

# **Gloucestershire County Council**

## **Property Acquisition Policy**

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## Overview

- i. This policy document is to be followed when considering the acquisition by the Council of an interest in property, whether that be for operational or investment purposes. For the purpose of this policy, reference to “property” includes any property constructed on land or land or an interest in land or property.
- ii. Property occupied or used by the Council to deliver its services is described as *operational property*. All other property is described as *non-operational property*.
- iii. This policy applies to the acquisition by the Council of the following interests in property: freeholds: long leaseholds (where the term is more than 49 years); and legal charges (to protect investments).
- iv. Property is a corporate resource and is held and should be acquired in accordance with the Core Values in the Council Strategy, which are: living within our means; doing the right thing; and helping communities to help themselves.
- v. This policy places emphasis on adopting procedures that are open, transparent and consistent and aims to ensure maximum benefit from the effective purchase and subsequent management of the Council’s assets. Within this framework the policy will ensure the Council achieves best value,

acts within the appropriate legal framework, and acts in a demonstrably fair and open manner and considers whole life costs.

- vi. Property is a unique and finite resource; each acquisition proposal will be considered on its own merits. All requests which require the acquisition of an operational property must be supported by a business case, which sets out why, in the opinion of the service, a property is required and what need the service is seeking to deliver. In making an acquisition it must be able to demonstrate how the acquisition supports the Council's strategic objectives. Further, all individual proposals for investment in property must be supported by a business case setting out the financial case for investment.
- vii. This Policy will apply to both the acquisition of property for operational service delivery purposes and to the acquisition and development of property for investment purposes. The two principal investment opportunities which are covered by this Policy can be categorised as follows:
  - Direct investment in property that has the potential to produce a good return on investment but requires active management and development.
  - Development of land, either already owned or purchased, then through the planning and development/construction of a commercial asset, which will then be let on the open market and retained.
- viii. For the avoidance of doubt this Policy does apply to the acquisition of agricultural land, buildings and other property that the Council may wish to

acquire to achieve the aims of the Rural Estate Strategy.

## **1. Legal**

1.1 The powers under which the County Council acquires property assets can be general or specific.

1.2 General Powers to acquire land and property stem from the Local Government Act 1972. (Section 120). These enable local authorities to acquire property for any of their functions, or for the benefit, improvement or development of their area.

1.3 The Local Government Act 2000 introduced additional 'wellbeing' powers which provide councils with the power to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental wellbeing of their area. This includes the power to incur expenditure, including land acquisition.

1.4 The Localism Act 2011 introduced the general power of competence and empowered local authorities to do anything as long as it is not specifically prohibited (either under that Act or other legislation).

1.5 There are more specific powers that support acquisitions for capital programmes or specific projects. Examples include acquisitions under the Highways or

Education Acts.

## **2. Governance**

2.1 When a property comes to the market to be bought or sold decision making needs to fit in to the due diligence processes and timetables usually followed by the professional property sector. These timetables can be tight, particularly where there is competition to secure a particular property. This policy recognises the necessity of the appropriate delegation of some powers in order to make decisions within a realistic timeframe.

2.2 A typical sequence for the acquisition of a property would be as follows: property appears on the market; potential buyers seek details and views; then submission of offers; followed by confirmation by the seller of the preferred buyer; then preparation of Heads of Terms; and period for due diligence investigations by the buyer; then exchange of contracts, followed by completion.

2.3 The governance process that would be adhered to would be as follows:

2.3.1 A request would be submitted by the service area to the Head of Property Services, setting out the *need* that the service are seeking to meet, the due regard implications of any proposed change of service and a business case that demonstrates the financial and service rationale underpinning the request for a property.

2.3.2 A report would then be compiled by the service area, in consultation with AMPS, for submission to and consideration by Property Board. The report would include clear criteria for the proposed property, size, location, type, etc. and details of the proposed funding.

2.3.3 In those instances where Property Board approve the business case, a decision report would be produced following the council's governance process, including consultation with the Cabinet Member for Finance and Change. Once approval has been given a property search would be undertaken by AMPS, in consultation with the service area, to determine what available assets are already held and which might be suitable.

2.3.4 Other available public sector partner assets would also be considered and assessed as part of the *One Gloucestershire Estates Group*.

2.3.5 If no existing GCC or partner assets met the criteria for suitable properties then a market search would be undertaken by AMPS.

2.3.6 Where a number of potentially suitable properties exist in the market place, objective comparisons will be made to establish which is the most appropriate to meet the Council's needs. The criteria for assessment will include both service and property considerations.

2.3.7 After the identification of a suitable property, AMPS shall consult with the relevant statutory authorities, including Planning, Legal and other appropriate Services as required, to establish whether there may be constraints on the development or use of the property.

2.3.8 In some cases, it may be appropriate to seek planning consent for a form of development prior to acquiring the property. The AMPS team will consult with the relevant planning authority and other departments as appropriate

to decide whether this is necessary. Equally, there may be circumstances where it is deemed appropriate to acquire the property, “at risk” and seek planning consent after the title of the property has been secured.

