

Ku-ring-gai Council

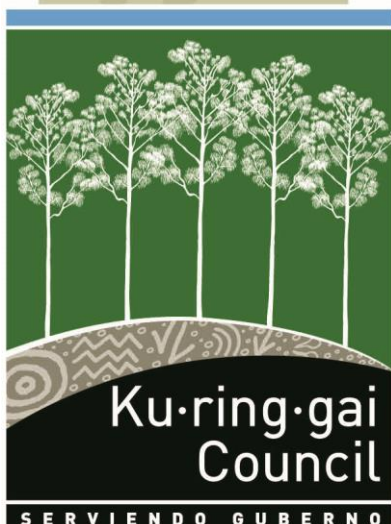
## **Draft Policy**

# **Acquisition and Divestment of Land Policy 2019**

Version Number 3

Adopted: 20 August 2019

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# Acquisition and Divestment of Land Policy 2019

## Table of Contents

<b>Controlled Document Information .....</b>	<b>3</b>
Authorisation Details .....	3
Related Document Information, Standards & References .....	3
Version History .....	4
<b>Policy .....</b>	<b>5</b>
1. Introduction.....	5
2. Purpose .....	5
3. Objectives.....	6
4. Legislative Requirements.....	6
5. Fundamental Principles .....	6
6. Land Acquisition Procedure .....	7
7. Methods of Acquisition.....	8
8. Compensation .....	9
9. Land Divestment Procedures.....	10
10. Methods of Divestment .....	12
11. Confidentiality .....	13
12. Departure from this Policy.....	14
13. Definitions.....	14

## Controlled Document Information

### Authorisation Details

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### Related Document Information, Standards & References

<b>Related Legislation:</b>	<p>Council's property activities will be managed within the legislative parameters of the:</p> <ul style="list-style-type: none"> <li>• Local Government Act, 1993;</li> <li>• Valuation of Land Act, 1916;</li> <li>• Conveyancing Act, 1919;</li> <li>• Environmental Planning and Assessment Act, 1979;</li> <li>• Land Acquisition (Just Terms Compensation) Act, 1991;</li> <li>• Roads Act, 1993;</li> <li>• Crown Land Management Act 2016</li> <li>• Environment Protection and Biodiversity Conservation Act, 1999;</li> <li>• Real Property Act, 1919;</li> <li>• Regulations under each of the above Acts;</li> <li>• any other legislation applicable to the Policy.</li> </ul>
<b>Related Documents - Procedures, Guidelines, Forms, WHS Modules/PCD's, Risk Assessments, Work Method Statements, etc</b>	<p>Council Community Strategic Plan – Our Ku-ring-gai 2038</p> <p>Easement Management Policy – Adopted August 2019</p> <p>Ku-ring-gai Contributions Plan 2010</p> <p>Ku-ring-gai s94A Contributions Plan 2015</p> <p>Ku-ring-gai Local Environmental Plan (Local Centres) 2012</p> <p>Ku-ring-gai Local Environmental Plan 2015</p> <p>Ku-ring-gai Local Centres Development Control Plan</p> <p>Ku-ring-gai Development Control Plan</p>
<b>Other References</b>	Independent Commission Against Corruption [ICAC], Direct Negotiations, May 2006

## Version History

Version Number	Version Start Date	Version End Date	Author	Details and Comments
1	08/09/2009	10/06/2014	Deborah Silva	First version
2	10/06/2014	20/08/2019	Deborah Silva	Second version
3	20/08/2019		Claire Khalil	Third version changes include: <ul style="list-style-type: none"><li>• Updating the property value threshold at which two valuations must be obtained for an acquisition or divestment from 2 million to 4 million</li><li>• Minor formatting changes and updates to current legislation</li></ul>

## Policy

### 1. Introduction

The acquisition and divestment of Land by Council requires a formal process that is underpinned by probity, due diligence, analysis of risk and other key issues. Land acquisitions and/or divestments undertaken by Council are crucial to the strategic provision of open space, operational and community benefits and achieving planning objectives associated with the development, growth and revitalisation of the local centres.

