

LOCAL GOVERNMENT
BEST PRACTICE GUIDELINE
FOR THE
SALE, EXCHANGE
& TRANSFER OF LAND

June 2009



Department of Planning
and Community Development

Revision History

Guideline revised June 2009.

Guideline has been expanded to address:

- transfers of land for no consideration; and
- sale/exchange of contaminated land.

Guideline revised August 2009 to correct a typographical error.

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LOCAL GOVERNMENT BEST PRACTICE GUIDELINE FOR THE SALE, EXCHANGE AND TRANSFER OF LAND

Background

This Best Practice Guideline has been prepared jointly by Local Government Victoria and the Government Land Monitor, Department of Planning and Community Development to provide guidance for councils that are proposing to either sell, exchange or transfer land.

This Guideline is in two parts:

- the first sets out the legal obligations under sections 189 and 191^{1,2} of the *Local Government Act* 1989; and
- the second part sets out general principles and best practice for the sale, exchange or transfer of land.

It should be noted that the general principles and best practice guidance is based on the "Policy and Instructions for the purchase, compulsory acquisition and sale of land" dated August 2000 which must be used by all State Government agencies and authorities.

It should also be noted that all references to legislation are to the *Local Government Act* 1989, unless otherwise specified.

Power to deal with property

Under section 5(2)(d), a council is able to acquire, hold, deal with or dispose of property (including land) for the purpose of performing its functions and exercising its powers.

Legal Requirements: Sale of Land

Section 189

Section 189 requires councils to do certain things before selling or exchanging land:

- to give at least four weeks public notice of an intention to sell or exchange land before selling or exchanging this land (section 189(2)(a));
- obtain a valuation of the land which is made not more than 6 months prior to the sale or exchange from an appropriately qualified person (section 189(2)(b)); and
- allow interested persons to make a submission under section 223 on the proposed sale or exchange (section 189(3)).

In essence, section 189 requires all councils to:

- consult ratepayers and residents on any proposal to sell or exchange land;
- give ratepayers and residents an opportunity to have their views heard; and
- have a current valuation for the land that is proposed for sale or exchange.

¹ This Guideline is concerned only with the legislative obligations of councils when selling/exchanging/transferring land. It is not the intention for this Guideline to address the legislative obligations of councils when leasing land under section 190.

² Refer to Attachment A for the full text of sections 189 and 191.

It should be noted that under section 189(4), the sale of land that formed part of a road that has been discontinued as the result of a council exercising its powers under clause 3 of Schedule 10 is not subject to section 189(3).

However, the sale or exchange of land under clause 3 of Schedule 10 is subject to a separate process. This is discussed in more detail later in the section on discontinued roads.

Public Notice

Section 189(2)(a) requires councils to give at least four (4) weeks public notice before the sale or exchange of land. Further, section 189(3) provides that a person has a right to make a submission under section 223 on the proposed sale or exchange of land.

Purpose of Public Notice

The purposes of giving this notice are twofold:

- to inform ratepayers and residents of the council's intention to dispose of or exchange a public asset; and
- to give an indication that the council is genuinely open to the best offer for that land, either on a price basis or alternative use basis.

It is therefore important that councils are genuinely receptive to all offers and do not see compliance with the public notice requirement as a mere 'procedural technicality'.

Content of Public Notice

The public notice should be informative and enable ratepayers and residents to:

- clearly identify the land that is proposed for sale/exchange;
- understand the proposed sale/exchange process; and
- understand the public consultation process.

As good practice, the public notice should include the following information:

- references to the relevant sections of the Act that the council is acting under, e.g. sections 189 (public notice) and 223 (public submissions);
- the location of the property/ies – street address/es, title details (i.e. Volume and Folio number/s),
- wherever possible, a map or plan of the land should be included;
- how the property/ies is/are to be sold or disposed of (i.e. by public auction, tender, private treaty);
- the time frame for the proposed sale/exchange of land;
- the prospective purchaser/s if this is known³;
- the commencement and end of the consultation period;
- how submissions can be made;
- that persons making a submission can request to be heard in person; and
- contact details at the council if further information is required.

³ It is often the case when selling/exchanging land by private treaty that the identity of the prospective purchaser/s will be known.

NOTE: Care should be taken that any additional information provided does not compromise the proposed transaction or disadvantage the council.

Conditional Contracts

A common practice is for councils to execute contracts for the sale or exchange of land conditional on a satisfactory outcome of the mandatory public consultation process.

Irrespective that a council may have determined that it wishes to sell/exchange land to/with a specific party; the public notice given in compliance with the Local Government Act 1989 must be genuine (and be seen to be genuine).

A conditional contract does not breach section 189 though it may be used as evidence of an attempt to argue disqualifying prejudgement of a kind, which was determined to be the case in *Bycon Pty Ltd & Byham v Moira Shire Council, Registrar of Titles & Nelread Pty Ltd* (1998) VSC 25 (*Bycon*).

The drafting of a conditional contract should always be based on sound legal advice having regard to the consequences of *Bycon*.

Requirement for Genuine Public Notice

In the case of *Bycon*, the Victorian Supreme Court, in granting an injunction against a sale of land, found that the Moira Shire Council wasn't genuinely open to all offers during the mandatory/statutory consultation period.

