

Gwasanaeth Cyhoeddus Cymru

Public Service Wales

Ymateb i Her Newid

Meeting the
Challenge of Change

Appendix C


National Assets Working Group

Best Practice Guide for disposal & transfer of
land and property assets between public
bodies in Wales

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BEST PRACTICE GUIDE FOR THE DISPOSAL & TRANSFER OF LAND & PROPERTY ASSETS BETWEEN PUBLIC SECTOR BODIES IN WALES

1. Executive Summary.

This guide sets out advice by the National Assets Working Group (NAWG) for a best practice solution for the transfer or disposal of land between public bodies in Wales.

One of the key deliverables of the NAWG is the development and delivery of a best practice guide for use by the Welsh public sector to assist in reducing cost and time associated with the transfer, use and disposal of the public estate between public bodies in Wales.

Key Principles:

- Identify surplus assets at an early stage and utilise e-Pims to assist with coordination with other bodies.
- Value assets at market value using RICS' Red Book
- The organisations should appoint a single independent valuation, commissioned from the District Valuer to settle the price to be paid.
- The organisations should take legal advice, especially where sponsored organisations are involved as these may have specific legal requirements for the transfer process.
- Transfers involving “Welsh Minister” owned property for internal departments within the Welsh Assembly Government may not need a full investigation of legal title.
- The terms of transfer, should not normally involve claw-back (rights to share disposal proceeds) or overage (rights to share future profits on disposal).
- Transfers/disposals to outside bodies can include restrictions which may be reflected in the valuation. However, care is to be exercised regarding the implications of “below market value disposal” and the interaction of “state aid” policies.
- Almost all transfers and disposals can result in accounting and / or budgeting adjustments. Each transfer must be judged on its own merits, involving a business case and covering all legal and financial perspectives

2. Purpose.

This guide sets out advice by the National Assets Working Group (NAWG) for a best practice solution for the transfer or disposal of land between public bodies in Wales.

One of the key deliverables of the NAWG will be the development and delivery of a best practice guide for use by the Welsh public sector to assist in reducing cost and time associated with the transfer, use and disposal of the public estate between public bodies in Wales.

This does not replace specific protocols (see annex 3) operated by individual bodies. However, it provides an “overarching” guide which in principle should be incorporated within those individual arrangements. It also provides a background to the relevant statutes and guidelines issued to different bodies so that these are available in one location for ease of reference and to avoid disputes about the legal powers of each organisation.

Some case studies are also included to highlight how different bodies have already implemented the arrangements set out. The case studies are included in Annex 9.

This guide does not seek to provide a comprehensive legal background or a complete statement of the law or policy. Appropriate legal (and other) advice should be sought in individual cases.

3. Background.

On the 26th February 2010, the First Minister announced the establishment of a Wales Efficiency and Innovation Programme.

The Programme works across public services and sectors and one of the established workstreams is the ‘National Assets Working Group’.

The public estate in Wales (excluding central Government assets) is valued at around £9.4 billion*¹. There has been ad hoc growth over many years and varying levels of corporate interest in its potential to drive efficiencies or deliver better services. The context has now changed. The efficiencies that can be derived from proactive, strategic estate management are fully recognised and the role of the estate in the delivery of high quality public services unquestioned.

To achieve effective strategic management of land and buildings across the public sector means working together, sharing information, challenging ways in which we deliver services and encouraging effective procurement. The

¹ This is an asset/accounting value and does not represent market value.

NAWG seeks to, in the first instance, unlock key barriers and facilitate a more collaborative approach in the use of the public estate. Long-term this will enable a public sector to develop innovative solutions in an open and collaborative environment. The objective of the NAWG will be to work in collaboration with public sector bodies, to facilitate a change in the way in which public assets are procured, operated, shared and disposed.

The key driver is the production of an efficient framework within which land & property transfers in the public sector can be more effectively utilised to support strategic aims and assist in the delivery of One Wales objectives.

4. Application.

The purpose of this guide is to assist with the preparation of protocols designed to achieve and manage the efficient transfer or disposal of all landed assets / interests (including leases, easements, other forms of occupation agreements etc) or even co-locations, between public bodies. It is assumed that the desire / need for an inter-public body transfer has been identified.

It does not therefore deal with the mechanics of identifying property need or availability. This guide does not seek to offer specific property management advice with regard to the process leading to a decision to dispose. However, disposing organisations should establish (at a very early stage) the existence of any restrictions or governance issues that may impact on their ability to dispose of an asset. (See annex 1).

It is envisaged that specific protocols would predominantly concern surplus assets. However, it is acknowledged that there will be instances involving transfers of operational property that may require a different approach e.g. Compulsory Purchase acquisition, general sharing of facilities.

5. Barriers to the acceptance of this guidance and the development of specific Protocols

- Although the document lists the known transfer arrangements within the Welsh public sector, bodies may be reluctant to abandon any existing and well established arrangements.
- Bodies may fear that the adoption of this guidance and the creation of new protocols could be to their financial disadvantage.
- Some organisations may feel that the adoption of a national approach will lessen their organisational autonomy.
- The differing governance arrangements between bodies (for example internal decision making processes, requirements for consultation etc).
- The priorities and objectives of the bodies involved may conflict.

6. Disposal good practice.

Managing Welsh Public Money and specialist guides such as those from OGC and HM Treasury all require that disposal, by any means, is properly handled and accounted for. All disposals should be managed carefully with a clear audit trail. It is good practice to have in place a property strategy together with a business case for specific disposals. The process should set out a strategy and time frame, identifying clear goals and objectives, supported by the measurable benefits. Where a public body no longer has use for a property, it should consider how to dispose of the asset in a way that gives best available overall value for money.

While the disposal should look to achieve value for money for the taxpayer, there should be a clear methodology that would stand up to public scrutiny.

Accounting practice requires that property formally declared surplus be disposed of as expeditiously as possible. Delay in disposal results in costs associated with securing the unused asset and ties up capital in a resource that does not contribute to business objectives. From a property perspective however it will not always be the most prudent option to dispose of an asset as expeditiously as possible. For example consideration must be given to the longer term in respect of planning use and associated value. Whilst a delay in disposal may incur costs in the short term, the longer term benefits may far outweigh them. Likewise potential site amalgamations/marriage value opportunities should also be explored.