This Policy applies to the acquisition and divestment of all Land as defined in this Policy. Section 8A of the Local Government Act, 1993, includes the following principles that apply to Council's exercise of functions related to the acquisition and divestment of land:

- Councils should carry out functions in a way that provides the best possible value for residents and ratepayers;
- Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way;
- Councils should act fairly, ethically and without bias in the interests of the local community;
- Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

### 2. Purpose

The purposes of this Policy are:

- 2.1 To set out the principles, framework, responsibilities and processes for Council and officers to account for, and manage the acquisition and divestment of Council Land assets;
- 2.2 To identify, manage and mitigate the risks associated with the acquisition and divestment of Land;
- 2.3 To ensure impartiality, transparency, accountability and the delivery of best value in the divestment of Land;
- 2.4 To describe the manner in which Ku-ring-gai Council will undertake the acquisition and divestment of Land assets and to provide Council with:
  - a) a documented reference to guide its decision making process;
  - b) a reference that will continue across successive Councils;
  - c) an endorsed framework to enable and pursue Land acquisition and divestment opportunities of merit and pro-actively present such opportunities to Council; and
  - d) established delegations necessary to allow implementation functions to be addressed to meet market drivers.
- 2.5 To define the criteria which must be considered prior to the acquisition and/or divestment of Council owned Land and the process and procedures, including public consultation and notification, required to be undertaken prior to the divestment of any Council owned Land.

### 3. Objectives

The objectives of this Policy are to provide Council with a framework for decision-making which adopts the following principles:

- a) probity;
- b) statutory compliance;
- c) commercial maximisation, flexibility and confidentiality; risk mitigation
- d) transparency of process; and
- e) achievement of specific strategic outcomes of Council and the community.

### 4. Legislative Requirements

Legislation and other instruments relevant to the acquisition and divestment of land under this Policy are listed under Related Legislation and Documents at the beginning of the policy. Other legislation or instruments may also be relevant depending on the particular circumstances.

- 4.1 The Local Government Act, 1993 vests authority in Council to sell or exchange Real Property. In respect of this Policy, “exchange” includes property acquisition and other related activities including Land swaps.
- 4.2 In accordance with Section 377 of the Act any decision to dispose of Land must be made by resolution of Council as the power to sell, exchange or surrender Land cannot be delegated.
- 4.3 Section 45 of the Act prevents Council from selling, exchanging or otherwise disposing of community Land other than to become or be added to a Crown Reserve or National Park.
- 4.4 Section 55 of the Act requires tenders to be called in certain circumstances. However, it is not necessary to call tenders for the sale of Land.
- 4.5 In accordance with Council's Purchasing Policy, Land acquisition activities are excluded from the provisions of the Purchasing Policy.

### 5. Fundamental Principles

All decisions and actions in relation to the acquisition and/or divestment of Land will have due regard to the following fundamental principles:

- **Best Value for Money** – Achieving “best value” may include financial, social and environmental benefits.
- **Transparency** – processes must be open to scrutiny and provide full information and record the reasons behind decisions.
- **Accountability** – demonstrate the best use of public resources and the highest level of performance through appropriate record keeping and audit trails.
- **Impartiality** – address perceived or actual conflicts of interests.

## 6. Land Acquisition Procedure

### 6.1 Fundamental Principles

Council will acquire Land for the purpose of carrying out its functions under the Act. Any Land to be acquired by Council is subject to a formal resolution of Council.

### 6.2 Independent Valuation Benchmark and Special Value.

Any Land acquisition is to be benchmarked to an independent valuation of Land.

In some cases there will be justified basis for Council acquiring property at a price above the valuation benchmark in order to guarantee the successful securing of the property to achieve defined goals and objectives of Council or to acquire the property with a view to adding value, or reducing risk, to a larger scheme or development, whether future or current.

Any special value should be determined and quantified within the decision of Council and referenced to the achievement of specific goals and objectives of Council.

### 6.3 Acquisition Process

While the General Manager and/or their delegate may make preliminary enquiries regarding a possible purchase, no negotiations will commence without there first being a resolution of Council authorising the negotiations. The General Manager shall:

- a) be responsible for the conduct of all negotiations;
- b) have regard to an independent valuation obtained from a registered valuer;
- c) seek such other professional advice as is considered necessary in the circumstances;
- d) have regard to the Independent Commission Against Corruption publication 'Direct Negotiations' so far as is appropriate in the circumstances; and
- e) report the outcome of all negotiations to the Council for determination.

### 6.4 Classification of Land

Prior to finalisation of an acquisition Council shall determine the classification of the Land as either operational or community.