The Supreme Court was clear that the commercial realities of running a council are to be allowed for. Councillors are allowed to have views regarding what sort of development they think is best for a certain area or parcel of land. The key issue is that Councillors have a genuinely open mind when considering submissions.

The current test of this is:

"The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile."

It is also important for Councillors to note that not only must they actually be unbiased but that they appear unbiased. The legal test relevant here is:

"To establish Council pre-determination, it is not necessary to prove actual bias by direct evidence: it is sufficient to demonstrate that it would appear to a right thinking person that the Authority is no longer able to discharge its statutory duty with fairness."

There is also High Court authority to suggest that actual bias needn't be proved, but that the relevant perspective is that of the reasonable observer, at least when judging the actions and decisions of public bodies.

Right to make submissions

Section 189(3) provides that a person has a right to make a submission under section 223 on any proposed sale or exchange of land.

In this context, the council must:

- publish a public notice stating that submissions in respect of the proposed sale or exchange of land will be considered in accordance with section 223;
- consider any written submission received within 28 days of publication of the public notice;
- hear any person who requests to be heard in support of their written submission;
- where a person who has made a written submission has requested to be heard in person, fix the day, time and place of the meeting, and give reasonable notice of the meeting to every person who has made a separate submission (in the case of a submission being made on behalf of a number of persons, notice is to be given to the person specified in the submission as the person to give notice to);
- consider all submissions made under this section; and
- after making a decision, give written notification to all people who have made a submission under this section, stating the decision and the reasons for the decision (where submissions are made on behalf of more than one person, notification in writing needs to be given to 1 of these people).

Requirement for a current valuation of land

Under section 189(2)(b), before a council sells or exchanges land, it must obtain a valuation of the land which is made not more than 6 months prior to the sale or exchange of that land.

The section stipulates that the valuer must hold the qualifications or experience specified under section 13DA(1A) of the *Valuation of Land Act 1960* (the VL Act).

Under section 13DA(1A) of the VL Act, councils can only appoint a valuer who holds the experience or qualifications specified from time to time by the Minister by notice published in the Government Gazette. For further information, contact the Deputy Valuer-General (Government Valuations) at Valuer-General Victoria (VGV) on (03) 8636 2585 or by e-mail to valuer.general@dse.vic.gov.au.

Exemptions from the provisions of section 189

Section 189 does not provide for any exemption from its requirements:

- to consult ratepayers and residents;
- to give ratepayers and residents an opportunity to have their views heard; and
- to have a current valuation for the land that is proposed for sale or exchange.

However, under section 193, which sets out the entrepreneurial powers of councils, the Minister for Local Government has broad powers to exempt councils from the application of any other provision of the Local Government Act 1989. It should be noted however that the exercise of this power:

- is at the discretion of the Minister for Local Government; and
- can only occur within the context of a council's proposal to enter into an entrepreneurial enterprise or activity which requires the prior approval of the Minister for Local Government.

Effect of a breach of section 189

In preparing this Guideline, advice was obtained from the Victorian Government Solicitor's Office⁴ (the VGSO) with regard to the status of any contract for the sale or exchange of land which may have been entered into in breach of the provisions of the Local Government Act 1989. The following is a summary of this advice.

There is a legislative purpose discernable in the Local Government Act 1989 to invalidate any action that fails to comply with the statutory provisions of section 189. If the statutory provisions of section 189 are not followed, the contract for the sale or exchange of land will be void.

In *Bycon*, the Supreme Court found compliance with the provisions of section 189 to be mandatory and accordingly, the purported sale of land was held void.

If a contract is rendered void for non-compliance with the statutory requirements, the contract cannot be sued on, i.e. the proposed purchaser could not sue on the contract. However, the proposed purchaser may have a claim in negligence against the council. Additionally, a person with sufficient interest may also obtain an injunction restraining the council from proceeding with the sale until all statutory requirements have been fulfilled.

Sale of Land – Discontinued Roads

The sale of land that formed part of a road that has been discontinued is subject to the provisions of section 189 except for public consultation under section 223⁵. Public consultation under section 223 is specifically provided for under clause 3, Schedule 10 and section 207A⁶.

Sale of Land – Public Open Space

In addition to the requirements under the Local Government Act 1989, councils are also required to comply with section 20 of the *Subdivision Act 1988*⁷ (the SD Act) when selling public open space.

Section 20(2) of the SD Act requires councils to use the proceeds from the sale of any public open space to:

- buy land for use for public recreation or public resort, as parklands or for similar purposes; or
- improve land already set aside, zoned or reserved (by the council, the Crown, a planning scheme or otherwise) for use for public recreation or public resort, as parklands or for similar purposes; or
- with the approval of the Minister administering the Local Government Act 1989, improve land (whether set aside on a plan or not) used for public recreation or public resort, as parklands *or for similar purposes*.

⁴ The full text of the advice of the VGSO is reproduced in full in Attachment C.

⁵ Section 189(4), the right of the public to make a submission under section 223 (given under section 189(3)) does not apply where a council is proposing to sell land that formed part of a road that has been discontinued as the result of a council exercising its powers under clause 3 of Schedule 10.

⁶ Refer to Attachment A for the full text of these provisions.

⁷ Refer to Attachment B for the full text of section 20 of the SD Act.

