



Policy:

**Land Acquisition
and Disposal**

2019

INFORMATION ABOUT THIS DOCUMENT

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Document History

Doc No.	Date Amended	Details/Comments eg Resolution No.
E2016/29999		Draft Policy
E2016/93366		Council Resolution 16-442 stipulated that Council adopt the draft Policy and place it on public exhibition for a minimum period of 28 days. As there were no submissions received, resolution 16-442 determined that the draft Policy be adopted and incorporated into Council's Corporate Documents Register.
E2018/82267	11/10/18	Amended to remove track changes and minor formatting
E2019/10540	23/01/19	Reviewed for currency, endorsed by ET. Minor change to update title year

Further Document Information and Relationships

List here the related strategies, procedures, references, policy or other documents that have a bearing on this Policy and that may be useful reference material for users of this Policy.

Related Legislation*	Local Government Act 1993 Valuation of Land Act 1916 Real Property Act 1900 Land Acquisition (Just Terms Compensation) Act 1991 Roads Act 1993 Environment Planning and assessment Act 1979 Office Local Government, Land Acquisition Information Guide, December 2014
Related Policies	Asset Management Policy
Related Procedures/ Protocols, Statements, documents	

Note: Any reference to Legislation will be updated in the Policy as required. See website <http://www.legislation.nsw.gov.au/> for current Acts, Regulations and Environmental Planning Instruments.

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1. BACKGROUND

From time to time Council will acquire land and dispose of its land assets. Council has duties and obligations under a range of legislation that concerns land acquisition and disposal. This policy has been developed in order to provide the framework for a transparent process that adheres to the relevant legislation.

2. OBJECTIVES

The main objectives of this policy are to –

1. Ensure that Byron Shire Council has open and accountable framework to consider the acquisition and disposal of land assets.
2. Establish the criteria under which Council will consider acquisition and sale of land and easements.

3. SCOPE

This policy applies to all acquisition and disposal of Council lands, easements, and includes interests in land.

Council (as custodian of public assets) acquires and disposes of all property interests in open market format to ensure due probity of process and optimal financial return (and minimal risk). All dealings in Council land can only be achieved through a resolution of Council.

4. RELEVANT LEGISLATION AND GUIDELINES

- *Local Government Act 1993*
- *Valuation of Land Act 1916*
- *Real Property Act 1900*
- *Land Acquisition (Just Terms Compensation) Act 1991*
- *Roads Act 1993*
- *Environmental Planning and Assessment Act 1979*
- Independent Commission Against Corruption, *Guidelines for managing risks in direct negotiation*, May 2006
- Office Local Government, *Land Acquisition Information Guide*, December 2014

5. LAND ACQUISITIONS

Section 186 of the *Local Government Act* prescribes what purposes Council can acquire land for:

(1) A council may acquire land (including an interest in land) for the purpose of exercising any of its functions.

(2) Without limiting subsection (1), a council may acquire:

(a) land that is to be made available for any public purpose for which it is reserved or zoned under an environmental planning instrument, or

(b) land which forms part of, or adjoins or lies in the vicinity of, other land proposed to be acquired under this Part.

At the time of acquisition, Council must resolve the classification of the land to be either Operational or Community land in accordance with sections 25-27 of the *Local Government Act*.

Section 187 of the *Local Government Act* prescribes that:

- (1) Land that a council is authorised to acquire under this Part may be acquired by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.
- (2) A council may not give a proposed acquisition notice under the *Land Acquisition (Just Terms Compensation) Act 1991* without the approval of the Minister.

5.1 Purposes and Assessment Criteria

Properties are to be identified by taking into consideration the purpose for which they need to be acquired, the strategic nature of such properties and the value that such properties have to the community.

5.2 Methods of Acquisition

Acquisition by Agreement and Value

Acquisition by agreement is the preferred process for Council to acquire land.