2.3.9 When the preferred property to acquire is identified it will be reviewed by an appropriately qualified property officer, in consultation with the service representative. Further, that property officer would be authorised to enter into initial negotiations on behalf of the Council.

2.3.10 No other party shall initiate negotiations nor make any contact with the agent or the vendor during these negotiations except with the express permission of the Head of Property Services.

2.3.11 On reaching agreement as to the terms of acquisition, where applicable a report will be prepared for approval by the Property Officer, who has been leading the acquisition. This report will review whether the acquisition is in accordance with the approvals given, including the relevant capital budget .

2.3.12 In all cases where valuation advice suggests that the open market value of the property is below the negotiated price the report must demonstrate there are overriding factors that justify the purchase. The report must include clear and supportable reasons for purchase above market value such as: service need, or that the Council is a “special purchaser”.

2.3.13 This report will then form the basis of the Implementation Decision, reflecting the approvals given earlier in the process. :

2.3.14 When all appropriate surveys have been satisfactorily completed or provided, the Council’s Legal Services team will be instructed by the Head of Property Services by way of delegated authority instructions to complete the documentation associated with the acquisition.

2.3.15 Once the acquisition has been completed, the Legal Services shall advise the AMPS Property Information Team and such others as is required.

2.3.16 Full records of the purchase process will be kept in a file relating to the property and these records shall include details as to the business case, the valuation relied upon in making the decision to acquire, with consents, approvals and papers recording decisions taken under any delegated powers.

2.3.17 In future Cabinet will be updated on acquisitions, in addition to the existing disposals schedule, as part of their six monthly update on property activity.

### **3 Funding**

3.1 The acquisition of operational property shall be prioritised in accordance with the Council's approved Capital Strategy.

3.2 The Council can fund the acquisition of operational property through a range of options and it is accepted that the appropriate option will vary in each case.

3.3 All acquisitions shall have the necessary budgetary approval before the acquisition is completed.

# **Schedule 1 - Statutory Duties and Powers relating to the acquisition of property**

## **Duties and Powers**

Gloucestershire County Council is a statutory body, that came into being pursuant to the Local Government Act 1972, and as such, every activity that it carries out must be authorised by statute, otherwise it will act *ultra vires*, or outside its powers.

This schedule sets out where those powers lie specifically, and more generally, in order for the County to carry out its duties and obligations, in particular in relation to the acquisition of land whilst not breaching the *ultra vires* rule. However, this schedule does not cover legal considerations in relation to “investment” type purchases.

## **Specific Powers**

There are a number of specific statutory powers that are likely to be used by GCC for the acquisition of land in order to carry out its statutory functions and duties.

Generally the powers apply to acquisition both by agreement and compulsorily, and are often limited by factors, but it is not the intention of this schedule to go through each one in detail. These acts should be the first port of call when relying on a statutory power of acquisition in relation to any of GCC’s functions, (but again noting that their application to “investment” type purchases is not covered in this schedule).

## **General Powers – Local Government Act 1972**

The first general power to consider is that in the Local Government Act 1972:

Section 120 (1), For the purposes of -

- (a) any of their functions under this or any other enactment, or
- (b) the benefit, improvement or development of their area,

a principal council may acquire by agreement any land, whether situated inside or outside their area.

s.120 (2) A principal council may acquire by agreement any land for any purpose for which they are authorised by this or any other enactment to acquire land, notwithstanding that the land is not immediately required for that purpose; and, until it is required for the purpose for which it was acquired, any land acquired under this subsection may be used for the purpose of any of the council's functions.

There is not much in the way of legal commentary on this particular general power, primarily because it has to some degree been overtaken firstly by the Local Government Act 2000 and subsequently the Localism Act 2011. However the Local Government Act 1972 is still the primary legislation under which GCC was created, and the functions and duties set out in it are extensive. However, and despite being wide-ranging, advice received indicates that those functions do not extend to "investment" type scenarios.

### **General Powers – Local Government Act 2000 – The Well Being Power**

This is the act that first set out the "well-being" power, i.e. power to do anything which a local authority considers is likely to achieve any one or more of the following objects—

- (a) the promotion or improvement of the economic well-being of their area,
- (b) the promotion or improvement of the social well-being of their area, and
- (c) the promotion or improvement of the environmental well-being of their area

It no longer applies to the County Council, having been superseded by the Localism Act 2011 (see below). The intention, apparently, was to create a power with breadth, to encourage innovative and imaginative use of it. However, that use was subsequently restricted by a number of cases (notably *R (Risk Management Partners) v Brent London Council & Others* [2008]) whereby local authorities were reminded that it is the economic welfare of *the area* that has to be promoted not the council's own economic well-being.

There is also a question mark whether the general power to compulsorily acquire under s121 in the Local Government Act 1972 (see above) applies to the powers in the Local Government Act 2000.

