

Appendix 6 - Organisational and sector studies

1. Government departments

(a) Ministry of Defence (MOD)

Current land holdings

Most of MOD estate was acquired post 1935, except some main training areas which were acquired earlier. They also hold Crown Land under the old Crown Revenue Rules. Some land was acquired under the Defence of the Realm Act (1916-22). In 1997 the MOD owned 235,000 hectares of land. There are currently over 240 sites on the market, all of which were considered under the Rules.

Disposal of MOD property

All land and property is held by Top Level Budget Holders (TLB's) i.e. the main services. They make the decision on whether they need to continue to hold land or property for operational purposes or not. If **not**, the Defence Estates (DE) become involved to declare the land surplus and offer it to other services in the MOD. If there are **no bids from other services** the land is formally handed over to the DE for disposal. The TLB (through the DE) obtain:

- Land quality assessment (for contamination)
- EOD (Explosives Ordinance).

The land is then passed to local land agents (LLAs) in the regional offices of the MOD. They carry out the following tasks:

- inspect the deeds and dates of acquisition to see whether the Rules apply;
- look in detail at and interpret the Rules. As the Rules have been materially altered since first introduced, some aspects are open to interpretation and there is some evidence of varying interpretations between LLAs;
- discuss the development potential of the site with local planning authority planners;
- undertake the disposal of the site either to the former owner (if the Rules are deemed to apply) or by an appropriate method on the open market;
- they follow an informal procedure (advised by Counsel) to write to former owners to advise them that they are not going to make a disposal under the Rules and give them the opportunity to make representations before the site is put on the open market. This makes the process more open but is considered to be an "administrative nightmare".

A number of issues recur for the MOD, due to the large and largely open nature of their holdings, which often have development value. There have been changing nuances on the interpretation of these issues contained in a range of Counsel's opinions obtained on these points over the last few years: -

- how to handle fragmented sales;
- back to back deals;
- what constitutes "material change in character";
- Rule 14.7(i) the criteria on how to determine whether part of a site has been materially changed and part not changed;
- Rule 14.7(ii) how to handle consortia, especially competing consortia of former owners;
- Are the Rules triggered where a property is let on a long lease?

Fragmented sale

This is when a fragmented sale to individual owners would realise substantially less than disposal of the whole site on the open market. In these cases there is a need to look at and obtain a valuation report looking at the value of the site if lotted versus the value as a whole. This arises from the dilemma of meeting differing requirements of the Government's Accounting ("Treasury") Rules to maximise returns and the Crichton Down Rules to act equitably to former owners.

Back to back deals

The St George's Barracks disposal was specifically referred to in the NAO Report on MOD disposals. This site was sold to a consortium of former owners and immediately sold on by them to developers. The site was sold at full market value. The advice from the solicitors acting on behalf of the NAO at that time was that they could not put in a claw-back clause to cover a windfall gain on a back to back deal. A claw-back clause to cover increased value resulting from improved planning was however permissible and imposed in this case.

Rule 14.7(i)

This is often linked with problems of fragmented sales and sales to consortia, for example where part has altered and part has not and the local authority is looking at the site for development as a whole. The site cannot be split down into fragmented parts, as it is worth more as a whole than the parts. If a consortium is formed this can overcome the problem of fragmentation.

Consortia

It is unclear from the wording of the Rules whether a representative of every former owner has to take part in a consortium of former owners. The MOD have had a case where a consortium was formed with only a few of the owners and the site was subsequently sold on to developers

There is no guidance on how to offer the land back to former owners when there are two or more competing consortia, both comprising individuals who could claim to be successors in title. Counsel's opinion was obtained on this point on a recent case when the two consortia would not join together. In this case both consortia were back to back with outside parties.

Property let on long lease

BAE occupy MOD sites around the country for their work on the defence contracts. The sites were surplus to requirements but were sold to BAE in the 1960s, as it was considered at that time that sales to a third party would affect their defence contracts. These disposals should have fallen under the Rules, but the Rules were not applied by Ministerial agreement. There were problems of occupation, complaints from the former owners and representations to the Prime Minister. This instance questions how longer leases or transfer of land or sites under PFI can be granted and still meet the requirements of the Rules.

