Acquisition and disposal of land

Department | Strategy and Business Services
Responsible Officer | Director | Strategy and Business Services

Introduction
The acquisition and disposal of Land by Council requires a formal process that ensures probity, due diligence, analysis of risk and other key issues. The number of Land acquisitions and/or disposals undertaken by Council in any given year varies, but is directly linked to the strategic provision of open space, operational and community benefits, economic growth and achieving planning outcomes.

Purpose and Objective
1. To acknowledge Council’s charter that it is the custodian and trustee of public assets and is required to effectively account for and manage the assets for which it is responsible (Section 8 of the Local Government Act 1993).
2. To set out the principles, framework, responsibilities and processes for Council and Council Officers to account for, and manage the acquisition and disposal of Council Land assets.
3. To identify, manage and mitigate the risks associated with the acquisition and disposal of Land.
4. To ensure impartiality, transparency, accountability and the delivery of best value in the disposal of Land.
5. To provide appropriate levels of discretion and flexibility in achieving desired outcomes recognising the highly complex nature of Land transactions, the wide variety of circumstances and methods of acquisition and sale available.

Definitions
For the purpose of this procedure:-

**Acquisition Authority** means the responsible agency to acquire affected properties identified in Bega Valley Shire Council’s Local Environmental Plan 2013 and as amended from time to time.

**Act** means the Local Government Act 1993.

**Contract** means any form of contract which legally binds the Council (or potentially binds Council) and includes formal contracts and other forms of contractual arrangements including deeds of agreement, in principle agreement, options to purchase etc.

**Land** is defined as Land as a physical entity including:

(i) any building or structure on or improvement to Land; or
(ii) any stratum of Land whether below or above ground; or
(iii) a strata lot pursuant to relevant strata subdivision legislation.

**Owner Initiated Acquisition** means the principle considerations defined in Section 23 of the Land Acquisition (Just Terms Compensation) Act 1991 to acquire affected properties.
Programmed Acquisition means when the acquiring authority requires the affected property and initiates the acquisition process.

Regulation means the Local Government (General) Regulation 2005 and any replacement Regulation.

Legislation
1. The Local Government Act 1993 vests authority in Council to sell or exchange Real Property. In respect of this Procedure, “exchange” includes property acquisition and other related activities including Land swaps etc.
2. In accordance with Section 377(1)(h) of the LG Act any decision to dispose of Land must be made by resolution of Council, as the power to sell, exchange or surrender Land cannot be delegated.
3. Section 45 of the LG Act prevents Council from selling, exchanging or otherwise disposing of community Land other than to become or be added to a Crown Reserve or National Park.
4. Section 55 of the LG Act requires tenders to be called in certain circumstances. However, it is not necessary to call tenders for the sale of Land.

Council’s property activities will be managed within the legislative parameters of the:
- Local Government Act, 1993;
- Valuation of Land Act, 1916;
- Conveyancing Act, 1919;
- Environmental Planning and Assessment Act, 1979;
- Residential Tenancies Act, 1987;
- Land Acquisition (Just Terms Compensation) Act, 1991;
- Roads Act, 1993;
- Retail Lease Act, 1994;
- Crown Lands Act, 1989;
- Environment Protection and Biodiversity Conservation Act, 2000;
- National Parks and Wildlife Conservation Act, 1975;
- Real Property Act, 1919;
- Regulations under each of the above Acts;
- Any other legislation applicable to the Procedure.

Fundamental Principles

All decisions and actions in relation to the acquisition and/or disposal of Land will have due regard to the following fundamental principles:

- Best value for money – achieving “best value” may include financial, social and environmental benefits.
- Transparency – processes must be open to scrutiny and provide full information and record the reasons behind the decisions.
- Accountability – demonstrate the best use of public resources and the highest level of performance through appropriate record keeping and audit trails.
- **Impartiality** – address perceived or actual conflicts of interests.

**Land Acquisition**

Council will acquire Land for the purpose of carrying out its functions under the LG Act. Any Land to be acquired by Council is subject to a formal resolution of Council.

**Independent Valuation Benchmark and Special Value**

Any Land acquisition is to be benchmarked to an independent valuation of the Land/property.

In some cases there will be justified reasons for Council acquiring property at a price above the valuation benchmark in order to guarantee the successful securing of the property to achieve defined goals and objectives of the Council, or to acquire the property with a view to adding value (or reducing risk) to a larger scheme or development (future or current).

Any special value should be determined and quantified within the initial decision of Council and reference to the achievement of specific goals and objectives of Council.

