

FILE NO: A2004-0853

TITLE: ACQUISITION AND DIVESTMENT OF LAND POLICY

POLICY OWNER: PROPERTY SERVICES SECTION MANAGER

PURPOSE:

To define the criteria which must be considered prior to the acquisition of land or the divestment of Council owned land and to define the process and procedures, including public consultation and notification, required to be undertaken prior to the divestment of any Council owned land.

CONTEXT/BACKGROUND:

The acquisition and divestment of land by Council requires a formal process that is underpinned by probity, due diligence, analysis of risk and other key objectives. The number of land acquisitions and/or divestments undertaken by Council in any given year, although relatively low, is crucial to the strategic provision of open space, operational and community benefits, achieving planning outcomes and commercial gains from land development.

This policy applies to the acquisition of all land as defined in this policy. It acknowledges the principles set out in *Chapter 3 of the Local Government Act 1993* providing guidance to enable Councils to carry out their functions in a way that facilitates local communities that are strong, healthy and prosperous. It also acknowledges Circular 15-09 from the Office of Local Government dated 25 February 2015 relating to compulsory acquisitions.

This policy applies only to the divestment of Operational Land as defined under the *Local Government Act 1993* but applies to the acquisition of all land either for Community or Operational purposes.

SCOPE:

To define the criteria which must be considered prior to the acquisition of land or the divestment of Council owned land and to define the process and procedures, including public consultation and notification, required to be undertaken prior to the divestment of any Council owned land. The objectives of this policy aim to provide Council with a framework which adopts the following principles:

- Probity
- Statutory compliance
- Commercial optimisation, flexibility and confidentiality
- Transparency of process; and
- Achievement of specific strategic outcomes of Council and the community.

All decisions and actions in relation to the acquisition or divestment 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, provide full information and record the reasons behind 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.

DEFINITIONS:

An outline of the key definitions of terms included in the policy.

Act	means the <i>Local Government Act 1993</i> .
Contract	means any form of contract which legally binds the Council [or potentially binds Council] to acquire or dispose of land or any interest therein and includes formal contracts for sale and purchase and other forms of contractual arrangements including heads of agreement, in principle agreement, options to purchase etc.
Land	<p>is as defined in Section 21 of the <i>Interpretation Act 1987</i>. As a more specific reference for the purpose of this policy, 'land' is defined as:</p> <p>Land as a physical entity including:</p> <ul style="list-style-type: none"> • any building or structure on or improvement to land; or • any stratum of land whether below or above ground; or • a strata lot pursuant to relevant strata subdivision legislation

Programmed acquisition means when Council requires the affected land and initiates the acquisition process.

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

POLICY STATEMENT:

The purpose of this policy is to describe the manner in which Port Stephens Council will undertake the acquisition and divestment of land assets and to provide Council with:

- A documented reference to guide its decision making process;
- A reference that will survive successive Councils;
- An endorsed framework to enable and pursue land acquisition and divestment opportunities of merit and proactively present such opportunities to Council;
- To establish delegations necessary to allow implementation functions to be addressed to meet market drivers;
- To set out the principles, framework, responsibilities and processes for Council and officers to account for and manage the acquisition and divestment of Council land assets;
- To identify, manage and mitigate the risks associated with the acquisition and divestment of land; and
- To ensure impartiality, transparency, accountability and the delivery of best value in the divestment of land ('fundamental principles').

POLICY RESPONSIBILITIES:

LAND ACQUISITION PROCEDURE

1) Fundamental Principles

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

Independent Valuation Benchmark and Purchaser's Premium

Any land acquisition is to be benchmarked to an independent valuation of land unless the size of the land or the agreed value is negligible.

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

Any Purchaser's Premium should be determined and quantified within the initial decision of Council and referenced to the achievement of specific goals and objectives of Council. In essence, Council can make a commercial decision to pay in excess of the valuation due to the importance of the acquisition for the public purpose.