The NAWG have highlighted the usefulness of an all Wales (public sector) property database (for detail see annex 5). With property data being shared and importantly any surplus assets highlighted at an early stage opportunities for collaboration should follow. In the first instance where assets are declared surplus or are in the process of being declared surplus, public organisations/bodies within Wales should make full use of the e-PIMS Lite facility. The initial purpose of "lite" is to encourage the co-ordination of asset use. This can take several forms beginning with flagging up empty / surplus accommodation for disposal, intensification of existing space (within property) encouraging collaboration and new schemes / demand can be brought together for the shared use of accommodation.

While not a replacement for marketing, an asset can be made available for transfer, within the public sector prior to general release. It is worth noting that property within the Central UK Government estate must be floated on e-PIMS for 40 days prior to offering it to the open market. Another aspect of the system is that the assets availability can be flagged well in advance of it actually becoming vacant.

7. Overriding consideration.

Where land or property was originally purchased via a CPO process (or where the use of such powers were, or could have been, contemplated) and there has been no material change since acquisition, the disposing body may need to have regard to the “Crichel Down Rules” to give former owners a first opportunity to repurchase the land and consideration should be given as to the applicability or otherwise of those rules for which separate guidance is available. The various bodies need to consider whether the Crichel Down rules apply.

In addition any contractual agreement to offer the land to the previous owner (pre emptive clause), entered into at original purchase, may impact on the disposal.

8. Transfer or Disposal.

A change in the holding of assets, (including landed interests), between bodies within the public sector boundary (within Wales or UK) might be deemed a transfer. This would depend on the legal status of the bodies involved. There would be a need for an accounting adjustment between the two bodies to cover the transaction and there would also be additional accounting required if any losses, profits or impairments arise from the transfer. The budgetary implications would depend on the bodies involved and how they are scored by HM Treasury. Because of the numerous permutations of bodies, each potential transfer must be judged on its own merits, involving a business case and covering all legal and financial perspectives.

When, an asset is made available to a body outside the public sector then the transaction is classified as a disposal and not a transfer (such as a sale to a Registered Social Landlord).

Annex 7 lists the various bodies within the Accountancy Boundary.

9. Transfer / disposal Value.

The principal basis of valuation at disposal / transfer, of a land or property interest will be market value although different bodies have different definitions governing the assessment of value e.g. “best consideration that can reasonably be obtained”. (See annex 4 for definitions)

In disposing of surplus assets, the appropriate Accounting Officer must take professional valuations into account if selling / disposing of assets and ensure that decisions reflect the general principles of securing value for money and acting with propriety and regularity.

All assets held by the Assembly Government should be included on an appropriate departmental asset register with an appropriate value attributed to them. In normal circumstances land which is identified as surplus should be disposed of at a market valuation. The Permanent Secretary is the Accounting

Officer of the Assembly Government and, as such, is answerable to the UK Parliament for how the Assembly Government manages its finances.

Other bodies will have other arrangements and protocols regarding asset registers.

There may be other cases where land is transferred between local authorities, Assembly Government Sponsored Body, or other Government Departments and the Assembly Government and there will be implications for the disposing bodies in relation to achieving the best consideration reasonably obtainable.

In limited cases book transfers of operational land will take place within the Assembly Government. Where the asset is to be held for the same purpose, there will usually be no implications regarding tests of market value because the corporate owner of the asset remains the same. In such circumstances the assumption remains that the transfer occurs at Market Value. Should a book value (Fair Value) form the basis of the transfer, it must be up to date (no older than 9 months). In the case of part transfers or where land is held for a different purpose a new value will always be required.

The UK Government's Office of Government Commerce (OGC) recommends that unrestricted Market value transfers would not normally include a requirement for any claw back provision etc. from one public sector body to another; although it may be appropriate to include such arrangements on properties which are transferred at a restricted or reduced value.

Public sector bodies can dispose of assets below market value. However, even where the law allows, public bodies would need to give careful consideration to the accounting and financial implications when transferring assets between sectors and not obtaining market value. In particular, bodies should consider the potential impact on the income and expenditure account when 'derecognising' an asset for transfer and the funding implications thereon. This is particularly acute for entities that compile their accounts on the basis of the Government Financial Reporting Manual (FReM) e.g. WAG, NHS, ASGBs etc.

10. Value for Money.

Government accounting practice acknowledges that, subject to achieving value for money overall, maximising the financial proceeds may not be the sole determinant of value for money. Other determinants, such as the securing non-financial benefits, the chances of a successful outcome and the impact of the disposal on others, may lead to a disposal at less than market value. In such cases the costs and benefits of the disposal must be clearly identified and documented and where appropriate controls put in place according to the level of risk identified.

If the disposal involves the sale of an asset from WAG to an outside body at less than market value then the difference between the proposed disposal proceeds and the market value would be classified as a gift. As such the

value of the gift constitutes a loss to the Assembly Government which has to be recognised in the Assembly Government's Resource Account and under the rules that govern the relationship between the Treasury and the Assembly Government (and also its sponsored bodies and the NHS Sector) this loss has to be properly charged to the resource account .

Any disposal at less than market value could potentially engage the state aid rules which are discussed further in Annex 4.

Further, where the disposal to an outside body includes obligations imposed on the use of the land, the public procurement rules may be engaged (see also Annex 4).

Both state aid and public procurement therefore need to be fully considered in any disposal and appropriate advice sought before proceeding.

11. The Transfer.

It will be appropriate to seek specific legal advice on the formalising of transfers or disposals depending on the circumstance of each case.

Transfer of ownership and title between organisations under the umbrella of "Welsh Ministers' ownership" amounts to an in house change in occupier and should therefore not require the rigour and formality of an exchange of contract and title registration.

Exchanges between public bodies (as opposed to transfers within the umbrella of 'Welsh Ministers') may require a more formal legal exchange. Individual arrangements and protocols will need to address the specifics as they arise.

Transfers between the Assembly Government and another body, such as an Assembly Government Sponsored Body, may benefit from a special relief in relation to Stamp Duty (see section 66 of the Finance Act 2003).

The application (or otherwise) of VAT to the transaction may differ depending on the nature of the holding / transaction.