**Acquisition Process**

While the General Manager and/or their delegate may make preliminary enquiries regarding a possible purchase, no negotiations will commence without a resolution of Council being made, authorizing negotiations. The General Manager shall:

- Be responsible for the conduct of all negotiations.
- Have regard to an independent valuation obtained from a registered valuer.
- Seek such other professional advice as is considered necessary in the circumstances.
- Have regard to the Independent Commission Against Corruption publication Direct Negotiations so far as is appropriate in the circumstances, and
- Report the outcome of all negotiations to the Council for determination.

Prior to finalisation of an acquisition, Council shall determine the classification of the Land as either ‘Operational’ or ‘Community’ in accordance with Section 31 of the LG Act.

Council’s process of Land acquisition must include the following steps:

- Identification of the Land acquisition opportunity by Council and/or the Responsible Officer;
- In principle decision by the General Manager to commence the pre-acquisition process;
- Preparation of a comprehensive assessment of the Land acquisition including:
  
  (i) Required due diligence,
  (ii) Independent valuation, maximum price (purchase, lease or other),
  (iii) Assessment against Council’s adopted Land Investment Strategy,
  (iv) Identification of funding source and assessment against Council’s Long Term Financial Plan, and
  (v) A statement of goals and objectives for the proposed Land to be acquired including a statement of any “Special Value” deemed appropriate by Council.
- Formal consideration by Council of dealing with the matter and if required, in accordance with Section 10A of the LG Act, it be dealt with in Closed Session;
• Formal report to Council including the Land acquisition assessment and documented reasons for Council’s acquisition of the Land, and if supported delegation to the General Manager to negotiate an outcome subject to the financial and risk parameters as determined by Council;
• Negotiation, and if successful, implementation of all matters necessary for the preparation, signing and sealing of contract documentation required; and
• Once completed the General Manager to advise Council of the outcome (successful or otherwise).

Methods of Acquisition

Wherever possible, Council’s preferred method of acquisition is to acquire Land through mutual agreement with the owner of the Land. The key principles in the acquisition of Land are:

1. Opportunistically by responding when the desired Land is offered to the market;
2. Proactively by initiating negotiations for the desired Land;
3. Council’s preferred position is not to acquire Land through compulsory acquisition, however, Council has an obligation to provide services to the community and if required, Council may consider utilising its powers under the LG Act in respect of “compulsory acquisition”; and
4. Compulsory acquisition for a public purpose can only be initiated with a resolution of Council.

Compensation

Compensation will apply to affected property owners under the following provisions:

1. Owner initiated acquisitions
2. Programmed acquisitions

In determining the amount of compensation to which a person is entitled, Part 3 Division 4 of the Land Acquisition (Just Terms Compensation) Act 1991 requires that regard must be given to the following matters only:

• the market value of the land on the date of its acquisition.
• any special value of the land to the person on the date of its acquisition.
• any loss attributable to severance.
• any loss attributable to disturbance.
• solatium (i.e. that is compensation for non-financial disadvantage arising from the need to relocate as a result of the acquisition), and
• any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

3. Property owners claiming hardship in accordance with Section 24 of the Land Acquisition (Just Terms Compensation) Act, 1991 provisions should note that:

(a) Council is not required to acquire Land unless it is of the opinion the owner will suffer hardship (within the meaning of the Land Acquisition (Just Terms Compensation) Act 1991. An owner of land must demonstrate they suffer hardship if:

(b) The owner is unable to sell the land, or is unable to sell the land at its market value, because of the designation of the land for acquisition for a public purpose, and
(c) it has become necessary for the owner to sell all or any part of the land without delay for pressing personal, domestic or social reasons, or in order to avoid the loss of (or a substantial reduction in) the owner’s income

(d) However, if the owner of the land is a corporation, the corporation does not suffer hardship unless it has become necessary for the corporation to sell all or any part of the land without delay for pressing personal, domestic or social reasons of an individual who holds at least 20 per cent of the shares in the corporation, or in order to avoid the loss of (or a substantial reduction in) the income of such an individual.

Land Disposal

Fundamental Principles

Any Land to be disposed of by Council is subject to a formal resolution of Council and will have due regard to the fundamental principles listed on Page 3 of this Procedure.

Land Deemed to be Surplus

“Land” includes all real property whether vacant or improved. Land may not be sold by Council unless it is classified as “operational” land under Section 25 of the LG Act.

In order to establish whether or not Land is deemed to be surplus, a process of consultation is required to be completed across relevant divisions of Council prior to reclassification in accordance with the LG Act.