Council may acquire land that is available for public sale under the same terms as any other prospective purchaser without having to satisfy the requirements of the *Land Acquisition (Just Terms Compensation) Act 1991*. Where properties are listed for sale on the open market, the General Manager shall negotiate the terms of purchase with either the vendor or the vendor's agent.

If Council identifies land or interests in land that is required to facilitate functions of Council, but the land is not available for public sale, Council may approach the landowner and negotiate the purchase of the required land or interests in land. In this case, the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* apply irrespective of whether the acquisition is by agreement or by compulsory process. This requires Council to pay a fair compensation for the land or interest in land that is being acquired.

Where properties are not listed on the open market, the General Manager is to arrange a valuation report as a basis for negotiation. The valuation report must be attached to the report submitted to Council. In the event of a formal valuation being obtained, the valuation report is to be used as a guide in any negotiations and subsequent report to Council.

Any negotiations are to be on the basis that a formal offer cannot be made until Council has considered a report authorising purchase of the property.

In some cases there may be a justified basis for Council acquiring land or interest in land at a price above the valuation benchmark in order to guarantee the successful securing of the property in order 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 special value should be determined and quantified within the initial decision of Council and referenced to the achievement of specific goals and objectives of Council.

Acquisition by Compulsory Process

If agreement to the acquisition of land or an interest in land cannot be made with the landowner, Council has the right to compulsorily acquire land or an interest in the land. A compulsory acquisition can only be pursued under the requirements of the *Roads Act 1993*, or the *Local Government Act 1993*, which give Council the authority to compulsorily acquire land. Compulsory land acquisition can only occur in accordance with the requirements of the *Land Acquisition (Just Terms Compensation) Act 1991*.

The compulsory process can not be used to acquire land for the purposes of resale.

Compulsory acquisition may become necessary as the effects of climate change impact on the Byron Shire coastline. For more information see "Appendix One".

For all land and easement acquisitions for properties not listed on the open market, the acquisition must be undertaken in strict accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.

The process to be followed for compulsory acquisition is set out in the *Land Acquisitions Acquisition Information Guide* (December 2014), as issued by the Office of Local Government. It is necessary for Council to satisfy the Office of Local Government that the acquisition is required for a public purpose.

Approval of the Minister for Local Government, and the Governor, is required to finalise the compulsory process.

Compensation for Acquisitions (other than land available for public sale)

The amount of compensation to be paid for land that is compulsorily acquired must be determined by the Valuer General of New South Wales.

In determining the amount for 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 had 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 (that is, compensation for non-financial disadvantage arising from the need to relocate as a result of the acquisition); and

any increase or decrease in the value of any other land of the person at the sate 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.

5.3 Procedure for Acquisition of Land

1) Council Resolution

The acquisition of land cannot be delegated and, as required by the *Local Government Act* 1993, must be effected by a resolution of Council.

2) Classification

Council must resolve what the classification of the land will be (either Community or Operational) at the time of resolving to acquire the land or in accordance with Sec 31 Local Government Act 1993. The default classification is Community.

3) Method of negotiation

Where a property is placed for sale on the open market, Council can negotiate the purchase price and terms of acquisition to achieve the best possible commercial value.

All other acquisitions must be negotiated having regard to the provisions of the *Land Acquisition (Just Terms Compensation) Act* 1991.

6. LAND DISPOSALS

Section 45 of the *Local Government Act* 1993 provides for the type of land Council has the power to dispose of:

(1) *A council has no power to sell, exchange or otherwise dispose of community land.*

With exception to:

(4) *This section does not prevent a council from selling, exchanging or otherwise disposing of community land for the purpose of enabling that land to become, or be added to, a Crown reserve or to become, or be added to, land that is reserved or dedicated under the National Parks and Wildlife Act 1974.*

Where land (including surplus areas of public road) is capable of being sold on the open market and able to be developed independently of any other property, the sale shall be by competitive process involving public auction, tender or expression of interest unless circumstances warrant sale by Direct Negotiation as set out below. The Guidelines for Managing Risks in Direct Negotiation published by the Independent Commission Against Corruption shall provide the guidelines for entering into Direct Negotiation.