This case law cast doubt on the extent of the well being power and therefore authorities were reluctant to rely on its powers. Again, in view of the restrictions highlighted by case law it is unlikely that this legislation would allow GCC to acquire

property as purely investment without demonstrating one of the well-being requirements.

### **General Powers – Localism Act 2011 – The General Power of Competence**

The Localism Act 2011 came into force in February 2012. As you will note from all of the above, prior to this, local authorities had to satisfy themselves that any action they wished to take was specifically permitted by legislation (whether that was by a specific power or more generally by e.g. Local Government Act 2000) and was therefore not ultra vires. The Localism Act turned this around, so that authorities are by this legislation, empowered to do anything as long as it is not specifically prohibited, and subject to public law principles. The power is very simply expressed in s. 1(1): “A local authority has power to do anything that individuals generally may do”. Individuals may, of course, buy, let, develop, and manage property for investment purposes and commercial gain and to set up or purchase a company for these purposes.

Section 1 (1) extends the power to do anything which individuals (deemed to have full capacity) generally do even if:

- It is unlike anything else the authority may do.
- It is unlike anything that other public bodies may do.
- It is carried out in any whatever, including:
  - Anywhere in the UK or elsewhere;
  - For a commercial purpose or otherwise for a charge, or without charge; and
  - For, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

This can be used in isolation or in conjunction with existing powers, for example where the extent of another power is in question. This is a wide ranging power, and like the well being power before it, seems to have been designed to encourage innovation and imagination in use of this power. As yet, as it is relatively new legislation, and there have been no challenges as to its use as yet, there are however restrictions:

- Pre-commencement powers. If the exercise of a power contained in an earlier act is curtailed by any restrictions, those restrictions also apply to the general power under the LA.
- Pre-commencement limitations. Authorities cannot exercise the general power to do something prevented by a prohibition, restriction or other limitation expressly imposed by a statutory provision contained in an earlier act.
- Post-commencement limitations. Where the intended action is subject to post-commencement limitations (i.e. expressly imposed by a statutory provision contained in a later act or order), the authority is similarly bound by those limitations if they apply to:
  - The general power in the LA
  - All of authority's powers
  - All of the authority's powers but with exceptions that do not include the general power.

In short, we are back to the ultra vires rule, but reversed: rather than GCC only being able to do what is within its power, **everything is within its power unless it is specifically excluded** (subject to the limitations above).

## Raising money

The general power of competence under the LA does not prevent local authorities from using the power to raise money (unlike the well-being power in the LGA2002, which was a factor in the Brent case.). However, the DCLG's impact assessment states that local authorities will remain governed by the existing regimes in relation to taxation, precepting and borrowing which suggests the General Power will not provide authorities with any new power to raise tax for precepts.

## Exclusions

The difficulty with the “everything within its power unless specifically excluded” concept is identifying what might be specifically excluded, and as mentioned above, there have, so far, been no challenges to any exercise of the general power of competence, and very little guidance has been issued, so there is no indication where any authority may inadvertently overstep the mark.

There is an exclusion which has been pointed out, namely: s13 Local Government Act 2003 which states that “a local authority may not mortgage or charge any of its property as security for money which it has borrowed or which it otherwise owes”. So if, for instance, funding was received for property acquisition, and the funder is looking for a legal charge on the property to protect that funding, then GCC is not able to offer that. Potentially that could restrict the sources of income GCC might be looking for in respect of investment properties.

## **Leases**

The policy set out in Section A for operational property acquisition covers both freehold and leasehold acquisitions, but excludes short-term tenancy arrangements. Further, it is not considered practical or prudent to seek Property Board approval for every leasehold interest sought by GCC. Rather, it is considered appropriate to mirror the existing disposal policy, which includes the granting of any leasehold interest in GCC property for a term exceeding forty nine years. On this basis this acquisition policy will apply to any leasehold interest by GCC of property, where that lease is for a term exceeding 49 years.

## **Conclusion**

GCC has extensive powers, both specific and general, to acquire land and property necessary to carry out its functions. Those general powers have been greatly extended by the general power of competence under the Localism Act 2011, which grants GCC power, basically, to do anything as long as it is not specifically excluded. Furthermore, the Localism Act has clearly been designed to encourage local authorities to think and act more commercially and more imaginatively in using those powers. The down side is that it is perhaps more difficult to identify exclusions to general power than it is to identify specific powers of acquisition.

It should be noted that the general power of competence is pretty much untested and there is little guidance available. In the circumstances, the County should bear in mind the risks of:

- being challenged (the general power of competence is open to judicial review); or
- damage to its reputation and public money if a project goes wrong.

It would be prudent to ensure that, in respect of any property acquisitions, whether freehold or long leasehold, the power relied upon for the acquisition should be documented and reasoning for relying on that power set out. Although GCC has the general power of competence under the Localism Act 2011 and may of course use it, it does not have to and can instead rely on its more specific powers.