2) Acquisition Process

Section 377(1)(h) of the *Local Government Act 1993* requires a specific resolution of Council to acquire land. This decision cannot be delegated. While the General Manager and/or their delegate may make preliminary enquiries and negotiations regarding a possible purchase and purchase price, any offer to acquire land must state that the proposed acquisition is conditional upon a resolution of Council authorising the acquisition. The General Manager and/or their delegate 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.
- 3) Prior to finalisation of an acquisition, Council shall determine the classification of the land as either Operational or Community.
- 4) 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:

- required due diligence;
- independent rental or purchase valuation;
- assessment against the principles and objectives of Council's Integrated Planning framework;
- identification of funding source and assessment against Council's Long Term Financial Plan; and
- a statement of goals and objectives for the proposed land to be acquired including a statement of any 'Purchaser's Premium' deemed appropriate by Council;
- Formal consideration by Council of dealing with the matter and, if required, in accordance with Section 10A of the Act be dealt with in a closed meeting;
- 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;
- Once completed the General Manager to advise Council of the outcome (successful or otherwise).

The process is designed to ensure fairness and equity.

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:

- Opportunistically by responding when the desired land is offered to the market; and
- Pro-actively by initiating negotiations for the desired land.

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 *Local Government Act 1993* in respect of 'compulsory acquisition'.

Circular 15-09 from the Office of Local Government dated 25 February 2015 outlines changes to the process for acquiring privately owned land by compulsory process, to improve fairness and transparency. The new requirements apply to all acquiring authorities in NSW, including local Councils. Compliance with the requirements is mandatory. NSW Office of Finance and Services (OFS) has issued [Circular No 2015-01](#) (of 1 January 2015) setting out the new requirements. Before making an application for approval to compulsorily acquire private land, Councils must provide the land owner with information about the compulsory acquisition process. OFS has prepared a "[Land Acquisition Information Guide](#)", which Councils can use for that purpose. In addition, Councils must make additional efforts to negotiate with the land owner, including making every reasonable effort to have at least one face to face meeting with the land owner and/or their representative. Councils seeking to acquire privately owned land by compulsory process, either under the *Local Government Act 1993* or the *Roads Act 1993*, must comply with the new requirements. Councils will need to provide evidence of having complied with these requirements with their Compulsory Acquisition application form.

Compliance with the new requirements is mandatory. They should be applied to all proposals to acquire private land currently under consideration by Councils and to all future proposals for the acquisition of private land where it is deemed appropriate for additional negotiation to occur.

If the land is to be acquired for future development or strategic investment purposes, the acquisition of the land will be through negotiation between Council and the vendor on the basis of a valuation to determine a fair market value plus or minus 10% for the purposes of negotiation. The key principles of the acquisition are to be:

- Location
- Topography
- Area
- Zoning

A business case and feasibility study will be prepared to determine the viability and development potential for the land to be included in the report to Council.

COMPENSATION

Compensation will apply to land owners affected by acquisition under the following provisions:

- Owner initiated acquisitions
- 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:

- a) The market value of the land on the date of its acquisition;
- b) Any special value of the land to the person on the date of its acquisition;
- c) Any loss attributable to severance;
- d) Any loss attributable to disturbance;
- e) Solatium (ie compensation for non-financial disadvantage arising the need to relocate as a result of the acquisition); and
- f) 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.

Land owners claiming hardship in accordance with Section 24 of *the Land Acquisition (Just Terms Compensation) Act, 1991* provisions should note that Council is not required to acquire land unless it is of the opinion that the owner will suffer hardship (within the meaning of Section 24 of this Act. An owner of land suffers hardship if:

- a) 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
 - b) It has become necessary for the owner to sell all or any part of the land without delay:
- i. For pressing personal, domestic or social reasons, or
 - ii. In order to avoid the loss of (or a substantial reduction in) the owner's income.

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 DIVESTMENT PROCEDURES

1) Fundamental Principles

All decisions and actions in relation to the divestment 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, provide full information, and record the reasons behind 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, ensuring fairness and equity.

2) 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 Local Government Act, 1993*.

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 *Local Government Act, 1993*.

3) Delegated Authority

Section 377 (1) (h) of the Local Government Act 1993 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 divestment (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).

The resolution should also provide for the General Manager to have 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 advisors.

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

While the General Manager and/or their delegate may enter into preliminary discussions or negotiations regarding a possible sale of Council land, all pre-sale discussions/negotiations with potential purchasers must always be qualified by the statement "subject to a resolution of Council authorising the sale" if there is no current resolution of Council to dispose of the land.