Council can dispose of land by Direct Negotiation under the following circumstances:

- 1) Where the total cost of the public sale process will exceed the expected community benefit. For example, where the land is worth \$1,000 and the cost to market the land is \$5,000.
- 2) Where there is only one identifiable purchaser. For example, where a site is not large enough for development in its own right (including a portion of road reserve) and is surrounded by public roads on all sides other than the adjoining owner. Where a site adjoins two owners such as laneways, they will each be offered 50%.
- 3) Where Council is bound by a contractual obligation. For example, a tenant with a first right of refusal, where that tenancy has been entered into as a result of public competition.

- 4) Disposal of land to a government or utility authority for the purpose of infrastructure provision.
- 5) Where a public marketing process which has been undertaken within the last 12 months in accordance with this policy has failed to achieve the desired outcome.
- 6) In response to a proposal which achieves specific policy goals of Council. This exclusion aims to allow Council to respond to an approach for the development of a unique project. Any such proposal must comprise a concept plan and description of the project and clear demonstration of the achievement of specific policy and strategic goals and objectives of Council, e.g. a land-swap transaction.

The report to Council covering these sales will identify the reasons why this sale process was chosen.

For public auction, the General Manager will set the reserve price based on a recommendation of an independent valuer.

6.1 Disposal Criteria

Land and buildings are to be tested against a number of criteria to determine whether the property is retained and developed for community use or developed or sold to realise its commercial potential.

The seven (7) criteria contained in the assessment are:

- 1) Statutory influences (restrictions or limitations): are there statutory reasons for the Council ownership of the property? This will extend to actual or implied trusts that have been established as a result of Council's acquisition of the land.
- 2) Existing usage: Is the land used or likely to be used to meet operational, community or recreational needs?
- 3) Potential future use: is the land or road likely to be required for Council's operational needs.
- 4) Spatial distribution: are there adequate-like facilities and opportunity to meet future needs in the area and serving the local community?
- 5) Conservation value: does the land or road have cultural, natural or heritage value that should be maintained?
- 6) Site constraints and opportunities: in addition to conservation value are there other site constraints which may extend to [but not restricted to] flood liability, land slip, mine subsidence or other physical impairment?
- 7) Maintenance issues: what maintenance requirement does Council have for the land?

Should the proposed sale be impacted by any of these matters, the request shall be refused unless it can be demonstrated that there is a public and/or economic benefit to the sale or the contract conditions can be structured to ensure that the issue is addressed.

6.2 Procedure for Sale of Land

1) Council Resolution

The sale of Council land cannot be delegated and, as required by the *Local Government Act 1993*, all sales must be effected by a resolution of Council.

2) Classification

All Council land is classified under the *Local Government Act* 1993 as either operational or community land. The Act provides that only operational land can be sold and if an area of community land is identified as being surplus, the land must first be reclassified to operational prior to that sale proceeding. The process of reclassification must be undertaken in accordance with the Environmental Planning and Assessment Act 1979.

3) Probity Plan

Where land is being sold by direct negotiation, a probity plan will be developed to cover the following matters:

- a. obtaining best value for money;
- b. demonstrating accountability and transparency;
- c. dealing with conflict of interest;
- d. providing a fair chance for all to participate;
- e. where Council sells property subject to a development application, that application will be assessed independently and submitted to either the Independent Hearing and Assessment Panel or the Joint Regional Planning Panel.

4) Valuation Requirements

Where Council proposes to sell land by direct negotiation and the value of the land is greater than \$1m, Council will obtain either:

- a. two independent valuations where the site has no special value to an adjoining owner and the market value based on the highest and best use can be established by analysis of direct comparative sales data; or
- b. one valuation undertaken jointly by two consultant valuers or a consultant valuer and land economist, quantity surveyor or retail specialist where the sale has a special value either to an adjoining owner or where the purchaser is acquiring the land for a specific purpose for which direct comparable sales data is not available.