12. Audit Trail.

It is important that a comprehensive documentary report is retained on the valuation process to ensure that any subsequent audit or governance scrutiny exercise can come to a clear view on the regularity and propriety of "procedures and transactions" and the assessment of overall "value for money".

13. Working Collaboratively.

The key message is that organisations should work collaboratively and seek to maximise benefits to both organisations. The process should not be

adversarial and should avoid a situation where both bodies engage in protracted negotiations.

Numerous Treasury guidance and advice from OGC has been issued detailing best practice on the disposal of assets. This specific guide focuses on transfers/disposals between public sector bodies in Wales and recommends the 2 organisations involved in any transfer/disposal should jointly commission a single valuation to determine the transfer sum. . This guide recommends the use of the District Valuer (DV) who provides an independent valuation service within the public sector. (See annex 2). The costs of the valuation should generally be borne jointly by the parties to reflect the joint savings involved.

Can two public bodies buying and selling an asset share valuation services?

There are no obvious barriers to public sector bodies obtaining a single, independent, valuation, providing that this is not in conflict with Standing Orders (or the ability to suspend said SO's). Presuming public bodies are obliged to use chartered surveyors this would be governed by the professional code of conduct as set out in the Royal Institution of Chartered Surveyors 'Red Book'

Powers to dispose.

The first issue to consider on any disposal is whether the public body has appropriate powers to dispose of the land. While this is the starting point, it does not necessarily follow that simply because a public body has power to dispose of land that it may do so in every case. Public bodies need to consider a whole range of factors, set out below, such as valuation, state aid, public procurement and the Crichel Down rules to name just some of these factors.

However, so far as powers are concerned, public bodies have wide ranging powers of disposal of property.

Welsh Assembly Government

Section 60 of the Government of Wales Act 2006 enables the Welsh Ministers to do anything which they consider to be appropriate to achieve one or more of the promotion or improvement of the economic; social and environmental well-being in Wales. Similar well-being powers are available to Local Authorities.

Section 71 of the Government of Wales Act empowers the Assembly Government to do anything (including the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the exercise of any of its functions.

There is a power, for Assembly Government land acquired and managed by the Forestry Commission, under the Forestry Act 1967 to be disposed of by the Assembly Government under section 39 of that Act.

Under the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, the functions, property, rights and liabilities of the Welsh Development Agency transferred to the Welsh Assembly Government on 1 April 2006. The Assembly Government now has the power to acquire and dispose of land for development purposes under section 1(7)(h) of the Welsh Development Agency Act 1975. The power to dispose is limited by section 21B which provides that land may not be disposed of for less than the best price that can be reasonably obtained unless it is either (i) disposed of for use as a public open space after works have been carried out on it (see section 16(7) or (ii) the Welsh Ministers consider it appropriate to do so. This means that while the Welsh Ministers have powers to dispose of land at less than a reasonable price, they must consider the reasons for doing so and must be able to articulate their reasons for doing so.

Local Government, Police, Fire and National Park Authorities

Local government bodies have a general duty to obtain best price when disposing of assets. Section 123(2) of the Local Government Act 1972 requires local government bodies to obtain the consent of the Secretary of State prior to disposing of an asset for a consideration that is less than the best that can reasonably be obtained.

However, the Local Government Act 1972: General Disposal Consent (Wales) 2003 (General Disposal Consent), which came into effect on 31 December 2003, removed the requirement for local government bodies, including police, fire and rescue and national park authorities, to seek specific consent for any disposal at an undervalue where the local government body considers that the disposal is in the interests of the economic, social or environmental well being of the whole or any part of its area, or any or all persons resident or present in its area and the undervalue is £2,000,000 or less.

Paragraph 4 of the General Disposal Consent requires local government bodies to advise their auditors within 28 days of a decision to dispose of land, where reliance is placed on the consent.

NHS Estate in Wales

Paragraph 13(3) of Schedule 2 to the *National Health Service (Wales) Act 2006* gives Local Health Boards (LHBs) the power to donate and receive assets, and transfer them at below market value, with the prior consent of the Welsh Ministers (this is not confined to transfers within the NHS.) Paragraph 14 of Schedule 3 of the 2006 Act gives the same powers to NHS Trusts, but does not require them to obtain the consent of the Welsh Ministers. In both instances the relevant actions must be 'necessary or expedient for the purposes of or in connection with (their) functions'.

Charities

Charity trustees can dispose of land & buildings at less than best value only in very limited circumstances such as when it is being disposed to another charity with the same objects.

Otherwise, trustees must obtain Charity Commission approval to do this. This approval will only generally be given in situations where the disposal is being made to a public body which intends to use the land & buildings for a purpose compatible with the objects of the charity.

Trustees have a duty to always act in the best interests of the charity. Consequently, trustees are legally required to ensure disposal of charity land & buildings is in the charity's interests & that they obtain the best price

reasonable in the circumstances. In order to do this, trustees must, when disposing of land & buildings:

- obtain & consider a written report from a qualified surveyor – effectively obtain a survey and valuation – this report must comply with the Charities (Qualified Surveyors' Reports) Regulations 1992
- advertise the disposal following the surveyor's advice
- be satisfied that the proposed terms of the disposal are the best that can reasonably be achieved

If trustees are unable to comply with 1 to 3 above they must obtain an Order from the Charity Commission – this is effectively the Charity Commission's authority and approval for the disposal. It provides assurance that the trustees have carried out the transaction openly and transparently and that it is in the best interests of the charity.

Trustees must always get an Order from the Charity Commission when they dispose of land & buildings to a connected person (section 36(1) of the Charities Act 1993). This is the case even if they can comply with 1 to 3 above.

An Order will have to be obtained where a disposal is at undervalue, for instance a disposal of property to another public body intending to use the property for a purpose that is compatible with the objects of the charity.

Further detail on this can be found in the Charity Commission publication CC28

<http://www.charity-commission.gov.uk/Publications/cc28.aspx>

Central Government

According to the central government guidance 'Managing Welsh Public Money': Asset Transfers between Public Sector Organisations (A4.8.5), organisations may transfer assets among themselves without placing the property on the open market, provided they do so at market prices and in accordance with the following guidance (box A4.8.3):

- Value assets at market prices using RICS' Red Book
- The organisations should work collaboratively on the transfer to agree a price.
- The organisations should take legal advice.