It should be noted that under section 20(4) of the SD Act, public open space can only be sold if the council has provided for replacement public open space.

Legal Requirements: Transfer/Exchange of Land without consideration

Section 191

Section 191 provides a specific power enabling councils to transfer, exchange or lease land for no consideration without having to comply with section 189. In effect, transactions effected under section 191 are not subject to the requirements of section 189 as provided under section 191(3).

However section 191(1) limits the parties with whom/which transactions may be effected to:

- the Crown; or
- a Minister; or
- any public body⁸; or
- the trustees appointed under any Act to be held on trust for public or municipal purposes; or
- a public hospital within the meaning of the Health Services Act 1988 or other hospital carried on by an association or society otherwise than for profit or gain to the members of the association or society.

Further section 191(2) provides that any transfer, exchange or lease made under section 191 is valid in law and equity. Section 191(2) makes it clear that councils, acting under the provisions of section 191(1), have the power to create and transfer both legal and equitable interests.

Section 191 does not limit councils' ability to transfer/exchange or lease land for no consideration to parties other than those listed under section 191(1). However any such transactions with these other parties will be subject to the provisions of section 189.

This means that before transferring/exchanging land for no consideration to a party not listed under section 191(1), a council must comply with the provisions of section 189 and:

- consult ratepayers and residents on the proposal to exchange/transfer land for no consideration;
- give ratepayers and residents an opportunity to have their views heard; and
- have a current valuation for the land that is proposed for exchange/transfer.

⁸ Section 3 defines public body as any government department or municipal council or body established for a public purpose by an Act of the Parliament of Victoria, any other State or Territory of the Commonwealth, or the Commonwealth.

General Principles

1. All sales, exchanges and transfers of land must comply with the provisions of the Local Government Act 1989.
2. Sales should be conducted through a public process (i.e. public auction, public tender or by registration of expressions of interest) unless circumstances exist that justify an alternative method of sale, for example the sale or exchange of land by private treaty.⁹ A council should explain to its community the circumstances which led to its decision to use an alternative method of sale in the interests of probity, public accountability and transparency.
3. Sales, exchanges and transfers of land should be in the best interests of the community and provide the best result, both financial and non-financial, for the council and the community.
4. Generally, all sales and exchanges of land should occur at not less than the market value assessed by a valuer engaged by the council. However, in the event that land is sold for less than the market value or exchanged for land of a lesser value, the council should explain the circumstances, reasons or factors which led to the decision to accept a sale price that is less than market value or land on exchange with a lower value.
5. Prior to being offered for sale, property should be appropriately zoned. This will ensure that the ultimate use of the land is determined by that zone and the highest possible sale price is achieved.

Procedures for the Sale of Land

Preparation of land for sale

Councils should ensure that land is offered for sale in a manner that will ensure the maximum price is achieved while protecting both the council and the public interest. Land zoned for public purposes must be appropriately rezoned prior to public sale.

Some examples of matters which should be addressed before offering land for sale include:

- Is the land proposed for sale being sold at its highest and best use or for a use other than its highest and best use? If the land is being sold for use other than its highest and best use, ratepayers need to be informed of any community service obligation that might arise from its sale.
- Presentation of the land to expose its best attributes: considerations include (where relevant) repairs, cleaning, painting, clearing of vegetation, pegging of boundaries and associated works.
- The optimum development potential of the land should be considered: a planning report should be prepared to assist/enable the council to make an informed decision about the sale of the land.

⁹ Examples of circumstances where the sale or exchange of land by private treaty may be more appropriate include the sale of a discontinued road where the only viable purchasers are the adjoining owners, the sale of allotments in an inappropriate subdivision to allow for consolidation, and so on.

- Preparation of an agreement under either section 173 of the *Planning and Environment Act* 1987 or other means should the council wish to control the future use of the land (other means may include covenants, easements, leases, licenses, planning protections or controls and so on).
- Would subdivision be appropriate?
- Structural and engineering reports may be required.
- An environmental report should be obtained where there is possible contamination and must be taken into account where rezoning is proposed.
- If land proposed for sale is contaminated, a strategy for its remediation (including the responsibility for and the funding of remediation works) needs to be developed.
- Where a Council proposes to offer a lease on the land before selling it, or where it offers a leaseback, the lease should be drawn in commercial terms and conditions to ensure the full market value of the land is realised.¹⁰
- Section 32 statements must contain full and proper disclosure of all relevant matters.
- Land must be offered for sale with full disclosure of relevant information to enable a full and proper due diligence enquiry.

As each sale is different, the above are only examples of the many potential matters that should be addressed before offering land for sale. In all cases, the preparation of land for sale should be cost-effective and be consistent with the nature of the land being proposed for sale as well as the circumstances which have led to the proposed sale.

Appointment of consultants and real estate agents

Consultants may be appointed to give advice or to assist with the preparation of the land for sale.¹¹ Consultants may include valuers, surveyors, engineers, environmental assessors (i.e. in relation to soil contamination and remediation), demolition specialists, town planners, legal advisers and so on.

Consultants must be independent and not have any personal or pecuniary interest in the transaction. A written declaration or disclosure in this regard is essential.

A consultant must not be appointed as valuer and selling agent for the same land.

