



Council Policy

Acquisition and Divestment of Land and Easements

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Policy

1 Purpose

This policy acknowledges that Lake Macquarie City Council (Council) is the custodian and trustee of public assets and is required to effectively account for and manage these assets.

It defines the criteria Council should consider prior to acquiring or divesting land or easements and outlines the processes Council will use to acquire and divest land and easements in accordance with relevant legislation. It provides Council with:

- an endorsed framework to enable and pursue land acquisition and divestment opportunities of merit
- the principles, framework, responsibilities, and processes for Council staff to account for and manage the acquisition and disposal of Council's land assets.

2 Scope

Council officers are required to act in accordance with this policy.

3 Objectives

By applying this policy, Council staff will be able to:

- identify, manage and mitigate the risks associated with the acquisition and disposal of land, and
- recognise the complexity of land transactions and apply discretion and flexibility to achieve outcomes.

4 Policy statement

Council will acquire or divest land with consideration to the following key principles:

- **Best value for money**
Achieving "best value" may include financial, social and environmental benefits.
- **Transparency**
Ensuring processes appropriately balance openness to scrutiny with commercial confidentiality.
- **Accountability**
Demonstrating the best use of public resources and the highest level of performance through appropriate record keeping and audit trails.
- **Impartiality**
Preventing or addressing any actual or perceived conflicts of interest ensuring fairness and equity.

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4.1 Land acquisition

4.1.1 Land acquisition procedures

Council may acquire land for the purpose of carrying out its functions under the *Local Government Act 1993* (NSW) (LG ACT).

When a land acquisition opportunity is identified, a comprehensive assessment of the land should be conducted in consultation with relevant departments within Council.

The assessment may include, but is not limited to:

- due diligence - this can include but is not limited to legal, environmental, planning and commercial investigations
- a valuation from an appropriately qualified and experienced valuer indicating a maximum price
- consideration of the principles and objectives of Council's Integrated Planning Framework
- identification of funding source and assessment against Council's Long-Term Financial Plan
- any justified urgency to acquire the land that may warrant an 'incentive value' payment in addition to the assessed market value - any incentive value associated with the acquisition must be referenced when seeking a Council resolution for the acquisition
- any justified reason to acquire the property at a price above the current market valuation assessment (for example, purchaser's premium) - before finalising the acquisition negotiations, any purchaser's premium must be referenced when seeking a Council resolution for the acquisition.

While the Chief Executive Officer and/or their delegate may make preliminary enquiries and negotiations regarding a possible purchase price, any formal offer is to be conditional upon a Council resolution authorising the acquisition.

In carrying out their duties, the Chief Executive Officer and/or their delegate shall:

- be responsible for the conduct of all negotiations
- seek such other professional advice as is considered necessary in the circumstances
- have regard to the Independent Commission Against Corruption's publication Direct Negotiations so far as is appropriate in the circumstances
- be consistent with the standards published by the Centre for Property Acquisition

The *Local Government Act 1993* provides "that all public land must be classified either community" or "operational" upon its acquisition". Any land that is acquired must clearly identify the intention for the land to be classified as either community land or operational land.

4.1.2 Methods of acquisition

Wherever possible Council's preference is to acquire land, easements or interest in the land through mutual agreement with the landowners. The key methods to acquire land are:

- Council opportunistically responding when the desired land is offered to the market
- Council pro-actively initiating negotiations for the desired land

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- an owner approaching Council to initiate negotiations for the desired land.

Council has an obligation to provide services to the community. Where mutual agreement cannot be achieved, Council may invoke its statutory powers under the *Land Acquisition (Just Terms Compensation) Act 1991*, to 'compulsorily acquire' land or easements for those services and/or other public purposes.

4.2 Land divestment review

4.2.1 Land deemed to be surplus

Before surplus land (vacant or improved) can be sold, all relevant Council departments must be consulted.

Land that is classified 'community' land and identified as surplus to the community's needs must be reclassified to 'operational' land in accordance with the Local Government Act 1993 before it can be sold.

4.2.2 Method of disposal

While the Chief Executive Officer and/or their delegate may make preliminary enquiries and negotiate regarding a possible disposal price, any formal offer is to be conditional upon a Council resolution authorising the disposal.

An open competitive process of disposal is preferred using one of the following methods:

- **Expression of interest**
Often used for unusual properties difficult to determine a market value, or where Council seeks to achieve "best value" triple bottom line (TBL) benefits.
- **Tender**
Used predominantly in high value, limited market situations.
- **Auction**
An open and public method, favoured by government bodies, but reliant on high levels of competition. Often achieves a quick sale. Can fail in a poor market.
- **Private treaty**
Most common method where an asking price is set and negotiated by individuals, usually through a real estate agent (who can be an independent third party to the negotiation process).

Council may approve a non-competitive process of divestment such as direct negotiations, subject to clearly documented and authorised reasons, plus the employment of risk mitigation measures.