Loans of assets should specify the terms of each loan, with conditions for return, liability, damage and charges for use (A4.8.4.2).

However, under paragraph 2.1 - Power to commit public funds, *'The Welsh Ministers have broad powers to direct the business of the Assembly*

Government. In general, they may do anything that is authorised under the Government of Wales Act 2006; any subsequent Legislative Competence Orders (LCOs) and any other enabling legislation’.

Consideration could therefore be given to the extent to which Welsh Ministers could override MWPM for themselves and AGSBs if they chose to do so. Consideration could also be given to whether a body could consider a transfer at undervalue as being a grant if they have general grants giving powers.

Probation

All real estate is owned by the National Offender Management Service and not by individual trusts. The costs of the estate are recharged (although not in full) to the trusts. Acquisition and disposals are all handled by NOMS and subject to CG rules.

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Valuation Procedures.

It is the recommendation of the NAWG that in a transfer between public bodies in Wales, the valuation is prepared by the District Valuer (DVS) by way of an “independent valuation report” (IVR). This substitutes the previous “identity of views” reports that some may be familiar with. Estates and Projects will liaise with DVS to agree procedures; as a result this appointment represents the default position. The rationale for their appointment is detailed at the end of this Annex. Where other contractual or framework arrangements exist with other advisers or in exceptional circumstances an alternative professionally qualified valuer may be used where both parties are in agreement. However, procedures must be in place that mirror those of DVS

Usually the disposing body would be responsible for commissioning the advice from DVS. (Where the acquisition covers circumstances that would otherwise involve a Compulsory Purchase Order the position may be reversed) The instruction must be in writing (E-Mail may be acceptable) and provide sufficient information to enable identification of the property interest along with tenure details and confirming that the request is for an “independent valuation report” for the purposes of a “transfer (or disposal) between public bodies”. The DV should be briefed regarding the circumstances of the disposal / acquisition. If there are plans of the holding and documents supporting the tenure (i.e. lease papers) they should also be supplied along with any condition reports or site investigation details. The instruction should also include details (with contact name) of the acquiring organisation and the form of instruction and costs agreed with that organisation in advance, to avoid protracted discussions about the outcome of the IVR. (An instruction check list is included within this guidance-Annex 6). The Instruction should be sent to the DVS office at Cardiff although may be dealt with by staff at a location closer to the subject site.

DV Services will confirm the instruction, identifying a case reference and setting out the terms of the instruction giving the name of the appointed valuer, contact details, an estimated cost for the work and a provisional time scale for delivery. The DV may request information to clarify any issues that might impact on value. The DV will also declare any past involvement with the property and is duty bound to declare any vested interest.

It will be the DVS Valuer's responsibility to act fairly and impartially between the parties to the transaction. Each body should be kept informed of progress and also be given an opportunity (if they wish) to provide evidence to assist with the valuation process. If the DV advises that it may be prudent to request further investigation of a site or property (e.g. mineral stability report, building surveyor's advice) that need should be brought to the attention of both parties so a joint decision can be made on its appropriateness. Draft reports will be issued to both parties for observations prior to the final report but the decision on value is for the independent Valuer (DV).

The inclusion of restrictions (both external and voluntary) will impact on valuation. It is recommended best practice that the two parties to the transfer / disposal agree the heads of terms for the proposal prior to instructing DVS. This will ensure the Valuer has all the relevant information (which could impact on value) and avoid the necessity to review a valuation later in the process.

Valuation Date.

The Valuation date will be the date of the DVS Independent Valuer Report (IVR). It is envisaged that the transfer will be concluded within a reasonable period. However, the DVS report will have a limited validity period usually with a maximum of 6 months. After expiry, a report will require re-validation by the Valuer or a revised valuation supplied (depending on market conditions).

Valuation Report (IVR) content.

In order to comply with all of the requirements regarding professional standards, DVS have a suite of standard report formats. These are reviewed in line with periodic advice from the professional bodies. However, individual bespoke protocols may need to accommodate specific issues depending on the nature of the disposal / transfer.

For example, the RICS UK Guidance note 5 (UKGN5) specifies valuation reporting requirements for a disposal at below market value. In particular it requires the valuer to specify the difference between Market Value and Market value subject to voluntary restrictions. This is so that the client (Local Authorities in the case of UKGN5) is aware there is a difference and can make a judgement regarding the financial and state aid impact of the restriction.

It is recommended that in preparing specific protocols and desk instructions the content of "standard" reports is set out and agreed between the users.

Why specifically the DV

The requirements of an IVR will be prior agreed with DVS in advance of this document being adopted. In addition there are 5 areas where the public sector has special needs or where general considerations take on extra significance:

- Confidentiality- Being within the public sector DVS it is fully compliant with requirements of the Freedom of Information Act 2000 and aware of where it applies.
- Independence & Impartiality- customers of DVS and professional bodies attach considerable importance to the advice being seen to be fair and impartial while still under the public sector umbrella.
- Consistency- in the approach to valuations and in interpretation of legislation consistency is essential between one person and another and between one part of the country and another in order to retain the confidence of the public body. This is more easily obtained by a single national service, as information and guidance can be collected centrally and disseminated to ensure a consistent and uniform approach.
- Public Accountability- Ministers, Councillors and officials are accountable to the public for the valuations carried out on their behalf and they benefit from the use of a public sector valuation service who meets the requirements of public scrutiny.

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Existing protocols include:-

- Welsh Health Circular (WHC (2007) 088 – A framework for the provision of surplus NHS land for affordable housing
- Protocol for the disposal of Welsh Assembly Government / AGSPB land for affordable housing (published 2007)
- Desk instruction for the transfer of land for highway purposes between DE&T Transport and Forestry Commission Wales
- Draft protocol between DE&T and housing directorate
- Draft protocol for the acquisition of DE&T operational land by Local Authorities through the transport grant mechanism, administered by Transport Wales
- Protocol for the acquisition of DE&T Operational land by Transport and Strategic regeneration for trunk Road development

It is good practice that protocols are reviewed regularly (with a maximum shelf life of 3 years).

Definitions & terminology:

Surplus Asset:-

The Welsh Assembly Government, AGSBs, and the NHS in Wales have significant land holdings. Much of the land is required for ongoing services and operations. However, the Government Accounting advice is that land holdings should be kept under constant review and once surplus assets have been identified, they should be disposed of as quickly as possible, subject to value for money considerations.

