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MUNICIPAL LAND DISPOSAL - INCENTIVE LEASING

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In this article, and the ones to follow in subsequent issues of THE MUNICIPAL ADVISER, we focus on land disposal - primarily sales and leases of municipal land. In our first article we provide an overview of the policy issues involved. Does it really matter how land is sold or leased? Are there reasons for doing it a particular way? Later we will focus on the ways local governments can accomplish their objectives in leasing or selling public property while minimizing the risks of unfairness inherent in some methods although it might seem strange, questions like "how can we promote the local economy?" and "how can we promote local hire?" are commonly raised when a local government seeks to lease (or sell) some of its real property. These are being asked in addition to the standard questions like 'shouldn't we get fair market value?' and "just what is fair market value anyway?" and we want to avoid competing with private enterprise?-

THE OBJECTIVE

The essential first step in a local government's consideration of the sale or lease of public land is to answer the question: "Just what are we trying to accomplish with this sale or lease?" Most problems in sale or leasing stem from the fact that the local governing body never had a clear answer to this question in the first place.

Answering this question is absolutely essential. If the primary concern of the local community is to promote those industries that provide local employment, then the whole approach to the issue is different than one if the objective is to maximize revenues. If local hire is the goal, a lease that requires a certain level of local employment as a condition to the lease might make more sense than one that simply seeks the maximum price for the parcel. Writing an agreement that calls for local employment can't probably be done in a public auction setting, whereas a public bid might be the best possible way to maximize price.

Without a clear understanding of the objectives, a sale or lease program is doomed to fail.

Of course, in most situations there isn't just one objective.

With mixed motives (maximizing revenue, avoiding competition with "private promotion of local hire, to name just a few) it becomes very difficult to structure the following: 1) the property will be put on the market (public auction, request for proposals, private negotiation, etc.), 2) the measure to be used in deciding which private party will get the deal (total rent, commitment to investment, commitment to local hire, etc.), 3) how the deal will be structured (sale, lease, lease with options, etc.), and 4) who will negotiate the deal (the city manager, the council as a whole, a subcommittee, etc.).

There are many ways to dispose of property and the following outline should help identify which methods best serve different policy objectives.

DISPOSAL MECHANISMS

Public Auction: By far the simplest, and some can argue the fairest mechanism for land disposal is to put the land out to bid. For example, if a city owns a residential subdivision, a public auction bid sale of residential lots may well be the fairest mechanism for disposal. Some cities have followed this approach. This is also the approach taken by the State of Alaska in some of its remote parcel disposal programs where either a "first come-first served" approach (remote parcel staking) or a lottery approach has been used (fixed price but random selection of purchasers). All of these systems can work in the local community, although they seem to make the most sense when the government is disposing of a number of parcels that are generally equivalent in use and the use is a general one. A classic example would be residential lots in a subdivision.

The issue is much more difficult when the city is dealing with unique or one-of-a-kind land parcels or facilities. It may make eminently good sense to put 200 lots out to public bid for residential construction but it may make much less sense to put a unique 20 acre industrial development site out to bid.

Before the comprehensive changes to Title 29 in 1986 there was a substantial difference between how home rule municipalities and first and second class governments could



dispose of land. Generally, first and second class governments couldn't dispose of land except by public auction and with ratification of the sale or lease the voters. This presented problems in that it is difficult to lease unique land or buildings by auction. For example, one developer may have a project that simply will not work without some changes in land use classification, or utility development, etc. Without the ability to negotiate those items from the local government a "fill in the blank" with the lease rate or purchase price may well preclude prospective tenants or buyers from even getting interested. With the changes to Title 29, first class and second class governments can develop their own disposal procedures IF THEY ADOPT CODE PROVISIONS TO THAT EFFECT. If a government has not enacted disposal provisions allowing for flexibility, then the "old" Title 29 provisions probably still apply and the local community simply doesn't have an option.

DISPOSAL BY REQUESTS FOR PROPOSALS

Under this approach, the local governments seek out those who might be interested in the land in an attempt to entice those people into making offers. This system is widely used in Alaska and has some distinct advantages in that it allows the proposer to tailor the deal to fit his individual needs. For example, one proposer might absolutely require the extension of an increased sewer main to the property. Another might need access to some other public property (for example, a dock) under certain conditions (preferential berthing while another might be more interested in some other feature of the property.

By allowing the prospective purchasers or tenants to develop their own proposal the local government can probably expand the market of people interested as those who might have been precluded because the "fill in the blank" approach taken in the auction System failed to meet a critical need.

Flexibility is the key to this approach and, at first look, it seems the best possible to go. Unfortunately, this system poses some real problems for the local government. A principal difficulty is trying to compare proposals that everyone recognized at the outset would be different (if they were all going to be identical - except for price - the auction method would have been the way to go). How do you fairly compare apples

(rent) with oranges (commitments to invest)?