For all other Council land proposed to be sold other than by public auction, Council will obtain a valuation from an independent valuer to establish the market value, taking into account the highest and best use of the site and any conditions Council may place on the sale. For land being sold to an adjoining owner, the valuation shall be carried out on an added-value basis and the sale price shall be consistent with the difference in values on a before-and after basis.

Council recognises that valuation advice is not an exact science and it is not unreasonable that a sale price of up to 10% variation from that valuation may be achieved. However, where the negotiated outcome results in a sale price more than 10% less than the assessed market value, it shall be acknowledged in the report to Council giving reason why that variation shall be adopted.

5) *Escalation Fee*

Where the sale is conditional on the determination of a development application, approval of a road closure or the making of an LEP to reclassify the land to operational, the agreed value shall increase at a rate of 5% pa (or such other amount as determined by Council from time to time) if settlement is not achieved within 12 months from the date of the Council resolution authorising the sale and the delay is not as a result of Council or statutory process.

6) *Form of Contract*

Where Council resolves to sell community land (subject to reclassification) to a prospective purchaser, a Deed of Agreement shall be entered into between Council and the prospective purchaser committing each party to entering into a contract immediately should the reclassification be finalised. That Deed will be structured so that Council's regulatory responsibilities are not compromised.

Where Council resolves to sell a portion of public road that is subject to a road closure under the *Roads Act* 1993 and the value of that land is less than \$100,000, the sale can be by memorandum of transfer.

All other land sales shall be by contract.

7) *Public Road*

A Council Public Road reserve must be closed under the *Roads Act* 1993 to enable the sale to proceed. The closure process is managed by Council and the Department of Primary Industries – Crown Lands Division (DPI – Crown).

An initial decision to move forward with a full or part road closure can be made by delegation of the General Manager. If preliminary investigations find that it is a *formed Council Public Road* then Council commences pre-lodgement actions. These can be viewed on the DPI-Crown Lands website. Once completed, a successful resolution passed for closure and sale is forwarded with application, along with the appropriate fee and survey plan to the DPI-Crown Lands. On successful closure by DPI-Crown Lands the new freehold title is vested in Council, and vested as operational land. Council would then undertake the necessary land transfer with the applicant.

If the *Council Public Road* is *unformed*, then on closing, the title reverts to the Crown, being the NSW Department of Industry, who would then negotiate the transfer of that land with the applicant.

For land that vests in Council upon Closure with the intent for its disposal, the General Manager is to obtain (as per resolution) at least one valuation of the land to be provided by a Registered Valuer to establish the disposal value.

An application for the full or part closure of a *Council Public Road Reserve* and where applicable, disposal of the *Road Reserve*, may be initiated by Council or by an individual.

For individual-initiated closures and disposals, a formal request needs to be made in writing by the applicant – addressed to the General Manager. All costs associated with the disposal of the land, including Council's reasonable legal costs, will be borne by the purchaser.

For closure of classified roads, the approval of the Roads and Maritime Services must be obtained prior to the matter being referred to Council for consideration.

7. EASEMENTS

Easements are a right over a private property for Council to use land for a specific purpose (drainage easement, easement in gross for access etc.) can be in the form of a covenant restricting the use of privately owned land (restriction as to user for unstable land etc) or can be a positive covenant that requires a land owner to use and or maintain the site for a specific use (maintain detention basins etc).

Where Council requires an easement over a private property and the easement is not created in subdivision or as a condition of development consent, compensation may be payable to the land owner and shall be paid to the respective land owner where appropriate. The amount of compensation shall be assessed by a consultant registered valuer in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.

Where a Council easement over private land is no longer required, Council can agree to the extinguishment of that easement at the request of the affected land owner. Where appropriate, Council can seek compensation from the landowner for the benefit of that extinguishment as determined by a consultant valuer.