Careful selection of consultants will ensure best results are achieved. Consultants should be fully briefed on the scope of their engagement. When seeking quotes, only those consultants who are qualified, skilled and experienced should be invited to tender for the services to be performed. This will generally enable acceptance of the lowest quote or tender.¹² Consultants must provide evidence of professional indemnity insurance.

¹⁰ If a council decides to offer a lease at lower than commercial terms, it should disclose the reasons behind this decision as well as the likely minimum difference in the sale price had the land been sold with a commercial lease in place.

¹¹ The appointment of consultants should be consistent with a council's own documented procurement policies and processes.

¹² In procuring the services of consultants, councils will be obliged to comply with section 186. Under section 186(4), councils are however not obliged to accept the lowest tender where a public tender has been undertaken.

Instructions for Valuers

Valuers should receive unbiased instructions to carry out the valuation independently, free from influence or collusion with the selling real estate agent and council officers, and in the case where land is being exchanged, with the owners of property which are the subject of the exchange. In appointing the valuer, the council must ensure that the preferred valuer must not have any conflict of interest.

Generally, valuers should be instructed to provide a valuation on the basis of highest and best use of the land proposed for sale. However, where land is proposed for sale for some purpose other than the highest and best use, the valuer should be instructed to provide a valuation on both bases. This will enable the council to make an informed decision on the sale of this land. Further, the community can be fully informed of the value of any community service obligation that might arise as a result of the land being used for a purpose other than highest and best use.

If the value of the land is high and/or the land is complex in nature, it would be prudent to have a second (check) valuation done by an independently instructed valuer on the same instructions. If there is a difference of opinion in the valuation, a valuers conference should be called to work out the differences and arrive at an agreed valuation. An impartial chairperson should preside over the conference.

Instructions for Real Estate Agents

Real estate agents should be required to provide a report, which outlines:

- details of the proposed marketing and advertising campaigns;
- the expected selling price; and
- details of any works required to be undertaken on the land being offered for sale.

Where the sale is by auction, the real estate agent should nominate the auctioneer prior to the appointment.

Method of Sale

Sale by public auction

Where a council has decided that land is to be sold by public auction, the sale of this land before auction must not be permitted.

Sale of land by public auction should be conducted in the following manner:

- After the selection and appointment of a real estate agent, the date of auction should be set, allowing approximately four to six weeks for an advertising campaign. The period may need to be varied depending on the type of land. The agent should be required to submit a summary to the council of the marketing campaign, enquiry rate and anticipated result approximately two weeks before the auction.
- The advertising campaign should be conducted in a manner that adequately exposes the land to the market.

- The valuer(s) should provide valuations to the council at least two to three weeks before the auction date. This will allow sufficient time to arrange a conference of valuers¹³, or to confer with the valuer(s) if there is any concern about or disagreement over the valuations provided.
- When the valuation(s) and the selling agent's report have been received, the council should determine a reserve price. The reserve price should be not less than the market value. The reserve price must be set before the auction and must remain confidential at all times.
- Security must be maintained over documentation relating to the reserve price. Documents such as valuations, agent's reports and related correspondence must be provided on a confidential basis and only to the council representatives responsible for the transaction.
- The reserve price or valuation advice must not be disclosed, particularly to the selling agent, before the auction.
- If the land fails to sell at auction, it is to be passed in for negotiation with the highest bidder and offered for sale to that person at not less than the reserve price.
- If the land remains unsold following negotiations after auction, it should be left on the market for private sale at not less than the reserve price for an appropriate or reasonable period of time as determined by the council.
- If an offer is received which is lower than the valuation and the council is considering acceptance of the offer, it should be submitted in writing to the valuer for consideration. Having considered the valuer's opinion and all other relevant factors, and the council having formed an opinion that the offer is reasonable, the land may be sold. The council should disclose the reasons for its decision to sell the land for a price lower than valuation.

Sale by public tender

Where a council has decided that land is to be sold by public tender, the sale of this land before the close of tenders must not be permitted.

Most of the procedures described in the conduct of a sale by public auction are relevant to a sale by public tender, and it is recommended that they be read in conjunction with this section.

Sale of land by public tender should be conducted in the following manner:

- Tender documents must be prepared which outline the process for the sale and all relevant timelines. The documents should also outline the broad objectives the council wishes to achieve through the sale, how tenders will be received and assessed, and how any post tender negotiations will be conducted.
- The council should consider the appointment of a probity auditor to oversee the entirety of the sale process.
- The reserve price must be set before the close of tenders and must remain confidential to ensure the integrity of the sale process. Tenders must not be opened until the reserve price is set (i.e. if a reserve price had not been set before the close of tenders).

¹³ Generally, it may only be necessary to seek the opinion of a second valuer where the land proposed for sale is of high value or complex in nature and/or there is a significant difference in opinion on the value of the land being assessed.

