal Authority meeting (scheduled for 23 October 2020) would introduce an unnecessary delay to progressing disposal of the asset.

2. LEGAL BASIS FOR DISPOSAL OF LAND

- 2.1. Section 123 of the Local Government Act 1972 (“the Act”) deals with the disposal of land by local authorities. This is specifically applied to this Authority by virtue of Part 3, paragraph 15 of the Devon and Somerset Fire and Rescue Authority (Combination Scheme) Order 2006 (as amended). Section 123 of the Act (amended in square brackets to indicate its applicability to this Authority) provides:
 - (1) Subject to the following provisions of this section, [the Authority] may dispose of land held by them in any manner they wish.
 - (2) Except with the consent of the Secretary of State, [the Authority] shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.
- 2.2. In response to Member questions, the Authority was, correctly, advised at the Authority Extraordinary Meeting on 10 January 2020 that the “well-being” power provided by Section 2 of the Local Government Act 2000 did not apply to combined fire and rescue authorities. For reference, Section 2 provides for county and district councils to do anything which they consider is likely to achieve one or more of the following:
 - (a). the promotion or improvement of the economic well-being of their area;
 - (b). the promotion or improvement of the social well-being of their area; and

- (c). the promotion or improvement of the environmental well-being of their area.

2.3. What was unknown at that time, however, but which subsequently come to light as a result of the disposal of the Budleigh Salterton Fire & Rescue Station, is that in 2003 the [then] Secretary of State issued, in exercise of the powers under Section 123(2) of the Act, a General Disposal Consent (“the Consent”). Whilst combined fire authorities are not included specifically in the list of authorities coming under the meaning of “local authority” within the Consent, Paragraph 3(1) of the Consent sets out that it applies “...to any other person to whom, by virtue of statute, Section 123(2) or Section 127(2) of the Local Government Act 1972 applies”. Legal advice obtained has confirmed that the Consent remains extant and applies to this Authority. The Consent allows the Authority to dispose of land, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained if the following specified circumstances apply:

- (a). the Authority considers that the purposes 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; and
 - (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).

2.4. In essence, the Consent provides the Authority with a discretionary power in respect of the disposal of land that is analogous to the “well-being” power provided to other local authorities by virtue of Section 2 of the Local Government Act 2000.

3. IMPLICATIONS FOR THE AUTHORITY

3.1. As indicated in paragraph 2.4, the Consent provides the Authority with a discretionary power that can, but does not have to, be used when disposing of land. Legal advice obtained has indicated that, given the Authority’s specialist and limited (single-purpose) function, it could be difficult and potentially problematic for the Authority to justify exercising the discretionary power and that any decision to sell at an undervalue (i.e. for less than can reasonably be obtained) should be taken with great care and on the basis of clear advice, with clear reasons recorded for the exercise of the discretionary power.

- 3.2. This legal advice is reinforced by the contents of Circular 06/03 (“the Circular”), initially issued by the [then] Office of the Deputy Prime Minister (subsequently the Department for Communities and Local Government) to provide guidance on the exercise of the discretionary power under the Consent. The Technical Appendix to the Circular sets out a process to be followed in exercising the discretionary power. This process is pro-active rather than reactive i.e. it should be undertaken prior to any sale process commencing. In summary, prior to any sale process commencing an independent valuation exercise should be undertaken to determine:
- (a). the unrestricted value of the land (in general terms, the amount that would be realised if the principal aim was to maximise the value of the receipt i.e. secure the best, reasonable consideration);
 - (b). the value of any voluntary conditions imposed by the authority as terms of the disposal (or under agreements linked to the disposal) that produce a direct or indirect benefit to the authority which can be assessed in monetary terms; and
 - (c). the restricted value (i.e. the unrestricted value amended to reflect the value of any voluntary contributions).
- 3.3. Paragraph 3.2, point (b) above is relevant in that it indicates that, in exercising the discretionary power, the relevant authority should still look to realise a benefit (either direct or indirect) that can be assessed in monetary terms. The Circular also provides that:
- (a). Generally, it is expected that land should be sold for the best consideration reasonably obtainable;
 - (b). that, when disposing of land at an undervalue, authorities must remain aware of the need to fulfil their fiduciary duty in a way that is accountable to local people;
 - (c). in considering whether to exercise the discretionary power, authorities should have regard to their community strategy; and
 - (d). in deciding whether to exercise the discretionary power, authorities should determine whether such a decision would be compliant with any other relevant governing legislation.