Practical problems and the application of the Rules

Because of the size of many MOD sites, there are very large numbers of representatives of former owners. In one case a site of 8 hectares had potentially about 86 eligible successors. With the longer timescales this would be more problematic because of increased numbers of successors.

The decisions on whether the Rules apply are made in the local offices and the reasons are contained in the office. If there are problems on a particular case, they approach the DE for advice. The DE acts as a clearing house for the other local offices and obtains Counsel's opinion.

Local offices that deal with disposals are under pressure to put sites on the market rather than offer them to owners to ensure or demonstrate that "best price/consideration" has been obtained for the auditors. As in all other public bodies there is a pressure to try to avoid offering sites back to their former owners. This is more pronounced in the MOD where they are handling extremely large development sites, where it is difficult to estimate market value prior to disposal to a former owner. Many of the local offices would prefer the sites to be competed for to ensure that it can be demonstrated that full open market value has been obtained. There is a possibility that the approach to consideration of the Rules adopted by the regional offices is varying

Within the last year the DE has introduced a system to monitor all disposals, prior to responsibility for disposals passing to them in 2000.

(b) Highways Agency

The Highways Agency is an Agency of the Department of Environment, Transport and the Regions, specifically tasked with delivering the Roads Programme. The disposal of surplus land is managed by its five regional offices. In total it has dealt with approximately 3-4,000 disposals over the last 10 years (2,000 disposals since 1994) of which 80% - 90% have fallen within the Rules. The Highways Agency does not have a clear database of its disposals and does not maintain a separate record of Rules cases.

The regional offices and regional road construction units (their predecessors) have undergone a number of major reorganisations and there have been problems of records passing from department to department and being lost. They have also lost a lot of staff and "corporate memory". The transfer of files at the time of reorganisations appears to have been handled without consideration of the need to retain and access information for their disposal work and for the consideration of the Rules. Their current filing system and retrieving files from archives is particularly problematic. In undertaking the research there were significant problems and difficulties of accessing information.

The Agency has clear Procedures Manuals on Land Disposal which is given as guidance to all regional offices for considering land disposals. This makes specific reference to the Rules and the Treasury Guidance DAO (GEN) 11/96. The case officers dealing with disposals have indicated that they have difficulty reconciling the competing requirements of these documents and prefer to sell property on the open market to demonstrate that best price has been achieved.

Most of the land it holds was acquired under the Highways Act for road works. When land is no longer required for highways purposes (whether the scheme is abandoned or built), the Agency is required to dispose of it "as soon as possible" under the Treasury Rules (within a maximum of 3 years). The Project Manager in the scheme team (Project Services) declares properties surplus. They define the building/site lines and provide details and schedules or plans to the Lands Section and hand over responsibility. The Regional Case Officers in the Lands Section (RCOs) confirm what land is needed and what is not with the Project Managers.

The RCO's consider the origins of acquisition i.e. if the land was compulsorily acquired or under threat of compulsion, in which case the Rules are deemed to apply. They also or acquired under threat of compulsion, in which case the Rules are deemed to apply. They also consider material changes and other possible exemptions and make the decision on whether the Rules apply or not.

There are no specific procedures in place to deal with how these decisions are made, or a review system. If there is any doubt the case proceeds as if the Rules applied.

If there are any problems for interpretation of the Rules these are passed to National Headquarters (Policy Section) for legal opinion etc. There is no central record held by headquarters of cases to which the Rules have been applied, although the Policy Section maintain a file containing special cases and particular problems and issues.

Responsibilities in relation to the Rules

Regional Case Officers - acquire, manage, dispose of land, make sites available to the scheme team, make decisions on whether the Rules apply, and notify and trace former owners (last known address, last known solicitors, advertise). When the names and contact details for former owner(s) are known, the responsibility for the site disposal passes to the District Valuer, or another agent.