- Tenders must be lodged with the council or its legal representative. Tenders must not be lodged with the selling agent. Tenders lodged with the selling agent should not be accepted. Tenders submitted by facsimile or by e-mail should also not be accepted.
- Late tenders must not be accepted.
- Tenders should only be opened by a formally appointed panel comprising representatives of the council and may include its legal representative and, if appointed, the probity auditor.
- The highest conforming tender at or above the reserve price should be accepted. If no conforming tenders are received at or above the reserve price, the council may commence post tender negotiations in accordance with its pre-determined strategy. This may involve negotiations with the highest tenderer or may involve inviting tenderers to consider increasing their offers for the property. Post tender negotiations should only be conducted for the duration allowed in the tender documentation. If the land remains unsold, it should be formally passed in and all tenderers must be advised. The land should continue to be marketed for an appropriate or reasonable period of time as determined by the council.
- If an offer is received which is lower than the valuation adopted as the reserve price and the council is considering acceptance of the offer, it must be submitted in writing to the valuer for consideration. Having considered the valuer's opinion and all other relevant factors, and the council having formed an opinion that the offer is reasonable, the land may be sold. The council should disclose the reasons for its decision to sell the land for a price lower than valuation.

Sale by public registration or expression of interest

This method of sale is useful where a council wishes to expose land to the market without the assistance of an agent. It can be used as a public marketing process that is an alternative to an auction or tender.

This method of sale is also appropriate in circumstances where, in addition to selling the land, a council wishes to control the future use or development of the land.

Potential purchasers can be invited to provide details of a design concept or to make a commitment to enter into an agreement to develop the land in accordance with the council's brief. Interested parties may also be required to provide details of their ability to perform and of their history of achievements.

Registration of expressions of interest may or may not be binding on either party.

The reserve price for the land should be set before the receipt of offers. Again, the reserve price must remain confidential to ensure the integrity of the sale process.

The marketing of the land should be conducted in the same manner as sales by auction or tender. If a council has a desired development outcome for the land, the advertising campaign must include details of the proposal. Valuation(s) must take the proposal into account.

Sale/Exchange by private treaty

There may be circumstances where it may be more appropriate to sell/exchange land by private treaty. Generally, it will be:

- the nature of land that is proposed for sale/exchange; and
 - how the proposed sale/exchange is initiated, e.g. often it is an external person who has initiated discussions with the council with regard to the sale/exchange of land,
- that will determine if a sale/exchange by private treaty is appropriate.

The nature/type of land may include¹⁴:

- rear laneways and rights-of-way;
- disused/closed roads; and
- allotments in inappropriate subdivisions.

Prospective purchasers of this type of land may include:

- owners of adjacent properties;
- developers;
- community groups;
- State/Commonwealth Government; and
- other parties with a particular interest in that land.

An important consideration is the value of land proposed for sale/exchange. The value of this land to the council may be different (and in some cases, significantly different) to the value of land to the prospective purchaser. For example:

- The addition of part of a laneway or disused/closed road to an adjoining owner's property may increase the value of the combined property.
- The sale of allotments in an inappropriate sub-division to an adjoining owner could mean the difference between not being able to and being able to develop the property.
- The sale/exchange of land to a developer could reap the developer a significant return on his/her/their investment.

Additionally, the sale/exchange of land to/with a community group may result in a loss of general public access to land which may become restricted as a consequence of the sale/exchange. Any change in public access needs to be balanced with the public/community benefit which may arise from the sale/exchange and managed properly.

Given the nature of land generally offered for sale/exchange, the differences in value of the land for the vendor and the prospective purchaser, and the likely public perceptions of the proposed transaction, the highest standards of probity and transparency must be applied and be seen to be applied.

When proposing to sell/exchange land by private treaty and having considered the nature and value of this land, and how the proposed sale/exchange was initiated, it is advisable that a probity auditor be appointed to oversee the probity of the transaction.

¹⁴ This list is not exhaustive.

Where a council and a government agency are proposing to transact a private treaty sale for land, the Government Land Monitor's policy needs to be followed in relation to the transaction and valuations. To avoid unnecessary costs and delays, joint instructions from the council and agency should be made to VGV who will then value the land and advise on the transaction.

Exchange of land of equivalent value

When proposing to exchange land by private treaty with a government agency or the private sector, the land should be exchanged at market value and where necessary, monetary adjustments should be made to establish equality of exchange. Where a council has decided to accept land on exchange with a lower value, it (the council) should disclose the reasons for its decision to do so.

Contaminated Land

When the sale, exchange or transfer of land is being considered, councils should be aware, if the land is contaminated, of the implications that this may have for it (the council).

Responsibility for contaminated land

Under section 62A of the Environment Protection Act 1970, if land is found to be polluted (or contaminated in a way likely to cause a health or environmental impact), the Environment Protection Authority (EPA) may serve a notice requiring the land to be cleaned up to a specified standard.

A clean-up notice may be served on:

- the current occupier of the site.

This could involve a council which may be required to clean up any contaminants in the soil or groundwater on the site regardless of whether or not it has caused or contributed to that contamination. It would then be the responsibility of the council to consider action against the party it believes caused the contamination in order to recover the cost of the clean-up, however this may not always be possible.

- any person or body who has caused, permitted or contributed to the contamination on the site during its occupation.

Again, this could involve a council, despite the fact that it no longer occupies or owns the land.

General procedures

It is the responsibility of the council to make sufficient enquiry about the nature of present and past uses to which the land may have been put and to initiate the following actions:

1. An historical review and site inspection should be carried out. This may be effected by reference to title searches, local council planning, engineering and rating records and other historical data sources including the EPA Priority Sites Register (Landata). The

review may be limited in nature or more detailed, depending on the land in question. For example, it may be necessary for a site contamination assessment, incorporating soil sampling and laboratory analysis, to be carried out by an expert where:

- the result of the historic data review reveals that the site has been used, or is currently used, for any of the purposes listed in the section '*Types of potentially contaminated land*' below;
- the site inspection reveals visible contamination or odour which may indicate contamination; or
- there is evidence of the presence of underground fuel tanks or potentially contaminated fill material.