The General Manager and/or their delegate may enter into non-binding indicative offers in the form of a:

- a) Letter; or
- b) Heads of Agreement; or
- c) Memorandum of Understanding

provided that the document clearly states the offer is:

- i. Not legally binding; and
- ii. Subject to:
 - a) Adoption of a final Council resolution authorizing the sale; and
 - b) Legally binding Contracts for Sale and Purchase of Land on terms acceptable to both parties being entered into.

4) Marketing Process

Except in exceptional circumstances such as the sale to an adjoining owner of "landlocked" land that does not have legal access to a public road, any divestment of Council land must be preceded by a commercial marketing campaign which may include one or more of the following:

- a) Appointment of a licensed real estate agent;
- b) Online advertising;
- c) Advertising in print media; and
- d) Sign boards on the land.

5) Valuation Processes

At least one formal market valuation undertaken by a valuer registered to value such land is required to be commissioned prior to all land divestments.

Two valuations may be required when the value of the land is likely to exceed \$2,000,000 and/or the process of divestment 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, there is considered to be a material movement in the value.

The valuation instructions must clearly state the following:

- The purpose of the valuation being 'divestment'.
- 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, including supply and demand details of sales evidence and adjustments, valuation rationale and methodology, a valuation range (for negotiations) and comments on marketability, most appropriate method of divestment and opportunities to add value.

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

METHODS OF DIVESTMENT

An open competitive process of divestment is required using one of the following methods:

- Expression of interest - used for unusual properties capable of a variety of development, 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. Can fail in 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 divestment 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 \$2,000,000; and consequently 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.

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.

1) 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' valuation method for 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 that 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.

2) 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.

CONFIDENTIALITY

In the majority of divestments of land, the information contained in reports to Council to sell land may confer an advantage upon a person with whom Council is, or proposes, to be conducting business. On balance, it would be contrary to the public interest for Council to deal with such matter in an open session because release of the information could

prejudice Council's ability to obtain the maximum return on the land.

It is acknowledged therefore that reports to Council on the divestment of land will be generally deemed confidential under *Section 10A (2) (c) of the Local Government Act, 1993*. This confidentiality may be lifted by Council resolution upon settlement, if considered to be in the public interest.

The need for confidentiality also arises for acquisitions of land by Council, as business papers for resolutions will contain an indicative budget amount for the acquisition thus providing an advantage to the potential vendor. Hence, *Section 10A (2) (c)* should also apply to all acquisitions by Council.

DISTRIBUTION OF FUNDS

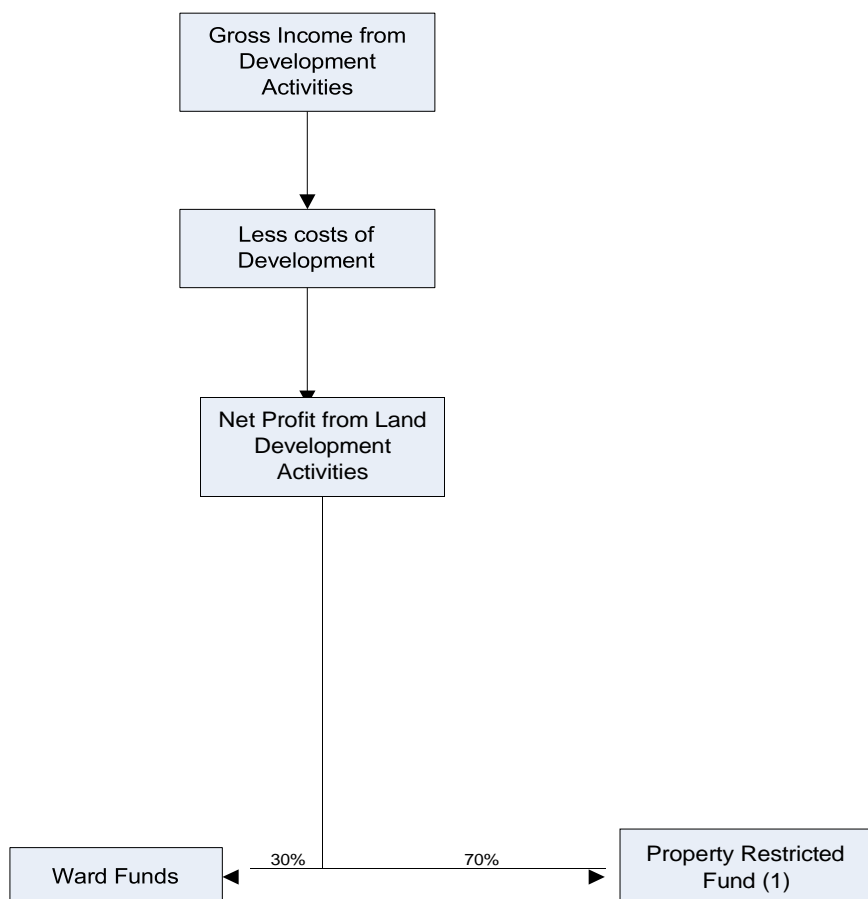
Net profit received from sales of surplus Community Land that has been rezoned and reclassified will be entirely allocated to the Asset Rehabilitation reserve.

