

Appendix 3 - Legal Advice on Asset Transfer:

Disposal of local authority land at less than best consideration

Under the Local Government Act 1972, local authorities have powers to dispose of land in any manner they wish. The only constraint is that a disposal must be for the best consideration reasonably obtainable, unless the Secretary of State consents to the disposal. To facilitate the process of obtaining consent, the Local Government Act 1972 confers powers on the Secretary of State to give a general consent for land disposals. This consent is contained in the Local Government Act 1972: General Disposal Consent (England) 2003.

In determining whether or not to dispose of land for less than best consideration, the Council would need to 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.

The consent is only available where the Council 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 in its area:

- the promotion or improvement of economic well-being;
- the promotion or improvement of social well-being;
- the promotion or improvement of environmental well-being; and
- 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).

From an initial view it would appear that facilitating a disposal of some (or all) of the council's leisure facilities as part of the Council's wider leisure procurement strategy to improve the leisure facilities in Barnet would generally fall within this consent, particularly as at least one of the above objectives will be fulfilled. Given the value of the facilities the Council will however need to consider whether it has exceeded the £2,000,000 threshold, though this will of course depend on the commercial nature of the deal. Depending on the circumstances, the carrying out of a procurement exercise may in itself be sufficient proof that a fair commercial value has been obtained, thereby negating the need for any consent.

In circumstances where a transaction is for less than best consideration the Council will also need to comply with state aid rules and an appropriate valuation of the relevant assets will need to be undertaken.

Do you have any best practice information where an authority has undergone asset transfer?

In our experience each disposal is quite unique, particularly (as is likely to be in this case) where there is a complex contractual structure. We would however recommend that significant preparation is put in place prior to commencing

any contractual negotiations to ensure that the Council has up to date valuations of the facilities, and full title due diligence of the sites. From a property perspective title to facilities is not always straight forward and existing encumbrances on the land may prevent the Council from pursuing some options.

Is there any specific procurement practice within an asset transfer process?

Where a transaction is in the form of a sale of land and development agreement, there are circumstances where a procurement exercise will not need to be undertaken, as the Public Contracts Regulations 2006 (the **Regulations**) do not apply to simple transactions in land. There is however a significant amount of recent case law where the courts have distinguished between whether a development agreement amounts to a public works contract (which falls within the ambit of the Regulations) or whether merely a land transaction is taking place. Where local authorities impose their own requirements on developers as a condition of allowing developments to proceed, the risks of treating the development agreement as anything other than falling within the requirements of the Regulations are substantial.

As the current proposals appear to be more than a disposal of land, and relate to a wider procurement of leisure facilities and on-going management, the council will be subject to the full application of the Regulations. Due to the likely complexity of the procurement at this stage we would envisage that the most suitable procurement process will be to use the competitive dialogue procedure.

Are evaluation criteria and a methodology for selection necessary?

In accordance with the EU Treaty principle of transparency, evaluation criteria and methodology will be required in any procurement process. The Regulations and the related European and domestic case law relating to evaluation of tenders is complex, and we would advise the Council to carefully prepare and scrutinise its proposed criteria and methodology to ensure that they are fair and workable. Recent UK case law makes it clear that public authorities are expected to disclose, in advance, award criteria, sub-criteria and weightings.

The Council will need to ensure that it distinguishes between selection criteria and award criteria. Selection criteria relate to the tenderer and are used to assess the tenderer's ability to perform the proposed contract (for example, in terms of experience, economic standing and qualifications). Selection criteria may only be applied at the pre-qualification stage in order to short-list bidders to be invited to tender or participate in dialogue. Award criteria relate to the tender and are used to identify the tender that is the most economically advantageous (for example, in terms of price, technical specifications and project management proposals).

Can we specify a lease with investment where Barnet retain the freehold of the property?

Subject to commercial requirements, the Council will be free to choose its preferred method and whether it wishes to dispose of the freehold or grant a short or long term lease. We envisage that it may be more politically acceptable to enter into a lease arrangement rather than dispose of the Council's freehold interest in any facility. We would note however that the requirements of the General Disposal Consent (England) 2003 apply equally to freehold and leasehold disposals.