Land and or buildings that cease, permanently, to be used for the needs of a public body are designated as non operational assets awaiting disposal. These surplus property interests are then often re-valued (for capital accounting purposes) to Market Value.

Each body will have established guidance on when an asset formally becomes surplus. However, it can sometimes be prudent to examine the possibility of disposal prior to formal declaration.

Fair Value:-

Fair value is a measurement basis required or permitted under International Financial Reporting Standards. Fair Value is a broader concept than Market Value. Although in many cases the price that is fair between two parties will equate to that obtainable in the general market, there will be cases where the assessment of Fair Value will involve taking into account matters that have to be disregarded in the assessment of Market Value. While the International Valuation Standards Council is currently consulting on a usable definition the RICS defines fair value as follows:

(Red Book) Royal Institution of Chartered Surveyors Practice statement 3.5:

“The amount for which an asset could be exchanged, between knowledgeable, willing parties, in an arm’s length transaction”

Fair value is often known as book value as it represents the valuation for asset purposes. The general principles underlying the valuation for financial accounting (asset valuation) are no different from those of other assets where there is a requirement to determine the value to the business in terms of the contribution those assets make to the activities and function of the business.

Market Value:-

The basis of “Market Value” is an internationally recognised definition. It represents the figure that would appear in a hypothetical contract of sale at the valuation date.

(Red Book) Royal Institution of Chartered Surveyors Practice statement 3.2:-

“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”.

Unrestricted Value:-

This is the best price obtainable for a property and accords with the definition of Market Value (above). It is the amount which would be received for a disposal of a property where the principal aim was to maximise the value of the receipt. This value will be determined subject to any external or statutory conditions (e.g. planning guidance) specific to the site / property.

Restricted Value:-

This is the market value of the property having regard to any proposed terms to the transaction. It is defined in the same way as unrestricted value, except that it should take into account the effect on value of any voluntary conditions.

The restricted value will often take into account claw back mechanisms which while specifying a restriction, enable the disposing organisation to reclaim value if the restriction is breached.

The resultant value may be described as “Market Value subject to restrictions”. The precise nature of the restrictions must be established in advance of obtaining a valuation report. The report must specify those restrictions as reflected in the Valuer’s opinion. By example WAG usually requires an undertaking that buildings constructed on its (former) land will achieve a BREEAM excellent rating.

Voluntary Conditions:-

A voluntary condition is any term or condition of the proposed transaction which the body chooses to impose. It does not include any term or condition which the body is obliged to impose, (for example, as a matter of statute), or which runs with the land.

The value of voluntary conditions is the total of the capital values of voluntary conditions imposed by the body as terms of the disposal or under agreements linked to the disposal that produce a direct or indirect benefit to the disposing body which can be assessed in monetary terms. It is not the reduction in

value (if any) caused by the imposition of voluntary conditions and any adverse effect these may have on value should not be included in this figure.

Best Value:-

This is a term often referred to in public sector procurement circles and sometimes used by OGC; it is linked to what is described as “value for money”. Generally in pure financial terms the best value option would be the one with the lowest cumulative cost to the acquirer.

Definitions often revolve around:

‘The optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer’s requirement’

Best Value need not be the same as market value. It recognises the relationship with value for money overall, as opposed simply to the maximum achievable sale price.

Under Value:-

Undervalue is the expression used to identify the difference between the unrestricted value of the interest to be disposed of and the consideration/payment proposed.

Managing Welsh Public Money:-

A guide published by Welsh Assembly Government finance colleagues. It is described as a “must read” for all engaged within the finance function of the Welsh Assembly Government, and anyone seeking to understand public sector funding together with the principles of regularity and propriety in expending resources.

Value for Money (VFM):-

The Welsh Assembly Government’s definition of Value for Money is contained within the publication ‘Managing Welsh Public Money’:-

The process by which ‘an organisation’s procurement, projects and processes are systematically evaluated and assessed to provide confidence about stability, effectiveness, prudence, quality, good value and avoidance of error and other waste, judged for the public sector as a whole’.

UKGN 5:-

The RICS Appraisal and Valuation Standards UKGN5 cover Local Authority Disposal of Land at less than best consideration. It highlights the wide powers, for disposal that are available to Local Authorities.

In addition it provides guidance on the valuation basis and assists the Valuer by highlighting key components of any report.

Well-Being Powers:-

These are discretionary powers of the Welsh Ministers, to undertake any action to promote or improve the social, economic and environmental well-being of Wales or any part of Wales . The power is designed to, encourage innovative practice and provide opportunities for bodies, together with their partners, to help facilitate objectives that are likely to improve well-being.

The Assembly Government may potentially dispose of land or property at less than market value in accordance with its well-being powers, provided all other compliance checks have been undertaken (such as state aid and public procurement – see below).

The Government of Wales Act 2006 enables the Welsh Ministers to consider disposal at a below “market value” consideration to be appropriate, to achieve one or more of the promotion or improvement of the economic; social and environmental well-being in Wales.

Comparable well-being powers for local government are set out in Section 2 of the Local Government Act 2000 subject to certain caveats (that do impact specifically on the ability of local authorities to dispose of land). The Local Government Act 1972 imposes a requirement on a local authority to seek the agreement of the Welsh Ministers for the disposal of land at less than market value. By letter of 16 December 2003 (the General Disposal Consent (Wales) 2003) the Welsh Ministers agreed that this requirement would apply only to where the undervalue is £2 million or more.

The Management Statement and Financial Memorandum of Assembly Government Sponsored Bodies also include provision for the disposal of assets at less than market value subject to the consent of the Assembly Government.

The NHS (Wales) Estatecode allows for disposals at a price below market value in circumstances where it is relevant to consider issues of wider public benefit (“a concessionary sale”). The approval of the Minister for Health & Social Services for such a sale is required if the “concession” exceeds £100,000.

Crichel Down Rules:-

The rules were prepared by the UK Government as a result of issues raised in a land holding at Crichel Down in Dorset in the 1950s.

The rules are non-statutory. However, all government departments and the former nationalised industries are expected to observe them. They apply to land that was acquired by compulsory purchase or where the use of such

powers were, or could have been, contemplated, but which have since been declared surplus to requirements.