Delegated Authority

Section 377(1)(h) of the LG Act requires a specific resolution of Council to dispose of Land. The decision cannot be delegated.

The report to Council is to include reference to the manner of disposal (often contained within a confidential report) in regards to the terms of the sale and the agreed price, or range for negotiations. The sale cannot proceed outside of such parameters (without a further resolution of Council).

The resolution should also provide for the General Manager to be provided with delegated authority to negotiate any outstanding, usually minor conditions, and to be authorised to execute any documents in relation to the matter deemed appropriate by Council’s legal panel solicitors.

A copy of the report and resolution is to be provided to Council’s solicitor upon instruction, as authority to act and to ensure compliance with the resolution.

No formal actions may be commenced in the disposal of Land until a report has been considered by Council and an appropriate resolution adopted.

Informal pre-sale discussions/negotiations must always be qualified “subject to resolution of Council” if there is no current resolution of Council to dispose of the Land.

Valuation Processes

At least one formal market valuation undertaken by a valuer registered to value such property is required to be commissioned prior to all property disposals. Two valuations may be required when the value of the property is likely to exceed $1,000,000 and/or the process of disposal is not competitive (as defined below).

An internal review of the valuation(s) is to be carried out and reported, with specific attention to the valuation rationale, method of valuation, calculations and sales evidence used. After such review, the valuation is to be considered in the setting of an asking price for sale, reserve price for auction or benchmark for negotiations, tender or expression of interest.
When two valuations have been provided, averaging is the preferred method for considering the price, when any difference in the valuation is 10% or less. Differences in valuations of more than 10% require an assessment of the reasons why they are different, and more detailed justification of the price.

An updated valuation or valuation advice is required after 12 months of the date of the original valuation if the Land is not sold, or at any time it is considered there may have been a reasonable movement in value since the original valuation was received.

The valuation instructions must clearly state the following:

- The purpose of the valuation being for “disposal” of the Land;
- The basis of valuation being “market value highest and best use”, unless an alternative basis is considered more appropriate in the circumstances;
- That the valuation is to be marked confidential; and
- That the valuation includes market commentary, details of sales evidence and adjustments, valuation rationale and methodology, a valuation range (for negotiations) and comments on marketability, most appropriate method of disposal and opportunities to add value.

In addition, the valuer must make a statement there is no actual or perceived conflict of interest in undertaking the valuation.

**Methods of Disposal**

An open competitive process of disposal is required, selecting one of the following methods:

- Expression of interest – to be used for unusual properties capable of a variety of development where it is difficult to determine a market value.
- Tender – least common and used predominantly in high value, limited market situations.
- Auction – the most open and public method, favoured by government, but reliant on high levels of competition. Often achieves a quick sale, but can fail in a poor market.
- Private Treaty – most common, where an asking price is set and negotiated with individuals, usually through a real estate agent (who can be an independent third party to the negotiation process) and can arise after an unsuccessful Auction.
- Council may approve a non-competitive process of disposal such as direct negotiations, subject to clearly documented reasons and the employment of risk mitigation measures.

Risk mitigation measures for direct negotiations may include:

- Obtaining two valuations where the Land may be valued at more than $1,000,000.
- Pre-establishing a range for negotiation, having regard to the two valuations.
- Managing conflicts of interest with declarations of no personal or financial associations.
- Establishing a Negotiation Protocol, describing the manner in which meetings, negotiations, decisions and progress reporting is to be managed and documented, and
- Limitation on marketing budget and exclusive agency periods.

**Contract for the Sale of Land**

Contracts for the sale of Land will usually contain standard conditions of sale.

Any unusual or special conditions of sale require the delegated approval of Council or the General Manager as set out in the section of this procedure named ‘Delegated Authority’.
Council’s solicitor is responsible to ensure Contracts for the sale of Land satisfy statutory disclosure and warranty obligations (Conveyancing (Sale of Land) Regulation 2005).

**Disposal below Market Value**

In rare circumstances, Land may be disposed of to achieve strategic outcomes. In such situations, “best value” may comprise financial, environmental or social elements, with the price falling below the “market value” range.

The report seeking resolution of Council should clearly state the reasons for such sale and quantify the amount below market value attributable to each element.

The obligation to obtain a market valuation exists in accordance with the above, in order to provide a measure of the non-financial elements of the sale.

**Sale to Adjoining Owners**

In circumstances where Land is not able to be sold in isolation on the open market (such as small parcels, undersized lots, former road widening, closed laneways, boundary adjustments etc) and the only potential purchasers are adjoining owners; the Land must be offered in equal proportions to each adjoining owner on identical sale terms and conditions.