### 6.5 Land Acquisition Process

Council's process of Land acquisition must include the following steps to ensure transparency, fairness and equity:

- 6.5.1 Identification of the Land acquisition opportunity by Council and/or the Responsible Officer;

- 6.5.2 In principle decision by the General Manager to commence the pre-acquisition process;
- 6.5.3 Preparation of a comprehensive assessment of the Land acquisition including the following:
  - a) required due diligence
  - b) independent valuation, maximum price [purchase, lease or other];
  - c) if applicable an assessment against the principles and objectives of Council's Open Space Acquisition Strategy;
  - d) identification of funding source and assessment against Council's Long Term Financial Model; and
  - e) a statement of goals and objectives for the proposed Land to be acquired including a statement of any "Special Value" deemed appropriate by Council.
- 6.5.4 Formal consideration by Council of the matter and, if required in accordance with Section 10A of the Act, the matter to be dealt with in a closed meeting;
- 6.5.5 A formal report to Council including the Land acquisition assessment and documented reasons for Council's acquisition of the Land, and if supported, delegation to the General Manager to negotiate an outcome, subject to the financial and risk parameters as determined by Council;
- 6.5.6 Negotiation, and if successful, implementation of all matters necessary for the preparation, signing and sealing of contract documentation required; and
- 6.5.7 Once completed the General Manager to advise Council of the outcome, whether successful or otherwise.

## 7. Methods of Acquisition

Wherever possible Council's preferred method of acquisition is to acquire Land through mutual agreement with the owner of the Land.

- 7.1 The key principles in the acquisition of Land are:
  - 7.1.1 Opportunistically by responding when the desired Land is offered to the market; and
  - 7.1.2 Pro-actively by initiating negotiations for the desired Land.
- 7.2 Council's preferred position is to acquire Land through negotiation. However, Council has an obligation to provide services to the community and if required Council will consider utilising its powers under the Local Government Act, 1993 in respect of "compulsory acquisition".



- 7.3 Council is the nominated acquisition authority for land reserved for public purposes as RE1 and SP2 within its draft Ku-ring-gai Local Environmental Plan (Local Centres) 2012 and these acquisitions will be dealt with in accordance with Land Acquisition (Just Terms Compensation) Act, 1991 for the acquisition of Land and the payment of compensation if no agreement is reached by negotiation in accordance with section 7.2 above.

## 8. Compensation

- 8.1 Compensation will apply to affected property owners under the following provisions:
- 8.1.1 Owner initiated acquisitions
  - 8.1.2 Programmed acquisitions
  - 8.1.3 Compulsory acquisitions
- 8.2 In determining the amount of 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 given 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 (i.e. that is compensation for non-financial disadvantage arising the need to relocate as a result of the acquisition); and
  - f) any increase or decrease in the value of any other land of the person at the date 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.
- 8.3 Property owners claiming hardship in accordance with Section 24 of the Land Acquisition (Just Terms Compensation) Act, 1991 provisions should note that:
- 8.3.1 Council is not required to acquire land unless it is of the opinion that the owner will suffer hardship (within the meaning of the Land Acquisition (Just Terms Compensation) Act, 1991. An owner of land must demonstrate they suffer hardship if:
- a) The owner is unable to sell the land, or is unable to sell the land at its market value,
  - b) Because of the designation of the land for acquisition for a public purpose, and
  - c) It has become necessary for the owner to sell all or any part of the land without delay:
    - i. For pressing personal, domestic or social reasons, or
    - ii. In order to avoid the loss of (or a substantial reduction in) the owner's income.

- 8.3.2 If the owner of the land is a corporation the corporation does not suffer hardship unless it has become necessary for the corporation to sell all or any part of the land without delay for pressing personal, domestic or social reasons of an individual who holds at least 20 per cent of the shares in the corporation, or in order to avoid the loss of (or a substantial reduction in) the income of such an individual.

## 9. Land Divestment Procedures

### 9.1 Fundamental Principles

All decisions and actions in relation to the divestment of Land will have due regard to the following fundamental principles:

- **Best Value for Money** – Achieving “best value” may include financial, social and environmental benefits.
- **Transparency** – processes must be open to scrutiny and provide full information and record the reasons behind decisions.
- **Accountability** – demonstrate the best use of public resources and the highest level of performance through appropriate record keeping and audit trails.
- **Impartiality** – address perceived or actual conflicts of interests, ensuring fairness and equity.