The assessment should evaluate whether any contamination present on the land may prevent the continuation of existing or intended uses of the land. Environmental consultants should be engaged to undertake site assessments. Consultants must be appropriately qualified, experienced, accredited and have professional indemnity insurance.

2. If the initial contamination assessment report does not reveal contamination, the transaction may proceed without further assessment of the site. If, however, contamination is found, a more detailed site assessment may be required in order to identify the extent and nature of the contamination.
3. Any contamination assessment reports and Certificates or Statements of Environmental Audit prepared before the sale of land must be made available to prospective purchasers.

Options if a site is contaminated

If a council is selling land that is contaminated, it will need to make a decision on whether to clean up the site or sell it in its contaminated condition.

The decision will be influenced by a range of commercial and legal considerations. Major factors will be the intended or likely use of the land following its sale. The degree of acceptable contamination will depend upon the intended use of the site and, possibly, even the layout of any proposed development. Uses which are more likely to give rise to prolonged human exposure to contaminants, particularly where young children are involved, will require more stringent clean-up standards than, for example, industrial uses.

Accordingly, without exposing the community or the environment to adverse effects from the contamination, a decision needs to be made with regard to the objectives of:

- maximising the return from the sale (bearing in mind both sale price and clean-up cost); and
- minimising potential exposure to legal liability for the clean-up (or further clean-up) of the site in the future and other possible claims (for example, personal injury, economic loss, etc).

Within these constraints, there is a wide range of options open to the council as the vendor of land. These include:

- fully cleaning up the site before sale and obtaining a Certificate of Environmental Audit that the land is suitable for all purposes; or
- conducting a limited clean-up and obtaining a Statement of Environmental Audit that the land is suitable for certain specified uses (for example, industrial);

- conducting a site contamination assessment with or without site clean-up and without a certificate or statement of environmental audit; or
- selling without undertaking any clean-up.

Dealing with contaminated land – A Summary

There can be no general rule as to which approach is the best. Each has positive and negative aspects and must be considered in the context of the proposed transaction, including a careful consideration of the contractual conditions in the sale and legislative requirements.

The following special conditions may be included in the contract of sale:

- a limitation on the vendor's liability;
- the granting of warranties and indemnities absolutely or conditional upon certain matters occurring or not occurring, or certain circumstances continuing;
- clauses dealing with possible changes in the law, planning controls, or the use of the site; and
- clauses allocating liability for potential clean-up and other costs among the parties involved.

Naturally, the approach adopted and the terms and conditions negotiated will be reflected in the sale price. It should be noted that, in some cases, it is mandatory to undertake an Environmental Audit. For example, if a clean-up notice requiring an Environmental Audit has been issued by the EPA, or if it is intended to remove the site from the EPA's Priority Sites Register.

The environmental state of the property must be included in the instructions to the valuer(s), as any contamination present on the land may affect its market value.

Types of potentially contaminated land

Land that is being used or has ever been used for any of the following activities is likely to be contaminated. These uses may therefore give rise to potentially significant liabilities and caution should be exercised whenever dealing with such land. Obviously, the list is not an exhaustive review of uses which present contamination risks.

- | | |
|--|--|
| • Acid/alkali plant and formulation | • Defence establishments and training areas |
| • Agricultural fertiliser manufacture | • Drum reconditioning works |
| • Airports | • Dry-cleaning establishments |
| • Asbestos production or manufacture and disposal | • Electrical manufacturing plants |
| • Battery manufacture or recycling | • Electroplating and heat treatment premises |
| • Chemical manufacture or formulation | • Explosives production or storage |
| • Storage of hazardous chemicals (being chemicals designated as dangerous goods under the Australian Code for the Transport of Dangerous Goods by Road and Rail) | • Fuel depots and storage areas |
| • Commercial waste storage or treatment | • Galvanisers |
| | • Gas works |
| | • Gun, pistol or rifle clubs |
| | • Landfill sites |
| | • Industrial cleaners |

- Lime-burners
- Metal foundries
- Metal sprayers
- Metal treaters and picklers
- Mining and extractive industries
- Paint manufacture or formulation
- Pest control works (that is, areas where pest control chemicals are stored or vehicles and tanks used in connection with pest control are washed)
- Pesticide and herbicide manufacture or formulation
- Petroleum or petrochemical industries
- Pharmaceutical manufacture or formulation
- Plastics and pigment manufacture
- Power-stations
- Printers
- Railway yards
- Sanitary landfill sites
- Scrap yards
- Service stations
- Sheep and cattle dips
- Smelting and refining
- Tannery, fellmongery and hide-curing works
- Waste disposal, storage and treatment
- Wood treatment/preservation sites.