Local authorities in Wales are recommended to adopt the rules but this is not, strictly speaking, mandatory

The land is to be offered back to the original owner (or successor in title) at the market value, provided the nature of the property has not suffered a 'material change'.

State Aid:-

There are no state aid implications for a disposal at unrestricted market value. Transfers between departments of the Welsh Assembly Government are not disposals for this purpose.

EU law generally prohibits individual member-state governments and public bodies from providing funding to "undertakings" which are defined as bodies engaged in economic activity. Economic activity arises wherever there is a competitive market. Were governments to fund economic activity this would lead to unfair competition across the EU, undermine the market principle, discourage undertakings from being competitive and would ultimately lead to higher prices for consumers. This prohibition on funding undertakings is generally described as the "State Aid Rules".

Many individuals, charities, not-for-profit organisations and public bodies are involved in economic activity. For instance, a not-for-profit organisation may provide a nursing home, but simply because the organisation does not make a profit, it does not automatically follow that it is not engaged in economic activity. There will be other undertakings in the market providing the same service and so funding it would, on the face of it, engage the State Aid Rules.

There are, however, circumstances where the EU permits aid to undertakings. In Wales, there are areas ("convergence" areas) which are entitled to "structural funds" from the EU to assist with regeneration. However, in order to be permitted, the funding must be subject to a notified scheme or an exemption. Otherwise, Member States must notify the EU Commission in advance of awarding State Aid which the Commission will then approve or refuse. Certain large sums must be notified in any event (regardless of any scheme or exemption).

The starting point is to consider the 5 State Aid tests set out here:-

- Is the aid granted by the state or through state resources?
- Does it confer an advantage to an undertaking?
- Is it selective, favouring certain undertakings?
- Does the measure distort or have the potential to distort competition
- Is the activity tradable between member states

Please note that state aid does not have to be in the form of money, it can be in other forms such as land. It can also arise where a public body relaxes its usual requirements such as relieving a tax burden or disposing of land at an undervalue as discussed above.

If the 5 tests are satisfied, then it is necessary to consider whether the aid may be exempt or permitted in accordance with a notified scheme. It is outside the scope of this guide to provide details of individual schemes but advice should be sought on this issue. The Welsh Assembly Government's State Aid Unit advises officials as to state aid.

The key message is – seek advice early. State Aid rules are complex and getting it wrong can mean that the aid has to be repaid. Specific protocols must therefore address the issues pertinent to the proposed exchange. By example there is guidance on land released for affordable housing.

Public procurement:-

So far as the law of public procurement presently applies, where a public body disposes of land without imposing any conditions as to how that land should be used, public procurement implications will not arise.

However, where the public body disposes of land with a requirement that it be used or developed for particular purposes or in a particular way, the Public Contracts Regulations 2006 (the "Regulations") may apply. For instance, the Welsh Assembly Government may dispose of land to a local authority on the condition that it constructs a care home on the land. If the Regulations apply to the disposal, the public body must advertise the disposal of the land as a "public works contract" because the disposal involves imposing a requirement that the land be developed in a particular way, in other words, that works will take place on it. The opportunity to acquire the land must be advertised across the whole of the EU in "OJEU" the Official Journal of the EU. The Regulations stipulate that various alternative methods of advertising may be used, depending on the circumstances. These methods will stipulate time limits for return of tenders etc.

If a public body fails to advertise (correctly or at all) a public works contract which is subject to the Regulations, and simply disposes of the land to another public body without following the OJEU procedure, an aggrieved third party, which would have submitted a tender to acquire and develop the land (had it been advertised), may issue legal proceedings. If those proceedings are successful, the contract to sell the land could be cancelled, and the public body ordered to pay a civil financial penalty (essentially a "fine") as well as compensation and legal costs. The implications of failing to follow the Regulations are therefore, potentially very serious.

The Regulations apply only where the value of the works exceeds £3,927,260, but even the value is below this level, EU law requires some advertising of the land even if it is not advertised in OJEU.

This explanation provides only a brief overview of how public procurement may apply to disposals of land. This is a developing area of law and carries many uncertainties. Legal advice is recommended in individual cases.

National Assets Working Group (NAWG):-

The NAWG will operate across the public sector to improve services by identifying, facilitating and supporting the delivery of efficiencies and innovation in the operation of the public estate and its corresponding assets.

The aim of the Group is to develop a structure to help ensure that the public estate, including land, is utilised to its maximum efficiency to support service delivery and value for money across a wide range of assets – heritage, roads, social care facilities, libraries and leisure centres.

The objective of the NAWG will be to work in collaboration with public sector bodies, to facilitate a change in the way in which public assets are procured, operated, shared and disposed.

RICS:-

The Royal Institution of Chartered Surveyors is the recognised professional body for qualifications and standards in land property and construction.

All Wales public sector property database (e-Pims)

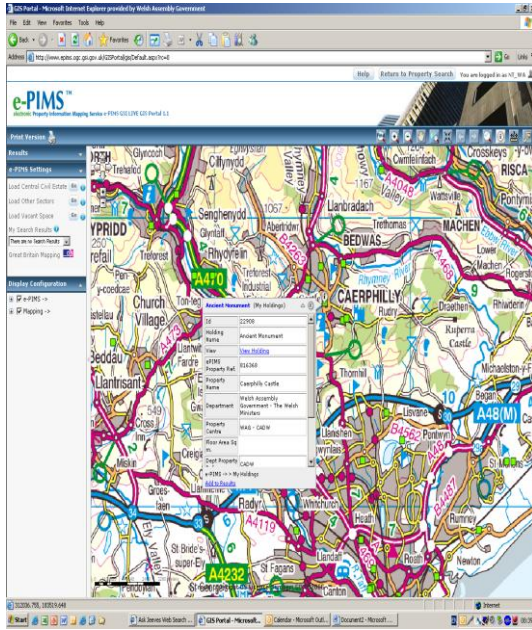
Working with representatives of Departments within the Welsh Assembly Government, AGSBs, NHS Wales and public Authorities across Wales, Estates & Projects division developed a system to register land and building interests. The register will be used to inform future strategic estates policies and to ensure that resources are developed and utilised to their full potential across the public sector.