Risk mitigation measures for direct negotiations may include:

- obtaining two valuations from appropriately qualified and experienced valuers to establish a range for negotiation
- managing conflicts of interest by obtaining declarations of no personal or financial associations
- establishing a project specific Probity Plan, describing how meetings, negotiations, decisions and progress reporting is to be managed and documented.

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4.2.3 Disposal below market value

Land may be disposed of to achieve strategic outcomes below the 'market value' range.

In such situations, best value may include financial, environmental, planning or social considerations.

The report seeking Council resolution should clearly state the reasons for such a sale and quantify the amount below market value attributable to each element.

The obligation to obtain a market valuation still exists to provide a measure of the non-financial element of the sale.

4.2.4 Sale to adjoining owners

In circumstances where land is not able to be sold in isolation on the open market, such as:

- small parcels
- undersized lots not permissible to be developed in isolation
- former road widenings and closed laneways
- large commercial sites

improved outcomes may be achieved by selling to adjoining owners.

Where potential purchasers are the adjoining landowners, the land must first be offered in equal proportions to each adjoining owner or apportioned according to adjoining land boundary length or frontage and on similar terms and conditions.

If an adjoining owner does not wish to purchase their proportion of the land, it can similarly be offered to the remaining adjoining owners. Where one or more adjoining owners accept Council's offer to purchase the land, but then decline to proceed with the purchase, Council will again reissue offers to all adjoining landowners.

While the recommended method of determining the sale price is the 'before and after' method as related to the purchasers' land, the valuation method used to value the land will be determined by the qualified valuer. Similarly, for small portions of land, the 'piecemeal' (\$ rate per square metre) method may be more appropriate, however the valuation method will be determined by the qualified valuer.

In most circumstances, the purchaser will be required to consolidate the subject land with their existing land at no cost to Council as a condition of sale.

Council will consider, on a case-by-case basis, selling land to a single adjoining owner when in the circumstances it can be established that the sale will:

- rectify an encroachment on Council's land
- facilitate future management of any infrastructure assets or
- provide wider social and economic benefits to the community.

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4.2.5 Sale of roads

A road, or any part thereof, cannot be sold until it is formally closed in accordance with the provisions of the *Roads Act 1993*.

Road closures can be initiated either by Council or by prospective purchasers who wish to acquire the redundant road following its closure.

When Council initiates the road closure (to realise the value of surplus land), all costs are borne by Council as development costs.

When closures are initiated by, or on behalf of, prospective purchasers, all costs for the closure will be borne by the prospective purchasers.

A Council resolution will be sought to close the road and sell the land at the agreed purchase price and estimated costs in accordance with the terms of the sale.

In accordance with Section 43 of the *Roads Act 1993* any funds realised from the sale of roads are required to be set aside for acquiring land for public roads or for carrying out of work on public roads.

4.3 Easements

Council deals with a number of easement matters including:

- creation of easements on Council land
- creation of easements on private land
- release or extinguishment of Council easements on private or Council land.

4.3.1 Creation of easements on Council land

Council may require an easement on Council land for any proposed infrastructure, such as extensions or connections from private land to utility infrastructure (for example, stormwater and electricity).

Easements ensure private landowners have appropriate legal rights to use, maintain and upgrade private infrastructure, while allowing Council to easily and accurately identify infrastructure on its land. It also ensures appropriate compensation for encroachments on public land.

Where easements are requested on Council land, consultation will be undertaken with relevant Council departments to determine if the proposed easement is appropriate, considering legal requirements, impacts on land use and the public interest.

Applicants must pay Council's administration fees and land compensation before Council will execute and return easement documents for lodgement with Land Registration Service (LRS).

Council may not require easements for infrastructure benefiting from statutory easement provisions (such as sewer main extensions to be owned by Hunter Water), or to replace existing lawful assets. Such circumstances will be considered on a case-by-case basis.

4.3.2 Council seeking easements on private land

To facilitate public infrastructure works, Council may approach private landowners about acquiring an easement and undertaking works on their property.

When negotiating with private landowners to obtain an easement, Council will generally undertake a valuation and offer market value for the easement, unless the proposed works provide benefit to the property exceeding the likely market value for the easement.

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4.3.3 Release or extinguishment of Council easements

Where easements or notations on private land in favour of Council are no longer required, landowners may approach Council to seek removing them.

Where this is acceptable, owners will need to prepare necessary documentation for Council's review, and once executed by Council, owners will need to subsequently lodge these with LRS to finalise the easement removal. Council has an administration fee applicable to release of easements.

4.4 Form of contract

A contract for the sale and purchase of land is the document required to sell and acquire land, in all circumstances other than those specifically exempted under the *Conveyancing (Sale of land) Regulation 2017*, in particular:

- a contract between owners of adjoining land that will result solely in an adjustment of a common boundary
- a contract with the Transport NSW for acquisition of land for the purpose of road, or
- a contract for the sale of part or whole of a former public road.

Contracts for the sale of land will usually contain standard conditions of sale. Complex or non-standard contracts of sale or purchase of land and their conditions should be drafted in consultation with relevant departments.

Council's Legal department is responsible for ensuring that contracts for the sale of land satisfy statutory disclosure and warranty obligations and that title to the land is transferred in accordance with the relevant legislation.

