



BACKGROUND

Anyone working in the field of local authority land disposals will be aware of the obligation not to dispose of land otherwise than for the best consideration that can reasonably be obtained (without the consent of the Secretary of State). This is set out in section 123(2) of the Local Government Act 1972 and binds “Principal Councils” (County, District, London Boroughs and Unitary Councils for those areas). Similar provisions apply to Parish Councils under section 127(2) of the 1972 Act.

It is important to note the word “reasonably” in the statutory objective. A local authority won’t have breached the duty simply because it has not taken the absolute highest cash offer that it received prior to the disposal. The market for land can be complex and subject to aggressive competition. There has been previous litigation on the subject of “spoiler” bids and the merits of the argument that “a bird in the hand is worth two in the bush”. Local authorities have had their decisions upheld even if there was a, arguably, higher offer where their conduct has been reasonable.

A WORD ABOUT “BEST VALUE”

It is not unusual to find people referring to the s123 duty as a “Best Value” obligation (and suggesting that an offer that includes non-cash benefits is a “Best Value” outcome), but that has the potential to be confusing.

‘Best Value’ is a different (and broader) concept than ‘best consideration’. It is clear from Government guidance and case law that ‘consideration’ means cash consideration and ‘best consideration’ means the best cash consideration for an unrestricted disposal. If a local authority has wider “Best Value” objectives, those need to be considered separately and in a different way.

HOW IS THE “BEST CONSIDERATION” TO BE OBTAINED?

There is no rule or law that states that this outcome must be achieved by exposing land to the open market (albeit that this is a fairly fireproof way of meeting the test). A ‘Red Book’ valuation of the disposal is generally accepted as a reasonable alternative if a sale ‘off-market’ is capable of rational justification.

However, if it intends to go down the route of negotiating “off-market” with a single (or multiple) purchaser(s) and relying on a valuation rather than a marketing exercise, the



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local authority still needs to make a rational decision on normal public law principles. Given that the route of a negotiated rather than market led sale is, perhaps, unusual, the rationale for the decision ought to be transparent and recorded with the decision to follow that route.

The reasoning for selling “off-market” is a different question to one of value and could include lots of factors such as the desire to see a coherent development of a larger area of land for which the authority has wider strategic aims. However, once that negotiation has reached a conclusion, the authority still needs to address the question of consideration and satisfy itself that the process has generated the correct result.

WHAT IF THE OFFER IS NOT THE “BEST CONSIDERATION”?

If a negotiated sale has been agreed but the price is not consistent with a Red Book valuation of ‘best consideration’, all is not lost because of the qualification to the duty “...except with the consent of the Secretary of State...”. The Secretary of State has given a general consent to sales at an undervalue of no more than £2M where such a disposal is likely to contribute to the achievement of one of the “well-being” objectives (originally introduced in the Local Government Act 2000).

These objectives are:

- 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.

This is where “Best Value” considerations of a broader nature fall to be considered. The local authority still needs to know what the best unrestricted consideration would have been (the Red Book valuation) but can then weigh (rationally, of course) the desirability of achieving the relevant well-being objective against an undervalue of up to £2M under this General Consent. If the undervalue is more than £2,000,000 an approach to the Secretary of State for a specific consent can be made.

The Secretary of State has given detailed advice on the General Consent and valuation issues in Circular 06/03.

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