The host system is e-PIMS (electronic property information and mapping service) which is a central database of civil estate properties, holdings and occupations developed by the OGC and already used by all Central Government Departments.

OGC developed an entry level version of their database known as e-PIMS “**lite**”. It provides a much more accessible route into e-PIMS (it requires fewer pages of detailed information) whilst still ensuring that key data - address, location and size of a holding is recorded. e-PIMS “lite” links to the mapping system, has ability to store electronic copies of leases, title documents, schedules of dilapidations, building audits, digital photos and other notes which will facilitate the storage of estates information for user bodies in Wales. The system will also access the vacant space register currently utilised by the central Government estate. This can alert other users (within the public sector) to the current (or planned) availability of accommodation.

Unlike other systems, e-PIMS provides all registered users with access to high level information across the database. This means that registered users can see, at a glance where other public sector property assets are located, their use and (in the full version) can be provided with a contact name to enable follow up enquiries to explore collaboration or development opportunities.

Property is displayed by map and behind the entry sits basic information about the holding such as size and tenure. The advantage of the system is that it is internet based, so (subject to password access) can be viewed by public organisations when planning schemes or collaborative property projects. Crucially it’s free to use and E&P would supply advice and training to interested organisations.



For more information contact:-

Nigel Thomas

Principal Estates Surveyor

Nigel.thomas2@wales.gsi.gov.uk

029 2082 1557

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CHECK LIST FOR INSTRUCTION TO DV FOR IVR

1. Full address of property.
2. Copy of Ordnance Survey (OS) extract plan indicating location and extent of property.
3. Confirmation that this is a request for an “Independent Valuation Report” (IVR) for a transfer / disposal between public bodies (with some background to the transaction).
4. Name and contact details of the proposed parties to the transaction.
5. Description of property (e.g. land, house, flat, factory etc.).
6. Area of site or area of building (if not known DV will provide both parties with any survey data gathered as part of the valuation process).
7. Tenure as held; Freehold, Leasehold (if Leasehold details of terms and or copy of lease)
8. For disposals, confirmation of transaction tenure (e.g. may envisage granting a lease over property held as Freehold).
9. Supply information on any inferior interests (e.g. easements, rights of way, exiting tenancies etc).
10. Provide means of access (contact details if appropriate) for inspection.
11. If any condition or investigation reports exist supply copies to DV (for buildings, information on energy certification and access to the Asbestos register may be required.)
12. Provide details of any planning consents available on completion. (Include any known restrictions or proposed section 106 planning agreements).
13. Supply the Valuer with any information relating to known restrictions such as CADW listings, conservation area status, tree preservations orders etc.
14. Give details of any proposed voluntary restriction to use (not appropriate for internal transfers).
15. Provide information regarding any service connections if known (gas, electricity, mains drainage & water)
16. Indicate if the transaction will be subject to VAT.
17. Provide date when property will be available for transfer / disposal.
18. Provide copy of the instructing letter to the other organisation.

District Valuer (DVS):-

District Valuer Services (DVS) is an arm of the Valuation Office Agency (VOA), providing professional property advice across the public sector, including private and third sector clients involved in delivering public services and functions of a public nature. It is a not-for-profit UK Government agency. The VOA is a Crown body and may be recognised as such when considering issues over procurement of their services.

DVS Wales main offices are at Cardiff but have offices at Newport, Merthyr Tydfil, Swansea, Carmarthen, Wrexham and Bangor.

Contact Alan Colston on 029 2080 6857, alan.d.colston@voa.gsi.gov.uk

District Valuer Services, Ty Rhodfa, Ty Glas Road, Llanishen, Cardiff,
CF14 5GR

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The Public Sector Boundary (Wales):-

Welsh Assembly Government
Inc. Royal Commission for Ancient and Historic Monuments

Subsidiary Companies

Finance Wales PLC
Welsh Development Management LTD
International Business Wales LTD
Design Commission for Wales
Meat Promotion Wales
Newport Unlimited
Ryder Cup Wales 2010 LTD
Regeneration Investment Fund for Wales LLP

Local Health Boards.

Note: All of the above are included within the WAG Consolidated Resource Accounting Boundary

Assembly Government Sponsored Bodies (AGSBs)

NHS Trusts
Environment Agency Wales
Forestry Commission Wales
Children's Commissioner for Wales
Older People's Commissioner for Wales
National Assembly for Wales Commission
Welsh Administration Ombudsman

Note: All of the above are included within the WAG Budgeting Boundary

Public Sector Bodies outside the current accounting and budgeting boundary include:

Local Authorities
General Teaching Council (Wales)
Estyn

Bodies outside the Public Sector include:

Registered Social landlords (RSL)
Voluntary sector organisations

EXTRACT FROM LOCAL GOVERNMENT ACT 1972

123 Disposal of land by principal councils

(1) Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a council 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.

[(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.

(2B) Where by virtue of subsection (2A) above a council dispose of land which is held—

(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.]

(3)–(6) (Repealed)

(7) For the purposes of this section a disposal of land is a disposal by way of a short tenancy if it consists—

(a) of the grant of a term not exceeding seven years, or

(b) of the assignment of a term which at the date of the assignment has not more than seven years to run,

“Principal Councils” means any of the 22 local authorities in Wales as set out in Parts I and II of Schedule 4 to the Local Government Act 1972.

GENERAL DISPOSAL CONSENT (WALES) 2003

To :

Chief Executives
County and County Borough Councils

Clerks
Community Councils

Chief Officers
National Park Authorities
Fire Authorities
Police Authorities

One Voice Wales
Association of Larger Local Councils
National Association of Local Councils Cymru
North Wales Association of Town Councils
Wales Association of Community and Town Councils
Welsh Local Government Association

Audit Commission in Wales

Our ref: **NAFWC 41/2003**

December 2003

**LOCAL GOVERNMENT ACT 1972 : GENERAL DISPOSAL CONSENT
(WALES) 2003**

**DISPOSAL OF LAND IN WALES BY AUTHORITIES FOR LESS THAN
BEST CONSIDERATION**

1. This circular and the General Disposal Consent (Wales) 2003 ("the General Disposal Consent") apply to the following authorities in Wales: county and county borough councils, community councils, fire authorities constituted by a combination scheme, police authorities and national park authorities. Authorities have powers, under sections 123 and 127 of the Local Government Act 1972 ("the 1972 Act"), to dispose of land in any manner they wish provided that the disposal is not at an undervalue. A disposal will be at an undervalue where the proposed consideration is less than the best that can reasonably be obtained.