Net profit received from the sale of land from road closures, boundary adjustments, small parcels and surplus operational land will be assigned to general revenue.

Where land development activities on land in the operational development land bank produce a net profit, 70% will be allocated to the Property Investment restricted fund and 30% will be allocated to Ward funds. The 30% Ward funds will be spent in accordance with the integrated strategic plans.

Should an allocation of funds be sought contrary to the ratio stated within this policy, a Council resolution will be required to amend the ratio.

Land Development Activities



ENVIRONMENTAL IMPLICATIONS

Environmental considerations for land that is to be reclassified or rezoned will be addressed at the time of the preparation of the Planning Proposal. The development of land will require a Development Application at which time it will be necessary to prepare a Statement of Environmental Effects, which will assess any environmental impacts.

RELEVANT LEGISLATIVE PROVISIONS

- 1) The *Local Government Act, 1993* vests authority in Council to sell or exchange Real Property. In respect of this policy, 'exchange' includes land acquisition and other related activities including land swaps etc.
- 2) In accordance with Section 377 of the 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 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 Act requires tenders to be called in certain circumstances. However, it is not necessary to call tenders for the sale of land.
- 5) In accordance with Council's Purchasing policy and Disposal policy, land acquisition and divestment activities are excluded from the provisions of the Purchasing policy.

Council's real estate 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 Leases 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;*
- Relevant Codes, Plans and Policies referred to in Section 13 of this policy; and
- Any other legislation applicable to the policy.

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 approval of Council or the General Manager under delegation.

Council's legal representative is responsible to ensure contracts for the sale of land satisfy statutory disclosure and warranty obligations (*Conveyancing (Sale of Land) Regulation 2017*).

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.

RELATED DOCUMENTS:

- 1) [Property Investment Policy](#)
- 2) [Cash Investment Policy](#)
- 3) [Long Term Financial Plan](#)
- 4) [Financial Business Rules Management Directive](#)
- 5) [Local Government Act, 1993](#)
- 6) [Land Acquisition \(Just Terms Compensation\) Act, 1991](#)
- 7) [Land Acquisition Information Guide](#)

CONTROLLED DOCUMENT INFORMATION:

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RM8 container No	A2004-0853	RM8 container No	18/67025
Audience	Council Staff		
Process Owner	Property Services Section Manager		
Author	Land Acquisition & Development Manager		
Review timeframe	Two Years	Next review date	##/##2020
Adoption date	29 May 2012		

VERSION HISTORY:

Version	Date	Author	Details	Minute No.
1	29 May 2012	Property Services Section Manager	Original policy.	110
2	14 April 2015	Land Acquisition & Development Manager	Changes to position titles and dates.	079
3	4 January 2016	Land Acquisition & Development Manager	Policy has been formatted into new template. No changes required to policy - only review date.	
4	23 February 2016	Land Acquisition & Development Manager	Adopted by Council.	034
5	##/## 2018	Land Acquisition & Development Manager	<p>Background updated to reflect current legislation by removing the reference to the Council Charter.</p> <p>Policy amended to set out process for non-binding offers to sell being documented prior to a formal resolution being secured.</p> <p>Policy amended to specify marketing of divestment lands in certain circumstances.</p>	