Where an adjoining owner does not wish to purchase their proportion of the Land, the rejected Land will be equally offered to the remaining adjoining owner.

The recommended method of determining the sale price is the “before and after” method as related to the purchaser’s Land. For small portions of Land, the “piecemeal” ($ rate per square metre) method may be more appropriate.

An essential condition of sale is the purchaser is required to consolidate the subject Land with their existing holding at no cost to Council.

The costs associated with the sale process will be borne by the prospective purchaser.

**Sale of Roads – Roads Act, 1993**

No road can be sold until it is formally closed in accordance with the provisions of the *Roads Act 1993*.

For purchaser initiated closures and sales, the costs associated with the road closure will be borne up front by the prospective purchaser.

When Council initiates the road closure (in order to realise the value of surplus Land), the costs will be borne by Council as development costs.

The agreed purchase price and estimated costs will be reported to Council seeking resolution agreeing to make application to close the road and dispose of the Land upon closure in accordance with the terms of sale.

In accordance with Section 43 of the *Roads Act, 1993*, funds from the sale of roads are required to be set aside for acquiring Land for public roads or for carrying out work on public roads.

**Proceeds of Sale**

In accordance with the Council’s adopted Long Term Financial Plan (LTFP), Council will use the proceeds from the sale of ‘operational’ Land to leverage investment or strategic outcomes. This may include generating private investment that creates jobs or a range of services that normally require residents to travel outside the Shire.

Council may also use funds generated from land disposal to leverage acquisition of other land critical to the orderly development of important urban or environmental areas and to supplement its revenue sources and minimise the demand for increasing rates above rate-pegging, or a reduction in services.
Confidentiality

In the majority of disposal of Land matters, the information contained in reports to Council to sell Land may confer an advantage upon a person with whom Council is, or proposes to, conduct business with. It would be considered contrary to the public interest for Council to deal with such matters in open session, because release of the information could prejudice Council’s ability to obtain maximum return on the property.

Therefore, it is acknowledged that reports to Council on the disposal of Land will generally be deemed confidential under Section 10A(2)(c) of the LG Act. This confidentiality may then be lifted by Council resolution upon settlement, if considered to be in the public interest to do so.

Departure from this Procedure

Any provision of this procedure may be varied to meet the needs of a particular matter, by resolution of the Council. The reasons for change will be clearly articulated within the report submitted for consideration by Council in adopting such resolution and will only apply to such matter.

Associated documents

- Bega Valley Shire Council Local Environmental Plan 2013 – Adopted August 2013
- Bega Valley Shire Council Long-term Financial Plan (LTFP)
- Bega Valley Shire Council Land Investment Strategy – September 2011
Classifying land as ‘operational’ or ‘community’ upon acquisition

Is the land to be acquired?
- Crown land;
- land for the purposes of a road;
- Community land before its acquisition;
- dedicated under s.94 EPA or purchased using s.94 funds;
- subject to another Act, contract term, Will or other instrument with which the classification is inconsistent;
- otherwise acquired by Council in circumstances requiring the land to be used for a public purpose;
- was compulsorily acquired for a public purpose.

YES
STOP.
Council cannot classify land as operational by resolution upon acquisition or within 3 months of acquisition. Refer procedure for options.

NO
Council can proceed to classify land as operational upon acquisition or within 3 months of acquisition.

Steps involved:
- Council gives public notice of the proposed resolution to classify the land as operational;
- The Public Notice must include the terms of the proposed resolution and a description of the public land concerned;
- The Public Notice must allow 28 days for submissions to be made to Council;
- Once the 28 days have passed, a resolution can be made that the land be classified as operational;
- Resolution must be made before or within 3 months of acquisition of the land.
NOTICE TO CLASSIFY PUBLIC LAND

Council has resolved to acquire (insert title details) being the (insert property description). Council intends to classify the land as operational under Section 31 of the LG Act 1993.

In accordance with Section 34 of the Act, notice is hereby given of the proposed resolution to classify the land as operational land upon acquisition.

Any person may make a written submission in respect of this notice. All submissions must be in writing, addressed to the General Manager and can be emailed, posted or faxed before (insert time and date).

For more information, please contact Council’s Property Officer on (insert phone number and email address).

Leanne Barnes
General Manager
Bega Valley Shire Council
PO Box 492, Bega NSW 2550
Facsimile: (02) 6499 2200
Email: council@begavalley.nsw.gov.au