Local Government Act 1989 – Sale/Exchange/Transfer of Land

189 Restriction on power to sell land

- (1) Except where section 181 or 191 applies, if a Council sells or exchanges any land it must comply with this section.
- (2) Before selling or exchanging the land the Council must—
 - (a) ensure that public notice of intention to do so is given at least 4 weeks prior to selling or exchanging the land; and
 - (b) obtain from a person who holds the qualifications or experience specified under section 13DA(1A) of the **Valuation of Land Act 1960** a valuation of the land which is made not more than 6 months prior to the sale or exchange.
- (3) A person has a right to make a submission under section 223 on the proposed sale or exchange.
- (4) Sub-section (3) does not apply to the sale of land that formed part of a road that has been discontinued as the result of a Council exercising its powers under clause 3 of Schedule 10.

S. 189(2)(b)
amended by
No. 91/1994
s. 36(6).

S. 189(4)
inserted by
No. 125/1993
s. 23.

191 Transfer, exchange or lease of land without consideration

- (1) A Council's powers to transfer, exchange or lease any land include the power to do so with or without consideration to—
 - (a) the Crown; or
 - (b) a Minister; or
 - (c) any public body; or
 - (d) the trustees appointed under any Act to be held on trust for public or municipal purposes; or
 - (e) a public hospital within the meaning of the **Health Services Act 1988** or other hospital carried on by an association or society otherwise than for profit or gain to the members of the association or society.
- (2) Any transfer, exchange or lease under this section is valid in law and equity.
- (3) Sections 189 and 190 do not apply to any transfer, exchange or lease under this section.

S. 191(1)(e)
amended by
No. 34/1996
s. 33(d).

207A Submissions under section 223

A person may make a submission under section 223 on the proposed exercise of any power under—

- (a) clauses 1(b), 2, 3, 7 and 8(1)(a) of Schedule 10;
- (b) clauses 9, 10(1)(c), 11 and 12 of Schedule 11;
- (c) sections 204(1) and (2).

S. 207A
inserted by
No. 125/1993
s. 22.

SCHEDULE 10
Powers of Councils over Roads

3 *Power to discontinue roads*

A Council may, in addition to any power given to it by sections 43 and 44 of the **Planning and Environment Act 1987**—

- (a) discontinue a road, or part of a road, by a notice published in the Government Gazette; and
- (b) sell the land from that road (if it is not Crown land), transfer the land to the Crown or itself or retain the land.

Subdivision Act 1988 – Sale/Exchange of Public Open Space

s. 20

20. What must the Council do with public open space?

S. 20(2)
substituted by
No. 48/1991
s. 16(1).

- (1) A Council must set aside for public open space any land which is vested in the Council for that purpose.
- (2) The Council must use any payment towards public open space it receives under this Act or has received under section 569B(8A) of the **Local Government Act 1958** but has not applied under sub-section (8C) of that section or the proceeds of any sale of public open space to—
 - (a) buy land for use for public recreation or public resort, as parklands or for similar purposes; or
 - (b) improve land already set aside, zoned or reserved (by the Council, the Crown, a planning scheme or otherwise) for use for public recreation or public resort, as parklands or for similar purposes; or
 - (c) with the approval of the Minister administering the **Local Government Act 1989**, improve land (whether set aside on a plan or not) used for public recreation or public resort, as parklands or for similar purposes.

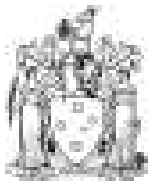
S. 20(3)
repealed by
No. 48/1991
s. 16(2).

* * * * *

- (4) Public open space can be used for municipal purposes in accordance with the planning scheme, or sold only if the Council has provided for replacement public open space.

Victorian Government Solicitor - Legal Advice

***Status of any Contract for the Sale/Exchange of Land
Entered into in breach of the provisions of the
Local Government Act 1989***



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30 May 2006

Mr John Watson
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1 Spring St,
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Dear Mr Watson

Advice on the status of any contract for the sale/exchange of land which may have been entered into in breach of the provisions of the *Local Government Act 1989*

We refer to your letter dated 16 May 2006.

Request for advice

1. You have asked us to provide advice on the status of any contract for the sale or exchange of land which may have been entered into in breach of the provisions of the *Local Government Act 1989* (the LG Act) and the legal consequences and ramifications for the Council.

Summary of Advice

2. Any contract for sale or exchange of land in breach of the statutory requirements of s 189 of the LG Act will be void.

Background

3. Section 189 of the LG Act provides as follows:

189. Restriction on power to sell land

- (1) Except where section 181 or 191 applies, if a Council sells or exchanges any land it must comply with this section.
- (2) Before selling or exchanging the land the Council must-



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- a. Ensure that public notice of intention to do so is given at least 4 weeks prior to selling or exchanging the land; and
 - b. Obtain from a person who holds the qualifications or experience specified under section 13DA (1A) of the *Valuation of Land Act* 1960 a valuation of the land which is made not more than 6 months prior to the sale or exchange.
 - (3) A person has a right to make a submission under section 223 on the proposed sale or exchange.
 - (4) Sub-section (3) does not apply to the sale of land that formed part of a road that has been discontinued as the result of a Council exercising its powers under clause 3 of Schedule 10.
4. Sections 181 and 191 of the LG Act provide exceptions to the provisions outlined in s 189.