### 9.2 Land Deemed to be Surplus

- 9.2.1 Land may not be sold by Council unless it is classified as “operational land” under Section 25 of the Local Government Act, 1993. “Land” includes all real property whether vacant or improved.
- 9.2.2 In order to establish whether or not Land is deemed to be surplus, a process of consultation is required to be completed across relevant divisions of Council prior to reclassification in accordance with the Local Government Act, 1993.

### 9.3 Delegated Authority

- 9.3.1 Section 377 (1) (h) of the Local Government Act 1993 requires a specific resolution of Council to dispose of Land. The decision cannot be delegated and requires the following:
- a) The report to Council, seeking a resolution to dispose of land, is to include reference to the manner of divestment (often contained within a confidential report) in regards to the terms of the sale and the agreed price, or range for negotiations. The sale cannot proceed outside of such parameters (without a further resolution).
  - b) The resolution should also provide for the General Manager to be provided with delegated authority to negotiate any outstanding, usually minor conditions, and to be authorised to execute any documents in relation to the matter deemed appropriate by Council’s legal advisors.
- 9.3.2 A copy of the report and resolution is to be provided to Council’s legal advisors upon instruction, as authority to act and to ensure compliance with the resolution.

- 9.3.3 No formal actions may be commenced on the divestment of Land until a report has been considered by Council and an appropriate resolution adopted.
- 9.3.4 Informal pre-sale discussions/negotiations must always be qualified “subject to resolution of Council” if there is no current resolution of Council to dispose of the Land.

#### 9.4 Valuation Processes

- 9.4.1 At least one formal market valuation undertaken by a valuer registered to value such property is required to be commissioned prior to all property divestments.
- 9.4.2 Two valuations may be required when the value of the property is likely to exceed \$4,000,000.00 and/or the process of divestment is not competitive (as defined below).
- 9.4.3 An internal review of the valuation(s) is to be carried out and reported, 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.
- 9.4.4 When two valuations have been provided, averaging is the preferred method for considering the price, when any difference in the valuation is 10% or less. Differences in valuations of more than 10% require an assessment of the reasons why they are different, and more detailed justification of the price.
- 9.4.5 An update valuation, or valuation advice is required after 12 months of the date of the original valuation if the Land is not sold, or at any time there is considered to be a material movement in the value.
- 9.4.6 The valuation instructions must clearly state the following:
  - a) The purpose of the valuation;
  - b) The basis of valuation being “market value highest and best use”, unless an alternative basis is considered more appropriate in the circumstances;
  - c) That the valuation is to be marked confidential; and
  - d) The valuation includes market commentary, details of sales evidence and adjustments, valuation rationale and methodology, a valuation range (for negotiations) and comments on marketability, most appropriate method of divestment and opportunities to add value.
- 9.4.7 The valuer must make a statement that there is no actual or perceived conflict of interest in undertaking the valuation.

## 10. Methods of Divestment

An open competitive process of divestment is required choosing one of the following methods:

- **Expression of interest** – usually used for unusual properties capable of a variety of development, difficult to determine a market value.
- **Tender** – least common and used predominantly in high value, limited market situations.
- **Auction** – the most open and public method, favoured by government, but reliant on high levels of competition. Often achieves a quick sale. Can fail in poor market.
- **Private Treaty** – most common, where an asking price is set and negotiated with individuals, usually through a real estate agent (who can be an independent third party to the negotiation process) and can arise after an unsuccessful Auction.

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

### 10.1 Risk mitigation measures

Risk mitigation measures for direct negotiations may include:

- a) obtaining two valuations where the Land may be valued at more than \$4,000,000.00;
- b) pre-establishing a range for negotiation, having regard to the two valuations;
- c) managing conflicts of interest with declarations of no personal or financial associations;
- d) establishing a Negotiation Protocol, describing the manner in which meetings, negotiations, decisions and progress reporting is to be managed and documented; and
- e) limitation on marketing budget and exclusive agency periods.

### 10.2 Contract for the Sale of Land

Contracts for the sale of Land will usually contain standard conditions of sale. Any unusual or special conditions of sale require the delegated approval of Council or the General Manager as set out in 9.3 above.

Council's solicitor is responsible to ensure Contracts for the sale of Land satisfy statutory disclosure and warranty obligations (Conveyancing (Sale of Land) Regulation 2017).

### 10.3 Divestment below Market Value

In rare circumstances Land may be disposed of to achieve strategic outcomes. In such situations, "best value" may comprise financial, environmental or social elements, with the price falling below the "market value" range.