4.5 Goods and services tax

Relevant consultation must be undertaken with Council's Financial Services department to ensure the relevant application of the goods and services tax (GST) is applied to the contract for sale of land.

4.6 Delegated authority

The *Local Government Act 1993* requires a specific Council resolution to acquire or divest land.

The Chief Executive Officer and/or or appropriately delegated Council staff are authorised to make minor contract alterations or appropriate actions where these alterations or actions are consistent with the terms and intent of the Council resolution. Such changes include deposit payment, completion date, inclusions/exclusions or provisions of GST and interest and payment of ancillary minor costs, where appropriate, arising from contract exchange and settlement (for example, legal, valuation, transactional, delay, health and safety).

All negotiations must be conducted on the basis that the acquisition is subject to consideration by Council and an appropriate resolution adopted.

4.7 Confidentiality

In most disposals of land, and in some land acquisitions, the information contained in reports to Council may confer an advantage upon another party.

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Accordingly, it would be contrary to public interest for Council to deal with such matters in an open session because release of information could prejudice Council's ability to operate in a commercially competitive manner.

Therefore, it is acknowledged that reports to Council on the disposal or acquisition of land will, on occasions, be deemed confidential in accordance with the *Local Government Act 1993*. This confidentiality may be lifted upon settlement (or sometime after) if it is considered to be in the public interest and the need for confidentiality is no longer required.

4.8 Valuation process

When Council acquires or disposes of (vacant or improved) land, at least one formal market valuation must be undertaken by an appropriately qualified and experienced valuer.

Valuation instructions must clearly identify:

- the purpose of the valuation (acquisition or disposal)
- the primary basis of the valuation considered most appropriate in the circumstances - there may be multiple bases of valuations required
- that the valuation be retained in a secure folder within Council's records management system
- that the valuation includes details of sales evidence and adjustments, valuation rationale and methodology, a valuation range (for negotiations) and comments on marketability, most appropriate method of disposal and opportunities to add value.

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

If a contract, deed or agreement documenting the transaction has not been entered into within 12 months from the date of the original valuation, or at any other time there is a material movement in the marketplace that may affect value, the valuation must be updated.

When the value of the land to be acquired or divested is likely to exceed \$2 million, two valuations may be sought. The requirement for a valuation may be varied where, in the informed opinion of the Chief Executive Officer or relevant Director such an action is impractical.

An internal review of the two valuations is to be carried out by staff and reported to the Manager, Property and Business Development, with specific attention to the valuation rationale, method of valuation, calculations and sales evidence used. After such review, the valuation is to be considered in the setting of an asking price for sale, reserve price for auction or benchmark for negotiations, tender or expression of interest or acquisition.

When two valuations have been provided and differ by 10 per cent or less, averaging is the preferred method for considering the price. Differences in valuations of more than 10 per cent require an assessment of the differences and more detailed justification of the price.

5 Review and evaluation

This policy will be reviewed at least once every two years or as required in the event of legislative changes.

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Related Document Information, Standards & References

Related Legislation:	(Legislation Name)	(Relationship/Context)
Related Policies:	Local Government Act 1993 Land Acquisition (Just Terms Compensation) Act 1991 Roads Act 1993 Conveyancing Act 1919 Real Property Act 1900	(Relationship/Context)
Related Procedures, Guidelines, Forms, WHS Modules/PCD's, Risk Assessments, Work Method Statements:	Amending LMLEP to Reclassify Land - Procedure - Version 14 – D08986201 Road Closures - Form - Version 12 – D08947657 GST Determination –Sale of Council Property – Form – Version 4 – D09218505 Policy for Assessing Public Requests to Reclassify Community Land to Operational Land - Version 3 – D02828777Not Applicable	(Relationship/Context)
Standards, COP's & Other References		(Relationship/Context)

Definitions

Term / Abbreviation	Definition
Land	Includes tenements and hereditaments, corporeal and incorporeal, and every estate vested or contingent, freehold or leasehold, and whether at law or in equity.
Before and After	Valuation methodology that can be applied to partial and whole property acquisitions. The before approach notionally considers the value of the property as if unaffected by the acquisition. The after approach notionally considers the value as if the acquisition was completed, with the difference between the two assessments being the loss or gain in value attributed to the acquisition

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Consultation (update for each version created)

Key Departments, Teams, Positions, Meetings:	Property & Business Development Team, Chief Financial Officer, General Counsel, Diverse Economy Portfolio, Councillor Briefing Session
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Version History

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1	12/02/15	M Shepherd	Policy created
2	13/4/17	A O'Reilly	Policy updated
3	8/10//19	A O'Reilly	Policy updated with additions and amendments included in: Objectives, Land Acquisition Procedures, Methods of Acquisition, Land Deemed to be Surplus, Sale to Adjoining Owners, Form of Contract, Departure from this Policy and inclusion of Chief Financial Officer wording.
4	20/11/2023	Jade Curtis	Policy updated for plain English and formatting. Additional guidance around acquisition and divestment of easements.