District Valuers (DV), Agency Valuers & WS Atkins. The DVs act as main agents and are brought in when land and buildings are declared surplus. The DV receives a report on the case from the RCO, discusses value with former owners, deals with planning potential, makes recommendations on the Rules, negotiates sales and advises on method of disposal (private treaty, auction, or sealed tender). The DV dealt with all disposals between 1954 and 1996 when WS Atkins were appointed following market testing of their services; since that time the Agency has gone to either the DV, WS Atkins or an agency valuer to obtain valuation and disposal advice.

Government's Property Lawyers (part of Treasury solicitors) dealt with the majority of land transfers and payment of monies for land until they were closed in mid 1999. There have been information difficulties relating to the transfer of title deeds and records from the GPL to the Agency. In recent years contracts have been let to private sector solicitors.

The Agency is clear its their primary duty on disposals is to carry these out in accordance with the Treasury Guidance and obtain best price for the land. A number of officers have expressed the view that the Rules are an anachronism and should be abolished. Where possible the Agency seeks to find that the surplus property is an exemption under the Rules and to dispose of it on the open market, to ensure that best price has been achieved and to demonstrate this.

We have received a number of representations during the research to draw to our attention the practice of retaining "ransom strips" adopted by the Agency when disposing of surplus land to former owners under the Rules. Officers from the Agency have confirmed that they adopt this approach where a new road has led to the long term release of development value, which they may not be able to quantify at the date of disposal.

(c) Ministry of Agriculture, Fisheries and Food (MAFF)

Our research on our case studies highlights that MAFF has very clear and well-established procedures relating to land disposals and the application of the Rules. The department has formal written guidance on the procedures to follow for disposals of surplus land which relies on guidance and the Rules themselves.

The Department has undergone relatively little reorganisation and has a centralised system and records of disposals, which is overseen by a member of staff with an in-depth knowledge of the operation of the Rules. Other staff members are furnished with the "aide memoire".

The majority of land acquisitions by compulsory purchase took place between the end of the Second World War and the mid 1950s and the land was predominantly

agricultural land required for the improvement of farms, or for the establishment or expansion of experimental farms.

As soon as a sale is contemplated research is carried out into the circumstances of acquisition and a case submitted to the Head of the Division recommending whether or not offer-back should apply. The Rules are not applied where land is needed by another department; where there is a government decision to dispose of land to local authority or other body with compulsory purchase powers; to small areas of agricultural land with no satisfactory agricultural use; and to sites where there has been a material change in the use or the character of the land since it was acquired.

In all the case studies the properties in question were offered back to the former owner, where appropriate, as soon as the land was declared surplus to the purposes for which it was acquired.

The case files were well maintained and even where the original purchase was 40 years previous, it was possible to trace the original owners and determine the background of the case. Occasionally it was impossible to determine whether the original purchase was by compulsory acquisition (or under threat of CPO). In such cases, the assumption was made that it was compulsorily acquired, unless the original owner (or successor), once traced, indicated otherwise.

The process to trace the former owners or their successors was very thorough and diligent. When the property is offered back to a former owner or successor, normally no restrictive covenants, clawback or other onerous conditions are applied, although internal regulations do not preclude their use in theory.

2. Government agencies and non-departmental public bodies

(a) Forestry Enterprise (agency of the Forestry Commission)

It is not the policy of Forestry Enterprise to use or to threaten to use their powers of compulsory purchase. However they consider the fact that they have such powers means that every land acquisition is, in effect, a compulsory purchase. In their opinion every subsequent disposal should be subject to further consideration under the offer back procedures in the Rules.

They have not been able to provide the Research Team with detailed information on the number of disposals other than to indicate that in the last 6 years there were 1,758, most of which were plantation sales not subject to the Rules. They take this view because they consider that the character of the land has been “*materially changed*” having been planted with trees. They do not maintain separate records of cases of land actually sold back under the Rules but estimate this at less than 2% over the last 6 years.

(b) English Nature (Nature Conservancy Council for England)

Since 1949 English Nature (NCC) have acquired land and built up a portfolio of national nature reserves by purchase, lease and by Nature Reserve agreements. Under the Wildlife and Countryside Act 1981, they have the power to acquire land, rather than enter into management agreements, where there is a potential threat of damage to sites.