The report seeking resolution of Council should clearly state the reasons for such sale and quantify the amount below market value attributable to each element. The obligation to obtain a market valuation exists in accordance with the above, in order to provide a measure of the non-financial elements of the sale.

#### 10.4 Sale to Adjoining Owners

- 10.4.1 In circumstances where Land is not able to be sold in isolation on the open market (such as small parcels, undersized lots, former road widening, closed laneways, boundary adjustments etc) and the only potential purchasers are adjoining owners; the Land must be offered in equal proportions to each adjoining owner on identical sale terms and conditions.
- 10.4.2 Where an adjoining owner does not wish to purchase their proportion of the Land, the rejected Land will be equally offered to the remaining adjoining owner.
- 10.4.3 The recommended method of determining the sale price is the “before and after” method as related to the purchaser’s Land. For small portions of Land, the “piecemeal” (\$ rate per square metre) method may be more appropriate.
- 10.4.4 An essential condition of sale is that the purchaser is required to consolidate the subject Land with their existing holding at no cost to Council.
- 10.4.5 The costs associated with the sale process will be borne by the prospective purchaser.

#### 10.5 Sale of Roads – Roads Act, 1993

- 10.5.1 No road can be sold until it is formally closed in accordance with the provisions of the Roads Act, 1993.
- 10.5.2 For purchaser initiated closures and sales, the costs associated with the road closure will be borne up front by the prospective purchaser.
- 10.5.3 When Council initiates the road closure (in order to realise the value of surplus Land), the costs will be borne by Council as development costs.
- 10.5.4 The agreed purchase price and estimated costs will be reported to Council seeking resolution agreeing to make application to close the road and dispose of the Land upon closure in accordance with the terms of sale.
- 10.5.5 In accordance with Section 43 of the Roads Act, 1993, funds from the sale of roads are required to be set aside for acquiring Land for public roads or for carrying out work on public roads.

### 11. Confidentiality

In the majority of divestments of Land, the information contained in reports to Council to sell Land may confer an advantage upon a person with whom Council is, or proposes, to be conducting business. On balance, it would be contrary to the public interest for Council to deal with such matter in an open session because release of the information could prejudice Council’s ability to obtain the maximum return on the property.

Therefore, it is acknowledged that reports to Council on the divestment of Land will be generally deemed confidential under Section 10A(2)(c) of the Local Government Act, 1993. This confidentiality may be lifted by Council resolution upon settlement, if considered to be in the public interest.

## 12. Departure from this Policy

Any provision of this policy may be varied to meet the needs of a particular matter, by resolution of Council. The reasons for change will be clearly articulated within the report submitted for consideration by Council in adopting such resolution and will only apply to such matter.

## 13. Definitions

Terms and abbreviations used in this Policy have the meanings set out in the Definitions section below.

Term / Abbreviation	Definition
Acquisition Authority	means the responsible agency to acquire affected properties identified in the Ku-ring-gai Local Environmental Plan (Local Centres) 2012, Ku-ring-gai Local Environmental Plan 2015 or the Ku-ring-gai Planning Scheme Ordinance and as amended from time to time.
Act	The Local Government Act 1993 as amended.
Contract	means any form of contract which legally binds the Council [or potentially binds Council] and includes formal contracts and other forms of contractual arrangements including heads of agreement, in principle agreement, options to purchase etc.
Land	is as defined in Section 21 of the Interpretation Act 1987 and as a more specific reference for the purpose of this Policy, Land is defined as; Land as a physical entity including: <ul style="list-style-type: none"><li>- any building or structure on or improvement to Land; or</li><li>- any stratum of land whether below or above ground; or</li><li>- a strata lot pursuant to relevant strata subdivision legislation.</li></ul>
Open Space Acquisition Strategy	means the strategy adopted by Council in October 2007
Owner Initiated Acquisition	means the principle considerations defined in Section 23 of the Land Acquisition (Just Terms Compensation) Act 1991 to acquire affected properties.
Programmed Acquisition	means when the acquiring authority requires the affected property and initiates the acquisition process.
Compulsory Acquisition	means when the acquiring authority requires the affected property and initiates the acquisition process in accordance with the Land Acquisition (Just Terms Compensation) Act 1991.
Regulation	means the Local Government (General) Regulation 2005 and any replacement Regulation.