Interpretation of statutory provisions

5. The courts have set down the test to apply in order to determine whether a breach of a statutory provision produces invalidity. The test is enunciated in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.
6. Traditionally, courts distinguished between mandatory procedures and directory procedures to determine the validity of an act done in breach of a statutory provision. Failure to follow the former was fatal and failure to follow the latter was not. However, the High Court in *Project Blue Sky* rejected the distinction, pointing out that the validity of an act done in breach of a statute provision was not dependent on whether the relevant procedural requirement was mandatory or directory.
7. The High Court held that the purpose of the legislation and the intention of Parliament must be ascertained in order to assess whether or not an action or decision made in breach of a statutory provision is invalid.
8. Therefore, the question for the court to determine is whether Parliament would have intended that, in the event of a failure to comply with s 189 of the LG Act, a consequent act or decision should be a legal nullity. In *Project Blue Sky*, McHugh, Gummow, Kirby and Hayne JJ state:

the existence of that purpose is ascertained by reference to the language of the statute, its subject matter and objects and the consequences for the parties of holding void every act done in breach of the condition.
9. Their Honours determined that, along with the express language of the provision, this task involved balancing two sets of considerations: first, the substantive consequences of non-compliance and secondly, the substantive consequences of

holding that action/decision (in this case entering into a contract) made in breach of the statutory requirement as a legal nullity.

Express wording and preamble to Act

10. As the High Court states in *Project Blue Sky*, the first point of interpretation of any statutory provision is ascertained by reference to the language of the statute. The express wording of s189 states that the Council “must comply” with the section and that before selling or exchanging the land the Council “must” follow the procedures in relation to the requirement of notice, valuation, and a persons right to make submissions.
11. The subject matter and object of the LG Act is reinforced by the preamble in the LG Act. Section 1 of the preamble provides as follows:

Local government is distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

Consequences of non-compliance

12. An action or decision made in non-compliance with the statutory provision, however, will not always be invalid: *Project Blue Sky*.
13. Where an act of non-compliance results in public inconvenience alone, it is unlikely to amount to consequence of substance. Public inconvenience may not be sufficient to invalidate the legal status of an act or decision entered into by the Council. In *Project Blue Sky*, the High Court stated:

Courts have always acknowledged that it is unlikely that it was a purpose of legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the Act.
14. In *Project Blue Sky*, the High Court held that non-compliance with the statutory procedure did not invalidate action taken under the statute, even though the duty to comply remains.
15. However, taking into account the language parliament has used and the purposes of s 189 we are of the opinion that Parliament intended that a breach of s 189 would make a sale or exchange void. We are assisted in this opinion because of the following case law.

16. In *Smith v Wyong Shire Council* (2003) NSWCA 322, the NSW Court of Appeal considered a challenge to the validity of *Wyong Local Environment Act 1991*. The plaintiffs claimed that the Council failed to comply with the public exhibition requirements, which lead to the invalidity of a plan. The Court of Appeal applying the test in *Project Blue Sky*, held that the plan was invalid due to failure to comply with the public exhibition requirements.
17. In *Bycon Pty Ltd & Byham v Moira Shire Council, Registrar of Titles & Nelread Pty Ltd* (1998) VSC 25, the Supreme Court of Victoria considered whether the Council had failed to comply with mandatory requirements of s 189 of the LG Act to receive and consider written public submissions on proposed sale and to hold meeting at which those who made submissions might be heard. The Council submitted that they totally overlooked or disregarded the statutory obligations that existed. Vincent J found compliance with the provision of s 189 of the LG Act, in circumstances where it is applicable, to be mandatory. Accordingly, his Honour held the purported sale of land was void. In this case, Vincent J did not refer to *Project Blue Sky* which was decided six months earlier. However, Vincent J was of the opinion non-compliance with the provision of s 189 was fatal and the contract for the sale of land was void.
18. Similarly, in a subsequent matter, *No 2 Pitt Street Pty Ltd v Wodonga Rural City Council* (No 4) (1999) VSC 322 the plaintiff sought an injunction restraining the Council from proceeding with the sale of land until the statutory requirements of the LG Act had been met. The Council's advertisement did not correctly describe the land intended to be sold. The plaintiff was unable to lodge an objection to the proposed sale within the time period provided. Balmford J held s 189 requires that a public notice by a Council of intention to sell land must accurately describe the land intended to be sold. For this reason, an injunction was issued restraining the Council from proceeding with the sale of the land until the statutory requirements were met. Again, Balmford J did not rely on *Project Blue Sky* but applied Vincent J's decision. However, we are of the opinion that these cases support the proposition that Parliament intended that the procedure in s 189 had to be followed.

Legal consequences and ramifications for the Council

19. If a contract is rendered void for non-compliance with the statutory requirements, the contract cannot be sued on. That is, a proposed purchaser could not sue on the contract. However, that party may have a claim in negligence against the Council. In addition, a person with a sufficient interest may also obtain an injunction

restraining the Council from proceeding with the sale until all statutory requirements have been fulfilled as illustrated in *No 2 Pitt Street*.

Conclusion

20. We are of the opinion that there is a legislative purpose discernible in the LG Act to invalidate any act that fails to comply with the statutory provision of s189. If the statutory provisions of s189 are not followed, the contract for the sale or exchange of land will be void.
21. You should feel free to include a copy of this advice in guidelines that we understand you are intending to circulate to Councils.

Yours faithfully
Victorian Government Solicitor's Office

James Ruddle
Deputy Victorian Government Solicitor