Many of the nature reserves are managed by English Nature, although some areas have been and are continuing to be transferred to other organisations in the following circumstances: -

- Where they have acquired areas of better land than that held in the portfolio and wish to dispose of the land of lesser quality;

- Where some SSSI land has been acquired to implement the requirements of the Wildlife and Countryside Act, but it is not of sufficient quality to declare as a national nature reserve. This land has come into the public domain, but it is inappropriate for English Nature with finite resources to manage the land as national nature reserves, although they are of SSSI quality. English Nature has taken the view that it is better for this land to be managed by other organisations on English Nature's behalf.

It is normal practice for NCC to transfer the land by lease to voluntary conservation organisations or other appropriate bodies, as defined under the Wildlife and Countryside Act 1981. These bodies do not all fall into the classes of exempt bodies under Rule 14(2). Such organisations include the National Trust, RSPB, and voluntary conservation organisations. They hold and manage the land as nature reserves on behalf of NCC. Where these areas of land are not subject to a pre-existing management plan, one of the requirements of the lease is to enter into a formal management agreement.

In conclusion, although land is transferred from English Nature, it is not disposed of as being "surplus" in accordance with the Rules. They do not consider that the land is surplus to requirements as the disposals are to successor organisations with the same objectives and ability to manage the land for the purposes for which it was originally acquired. They have therefore not considered the Rules on any of the land transfers, and are concerned that any amendment to the Rules to clarify whether such land transfers should fall within the Rules may require them to offer land back to former owners. In many cases land was acquired from these parties to protect it from damage or development.

Although the powers to transfer land have existed since the Wildlife and Countryside Act 1981, the powers were invoked only following the establishment of English Nature in 1991. The number of sites held by approved bodies contained in the annual report indicate the number of disposals since 1991 and should be used for the quantitative analysis in the Crichel Down research. These indicate that 43 sites have been transferred since 1991. The Rules were considered on none of the transfers.

3. Development agencies e.g. CNT, English Partnerships and the Regional Development Agencies

One of the main regeneration agencies and a number of practitioners working in urban regeneration consider that the operation of the Rules is most problematic where the land has been bought for broad public purposes, such as regeneration.

4. Health sector (RHAs and Trusts)

The Health Sector has undergone major re-organisation within the last 10 years. Prior to 1994 the majority of the estate was vested in the Secretary of State for Health by virtue of the National Health Service Act in 1946 and subsequent acquisitions under later NHS Acts were in order to provide sites for operational hospitals that are still in use.

During the 1980s the Regional Health Authorities (RHAs) acting on behalf of the Secretary of State for Health managed the Estate. At this time they undertook a major disposal programme of surplus property, mainly comprising the former mental institutions. Former employees of a number of the RHAs, and advisers working on their behalf have advised us that the Rules were not considered as part of the major disposals programme of former mental institutions and other properties which took place throughout the 1980s. Due to the major reorganisations which took place in the early 1990s, no detailed records on disposals are available to provide confirmation of this. We have however received a letter from a professional adviser who has acted for a wide number of RHAs and Trusts over many years, who has informed us that they have never considered the Rules as relevant.

During the early 1990s the property portfolios held and managed by the RHAs on behalf of the Secretary of State for Health were divested, over a number of years, to newly formed NHS Trusts which were set up under the National Health Service and Community Care Act (1990). At the time of the transfers to the Trusts, it was not considered that the properties were surplus, and as the NHS Estates were deemed to be successor organisations, the assets were transferred without consideration of the Rules.

We have been unable to obtain precise details on the number of disposals which took place other than to the Trusts at this time or get definitive information from NHS Estates whether the Rules were considered on the transfer of the assets to the Trusts.

Our research indicates that the NHS Trusts are deemed to be bound by the Rules, by virtue of the Act under which they were established. This requires that they have regard to the NHS Estatecode, which refers, in its guidance on disposals, to the Rules. This issue is however far from clear, and a health trust has recently sought advice from leading counsel on whether the Rules are mandatory or discretionary; he confirmed the former.

We have found much confusion among the Trusts and the new health authorities on the Rules and their status (see figure 5.2 ante). In the research 10% of respondents in both these sectors had not heard of the Rules and there is obviously confusion as to whether they are mandatory or discretionary. Very few Trusts have operated the Rules on their subsequent disposals.