2. The General Disposal Consent (Annexed to this circular), which comes into effect on **31 December 2003**, removes the requirement for authorities to seek specific consent for any disposal at an undervalue where the authority considers that the disposal is in the interests of the economic, social or environmental well being of the whole or any part of its area, or any or all persons resident or present in its area **and** the undervalue is £2,000,000 or less.

3. If an authority considers that a proposed disposal is at an undervalue and does not fall within the scope of the General Disposal Consent then it must first obtain the consent of the National Assembly for Wales ("the National Assembly") – see paragraphs 12 to 14. Where an authority wishes to grant an option to purchase, or an option holder wishes to exercise a previously negotiated option, the authority must consider whether the option terms will result in an undervalue.

4. It is for the local authority concerned to decide whether a proposed disposal requires the consent of the National Assembly, seeking its own legal or other professional advice as appropriate, and to bear responsibility for its decisions. It is recommended that authorities confer with their external auditors when seeking to rely on the General Disposal Consent. In any event, where an authority intends to dispose of land in reliance upon the General Disposal Consent, it should notify its external auditor within 28 days of taking the decision to do so. Where the undervalue is likely to be substantial and could exceed the £2 million threshold, authorities are recommended to obtain a professional valuation, in terms of "unrestricted value" as set out in the General Disposal Consent, in order to assess whether the National Assembly's specific consent to the disposal is required. The valuer should be directed to have regard to the guidance on local authority disposals of land at an undervalue in the version of the Appraisal and Valuation Manual of the Royal Institution of Chartered Surveyors' (otherwise known as "the Red Book"), which is current at the time of the disposal.

5. The National Assembly's role is solely to determine any application for consent to a disposal on its merit. Where the National Assembly gives consent to a disposal, that consent will apply only to the particular transaction detailed in the application. If there are any material changes to the transaction terms, the authority will need to make a fresh application for consent. The National Assembly has no power to grant consent for a disposal that has already taken place.

6. The General Disposal Consent disapplies Department of the Environment/Welsh Office Circular 6/93 (WO 19/93) and the Department of the Environment, Transport and the Regions/Welsh Office Circular letter issued on 11 December 1998 and replaces the Local Government Act 1972 General Disposal Consents 1998. In so far as these documents relate to Wales, they should be disregarded from the date of coming into effect of the General Disposal Consent.

7. The General Disposal Consent does not constitute any consent that may be required under any enactment other than sections 123 and 127 of the 1972 Act. It is the responsibility of the authority to undertake any further procedures that may be necessary to enable it to dispose of any particular area of land. In particular, authorities should note that the terms of the General Disposal Consent do not extend to the disposal of land under section 233 of the Town and Country Planning Act 1990 Act ("1990 Act"). Where consent to a disposal of land is given under a statutory power other than

section 128 of the 1972 Act, that provision may state that no further consent in respect of that disposal is required. For example, paragraph 12 of Part III of Schedule 3 of the School Standards and Framework Act 1998 provides that where land is held for educational purposes and is disposed of to a governing body of a foundation, voluntary or foundation special school (or other person proposing to establish such a school) consent under section 123 of the 1972 Act is not required. In these circumstances further consent under section 128 of the 1972 Act will not be required. Authorities must ensure that the disposal is made under the appropriate statutory power.

8. Sections 123(2A) and 127(3) of the 1972 Act require that where an authority wishes to dispose of "open space" (defined by section 336(1) of the 1990 Act), it must advertise its intentions in a local newspaper for two consecutive weeks and consider any objections. Such advertisement must be undertaken regardless of whether the proposed disposal of open space falls within the terms of the General Disposal Consent.

9. Where an authority is directed to dispose of land, under sections 98 and 99 of the Local Government, Planning and Land Act 1980, the National Assembly's consent, for the purposes of the 1972 Act will be deemed given if compliance with the direction results in a lower price being paid than would have been realised through some other method of disposal. However, where the authority voluntarily attaches conditions to the disposal (in addition to any specified in the National Assembly's direction) and any resultant undervalue exceeds the £2 million threshold in the general disposal consent, the Assembly's specific consent will be required.

10. Authorities are reminded that all disposals need to comply with the European Commission's State aid rules. The subsidised sale of land and property, and its subsequent development, can be deemed to be State Aid. The Commission has approved several schemes where a permitted amount of aid is allowed in the sale of land and buildings and the proposed transaction must meet the terms of such schemes as are from time to time in force. If authorities conclude that the proposed transaction may constitute state aid, it must seek clearance from the European Commission before proceeding. Where there is a failure to notify aid, that aid is illegal and it may have to be recovered from the beneficiary. The responsibility for compliance with State aid rules rests with the authority.

Applications for Specific Disposal Consent

11. The Welsh Assembly Government anticipates that far fewer applications for specific disposal consent will be required as a consequence of the new General Disposal Consent. Where an authority considers that it requires the specific consent of the National Assembly to a disposal, an application should be submitted to:

Local Government Administration Team
Local Government Modernisation Division
Welsh Assembly Government
Cathays Park
CARDIFF
CF10 3NQ

12. In future, the Welsh Assembly Government intends to simplify its approach to dealing with disposal consents. Authorities will not normally be required to submit the detailed information previously required for all applications at the outset.

13. In submitting an application, an authority should provide sufficient information to enable the National Assembly to make at least a decision in principle on the disposal. This will depend on the nature and scale of the disposal, but as a minimum will include details of the current and proposed future use of the land in question and an explanation of the authority's reasons for wishing to dispose of the land at an undervalue. Following initial consideration of the application, the National Assembly may approve or reject the application, or give an in principle decision. The National Assembly will in general seek to reach a decision based on the initial application. However, where the National Assembly gives an in principle decision, it will at that stage request any further information that it requires in order to reach a final decision.

14. Any queries regarding this circular should be directed to the Welsh Assembly Government at the above address, or by telephone on 029 2082 3621.

Kate Cassidy
Head of Local Government Modernisation Division

Case Studies

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Q & A

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