Community Strategy

- 3.4. Local authorities with well-being powers under Part 1, Section 2 of the Local Government Act 2000 were initially also required to prepare, by virtue of Part 1, Section 4 of that Act, a strategy for the promotion of well-being, commonly referred to as a “community strategy”. The purpose of a “community strategy” was to set out the strategic vision for a place in addressing difficult cross-cutting issues (such as the economic future of an area, social exclusion and climate change) by co-ordinating the public, private, voluntary and community sectors to promote or improve economic, social and environmental well-being and contribute to the achievement of sustainable development.

- 3.5. However, Part 1 of the Local Government Act 2000, in its entirety, has never applied to combined fire and rescue authorities (CFRAs) such as this Authority. Additionally, Section 4 of the Act (dealing with the requirement for a community strategy) was subsequently repealed by the Deregulation Act 2015.
- 3.6. While, therefore, the issue of a “community strategy” is no longer relevant (and never was for a CFRA), the remainder of the Circular and the Technical Appendix are still applicable in setting out those issues to be considered and the process that should be followed by any authority (including a CFRA) when looking to exercise the discretionary power under the Consent. In other words, in exercising the discretionary power under the Consent, the local authority should seek to realise for itself a tangible benefit that can be expressed in monetary terms. Such a benefit would, by definition, need to relate to those functions for which the authority is responsible.

Fire & Rescue Authority Functions and Integrated Risk Management Plan (IRMP)

- 3.7. The functions of a CFRA are, in comparison with the functions of those authorities listed in Section 1 of the Local Government Act 2000, very narrow in scope and may be summarised as providing fire and rescue services (including community safety) for the communities served. CFRAs do, though, still have a fiduciary duty to ensure that public funds are properly applied for these purposes.
- 3.8. As indicated above, CFRAs do not, nor have ever been required to, have a community strategy of the type initially envisaged by the Circular. They are, though, required to have an approved IRMP. Unlike the type of “community strategy” envisaged by the Circular and the Local Government Act 2000, this IRMP is very specific in its focus of identifying risks in the area served and how it is proposed to address these risks. In exercising its fiduciary duty, a CFRA should ensure that its resources are applied in a manner compatible with its statutory functions and with its IRMP.
- 3.9. Applying the above to any proposed exercise of the Consent discretionary power by this Authority, while it might be legitimate to approve the sale of land at an undervalue to an organisation that, for example, was intending to establish some kind of community safety centre, it is suggested it would be more difficult to justify an undervalue sale for a purpose that could not be linked back to the functions of the Authority.
- 3.10. Failure to exercise the discretionary power in an appropriate and justifiable manner, giving sound reasons for any such decision, would expose the Authority to the very real risk of judicial review either for failure to follow proper procedure, irrationality or both.

4. SUMMARY AND CONCLUSION

- 4.1. The “well-being” power provided by Section 2 of the Local Government Act 2000 does not apply to combined fire and rescue authorities.

- 4.2. Section 123 of the Local Government Act 1972 deals with the disposal of land by local authorities. This Section sets out that, except with the consent of the Secretary of State, authorities shall not dispose of land for a consideration less than the best that can reasonably be obtained. However, in exercise of the powers under Section 123(2) of the 1972 Act, the [then] Secretary of State issued a General Disposal Consent (“the Consent”) that allows relevant authorities to dispose of land for a consideration less than the best that can reasonably be obtained if specified circumstances apply. Legal advice has confirmed that the Consent remains extant and applies to the Authority.
- 4.3. The specified circumstances for exercising the discretionary power to dispose of land for a consideration less than the best that can reasonably be obtained are where the Authority considers that the purposes for which the land is to be disposed is likely to contribute to the achievement of the promotion or improvement of economic, social or environmental well-being.
- 4.4. The Circular issued by the [then] Government to provide guidance on the exercise of the discretionary power under the Consent sets out that, generally, it is expected that land should be sold for the best consideration reasonably obtainable. When disposing of land at an undervalue, authorities must remain aware of the need to fulfil their fiduciary duty and should have regard to their community strategy.
- 4.5. However, given the Authority’s narrow range of functions coupled with the fact that the Authority does not, nor has ever been required to, have a community strategy of the type envisaged by the Circular, it is suggested it would be more difficult to justify an undervalue sale for a purpose that could not be linked back to the functions of the Authority. Legal advice obtained supports this position, indicating that it could be difficult and potentially problematic for the Authority to justify exercising the discretionary power.
- 4.6. In light of these issues, it is proposed that the Authority policy in relation to the disposal of land should be that, as a general rule, disposals of land should be on the basis of the best consideration (price) that can reasonably be obtained and that any exercise of the discretionary power to dispose of land at undervalue will be taken with great care and on the basis of clear advice, with clear reasons recorded for the exercise of the discretionary power.

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