5. Statutory utilities

(a) Statutory Water and Electricity Companies

It is unclear, from the Rules themselves, whether the Rules apply to any or all statutory utility companies and under what circumstances they would apply to disposals of their land. These companies were set up under Acts of Parliament and land transferred to them from the former statutory undertakers. At this time responsibility for the estate and disposals passed to them from the former statutory undertakers. At the same time many staff transferred so there was continuity of records and procedures.

We have had informal discussions with former employees of the estates teams of the former statutory undertakers who have transferred to the statutory utility companies. They have advised us that, in practice, the Rules have never been a formal part of the disposals programme. We have not been able to ascertain how the Rules were considered for non-operational and surplus land at the time of transfer of the property portfolios from the statutory undertakers to the statutory utility companies.

The Water Acts of 1991, under which the statutory water companies were set up and the land transferred to them, define their responsibilities. These Acts (referred to in paragraph 4 of the Rules) do not make specific reference to the Rules (as they are non-statutory guidance) or the need to offer surplus land back to former owners if it was acquired by or under threat of compulsion.

The guidance note published in April 1996 by the Office of Water Services (Ofwat) entitled "Disposal of Land by Appointed Companies" sets out how the Rules are to be applied by these organisations. Under section 156 of the Water Industry Act 1991, land held on 1st September 1989 for water or sewerage purposes may not be disposed of without the express consent of the Secretary of State for the Environment (or for Wales) or in accordance with a general authorisation given by him. Disposals are considered to include the creation of an interest or right in or over land, as well as the surrender or termination of any such interest or right. Two such general authorisations exist; the first issued on 1st September 1989 deals with compulsorily acquired land and land with statutory environmental designations. This requires companies to follow a modified version of the Crichel Down Rules, when disposing of land which was acquired by the company or any of its predecessors, either compulsorily or at a time when the company

or its predecessor was authorised to acquire it compulsorily. The authorisation modifies, and lessens the scope of, the Rules by requiring only land which has been the subject of an approved Compulsory Purchase Order, and not just under the threat of CPO provisions, to be offered back.

This general authorisation provides that former owners should be given an opportunity to repurchase the land, where it is proposed to dispose of an interest in land for longer than a term of 21 years, or of a right in or over land which is capable of subsisting for more than 21 years, provided that it has not undergone a material change of character since its acquisition. The disposal guidance note also refers to the valuation methods to be employed and reproduces the 1992 version of the Rules in full as an appendix.

There are no corresponding references in the Rules to other statutory utility companies, such as electricity companies which were privatised under the Electricity Act of 1989. We have been unable to obtain any definitive legal opinions or information on whether the Rules are mandatory, discretionary or of no relevance to other statutory utility companies.

(b) British Rail

On 1 April 1994, British Rail was split into Railtrack which manages the rail network and Rail Property Ltd (RPL), which handles disposals. There are no details available on how any disposals were handled prior to 1994. At that time a subsidiary company was set up as a result of a transfer scheme made under the Railways Act 1993 and assets were vested in this company. Again there are no details available of the disposal of the assets of that company.

We have obtained information from RPL that they dealt with 2,357 disposals since 1994, none of which have been considered under the Criche Down Rules, however they have suggested that the number where principles consistent with the Rules have been applied, *“is not unadjacent to the total number of disposals”*.

Their approach to property disposal is guided by the Government's policy regarding land disposals by the Board, which was set out in 1985 in a letter from the then Minister of Transport to the Board's Chairman; relevant extracts from this letter are set out at the end of this section. At about the same time the Monopolies Commission had issued a report and recommendations on the activities of the Property Board. These two items together comprise the framework within which RPL have worked, and continue to work, subject to the general embargo on sales arising from last years Transport White Paper.

RPL do not have precise information available and did not consider the issues at the time of the disposals but have advised us that with very few exceptions, all land disposed of by the Board would have come within either paragraphs (i) or (iii) of paragraph 13 of the Rules i.e. they are exemptions within the Rules because of the date of acquisition. They state that even where there were land acquisitions after 1935 (or 1974 in case of non-agricultural land), the vast majority of these were not for new independent infrastructure but rather to allow for works to land already owned, such as widening of the track or reconstruction of embankments following a landslide. Although the vast majority of disposals would have been outside the Rules, due to the timing of the original acquisition or due to there being a material change in character of the land by virtue of it having been incorporated as part of the railway infrastructure or used for railway works, RPL consider that a significant number of disposals would have come within certain of the exemptions in Rule 14. Sub-paragraphs (1), (2), (7) and (8) are suggested as being the ones most relevant to their land holdings.

RPL consider that their disposal approach applies principles *“consistent with the Criche Down Rules”* because they tend to offer back land to adjoining owners. Where the sale is one of a closed branch line, in many cases, the adjoining owner is the only feasible

purchaser for the land, although the adjoining owner due to the passage of time would rarely have been the vendor to the acquiring railway company. However they are not able to analyse exactly how many sales come within this category, as there is nothing on the face of the deeds to indicate whether or not the buyer also owned the adjoining land.

Although a few sites were either in agricultural or residential use at point of sale, the vast majority would have been land which had shortly prior to sale been declared non-operational. This is either because the railway uses ceased and recoverable infrastructure had been removed or because land which had been held for possible future operational use had been re-examined and identified as not being required. Sites in the latter category were often let in the interim, together with redundant railway buildings if any existed on site. The majority of disposals are of relatively small areas of land where acquisition may have been from only one or two vendors to the railway company, although there are many sites where twenty or more acquisition deeds relate to an area of land disposed of as a single site.

“Extracts from letter dated 3 September 1985 from the Minister of Transport to the Chairman of British Rail Property Board”

“I have noted from the Property Board’s strategy paper that different objectives are envisaged for two parts of the Property Board business: continued disposal is the objective for the BRIL portfolio, but the objective for other land released from operational use is reported as being “to develop, manage or dispose of sites and properties..... in order to maximise the cash flow potential to full corporate advantage.

As you know, it has been the Government’s general policy towards all public authorities that all land surplus to requirements should be offered for sale as soon as practicable, and you will understand that I would like to see the Board continue with its very successful programme of disposals as vigorously as possible. As I said to you in my letter of 24 October 1983, “the Board should continue to pursue a vigorous policy of property development and disposal”.

I thought therefore that, in the light of the draft plan and the recent MMC report, I ought to restate for you the policies which the Government looks for in the handling of BR land.

- (a) It will be common ground that the Board’s main business is running the railway and that it should manage its operational property in accordance with best commercial practice. We would wish the Board to make a commercial plan for identifying and divesting itself of all its underused or surplus property, which should be considered in Rail Plan and IFR discussions.*
- (b) The plan for underused or surplus property should be based on the assumption that early outright disposal is the aim. That is the basis on which we intend to take decisions on provision of finance. This does not take place where a joint venture offers particular and early advantages sufficient to outweigh the preference for outright disposal.*
- (c) In a plan to make disposals as rapidly as possible consistent with the need to avoid distress sales there will still be some issues on timing. The Monopolies Commission recommend that judgements on timing and relative priorities should be based on DCF appraisal using a rate of discount not less than the RRR. The Government agrees with this, and I must ask the Board to adopt it. Disposals should not be deferred unless there are specific and imminent events which are demonstrably not reflected in the current market price”.*

6. Local authorities

The application of the Rules to local authority disposals is purely at the discretion of the individual authority. Our research indicates that many authorities have clearly documented disposal procedures, which have been drawn up to meet the requirements of Sections 123 and 127 of the Local Government Act 1972. This requires that special consent be sought for disposals made at less than the best consideration that can be reasonably obtained.

They are also to have regard to the Guidance on Good Practice for disposals which has been published by the Commission for Local Government Administration (Local Government Ombudsman). Detail of this and the local authority guidance procedures are contained in **Appendix 5**.

Our research indicates that local authorities consider the Rules only when directly approached by a former owner or successor who has made a claim; some authorities have developed procedures for considering the pre-emptive right of former owners for particular classes of property i.e. single residential units.