How does a city fairly chose between two proposers on the basis of financial ability, reputation, etc., and how do you prevent favoritism from creeping into the process? These are the difficult issues. A number of issues need to be addressed BEFORE the request for proposals is prepared. A few key issues are:

1. Deadlines for submission and confidentiality.

It hardly seems fair to let proposers learn from the competition before they have to submit their proposal. Extensions of time for proposals should probably NOT be granted except for EXTRAORDINARY circumstances (the airplane carrying the proposal crashed as opposed to a non-unusual delay due to weather). Proposals should be submitted in sealed packages and NOT opened until the deadline for receipt has passed. Someone in the city (most probably the city clerk) should keep careful records of when the proposals were received and assure that they are not made public until after the time for submission has passed.

2. Evaluation criteria.

If the city is trying to accomplish some goal other than maximizing cash flow, (encouraging the development of a beneficial new industry) then those goals should be - spelled out in the request for proposals. The beneficial new industry was one of the very few exceptions under the "old" Title 29 that allowed disposal of property without auction or at fair market value.

The State of Alaska has developed fairly complicated and sometimes confusing systems for "grading" proposals. The price of the rent or purchase might be considered 40 % of the evaluation criteria. Our experience, however, has been that when the criteria are complicated and fixed it becomes very difficult to apply them in a rational way. Any attempt to take a subjective question (which proposal is better) and decide it based on objective criteria (the price is worth 40% of a total of 100 points) is really difficult to do. Using a formula to decide a subjective issue can lead to problems. Unless the formula is perfect, it leads to imperfect results. Too many times the evaluators try to fit their judgment as to which proposal they think is the best into the various criteria. Any such approach can lead to serious problems, as the results can be subject to attack ("Why did you rank Company A at a 30 and Company

B at a 28?").

It is probably better to recognize that the process isn't perfect and there may be no magical formula that will work. It is probably better for the city to spend its time and effort in ensuring that the people making the decision are fair and that the approach was fair.

3. Who decides. The biggest problem in a proposal process is the issue of who decides. The local governing body is responsible. Sometimes the responsibility for the decision and the people who make it are different. It is important to realize that this can be a disaster. If a Council says "we just followed the recommendation of our city manager" it should realize that the voters don't vote for the city manager, but they do vote for the council, so the council will be responsible even if it didn't participate in the decision making process; There is a lesson to be learned here. City councils should not blindly follow recommendations and city managers who want to keep their jobs shouldn't allow themselves to be put into the position of making that sort of decision.

Yet involvement of the city council in the entire process may not be practical.

Often a city council simply doesn't have time to hear the proposals for all parties, so a screening committee can be useful. Often the city manager or administration can act to screen proposals and make recommendations. Sometimes the proposals are so difficult to understand that a professional engineer or financial expert is required. For example, how can a city council member know whether the financing mechanism called for in a proposal is realistic? On those sorts of issues, the experts should be consulted. Similarly, the city attorney may be useful in reviewing the legal risks associated with the various proposals. We would not recommend that these experts (including the attorney) be relied upon to make the decision. Rather their function is to point out the risks involved and answer questions.

Another useful technique, especially where the project involves some sort of unusual proposals, is to have an interview process where the top proposers submit to interviews by the council (or a committee).

4. The procedure. Once the proposals are in there are bound to be problems. Sometimes a proposal is confusing. Does the administration have the right (or the duty) to contact the proposer and get clarifications? At what point do clarifications become

negotiations? And if negotiations are to be conducted, who does them and what subjects can be covered?

These are difficult issues that need to be resolved, again, BEFORE the proposals are in. There are several basic safeguards that ought to be followed:

a) Equal access: If a proposer has a question — an issue not covered by the request for proposal — then the city ought to probably give the answer to all those who may have expressed an interest in submitting a proposal.

b) Bid shopping: No matter how good the request for proposal and the quality of a proposal itself, it is probably that the "best" proposers will have questions and the city will have concerns. How are these handled? A couple of problems arise. First of all, a city should be very careful not to be accused of "bid shopping." In a bid shopping environment the government seeks to change a proposer's bid or proposal based on the content of some other proposal (Company A offered us _____. Do you think you can match that?). These kinds of contacts can lead to serious trouble, including all sorts of opportunity for the bribing of public officials.

c) Open meetings: A problem present whenever any sort of contact occurs between the people making the decision. Do meetings of a subcommittee reviewing proposals have to be public? What about interviews between proposers and the council? If they are open do competing proposers have the right to attend, and if they do, doesn't the last to be interviewed have an advantage?

One possible way to try to bring some order to what can become a chaotic situation is to provide that the selection process will follow this order:

1. Those proposals that are "non-responsive" will be discarded and the best of the group will be selected for further review.
2. A short list is then reviewed in depth by the group making the initial recommendation.
3. Experts as needed (financial experts to review financing plans, city attorney for review of legal risks) are called in by the committee to review areas and answer questions.
4. If there are questions that need to be answered the committee or its representative will contact the proposers for information. A record of those contacts should be kept, and when in doubt, the committee should carefully consider whether the information





sought or received would provide a competitive advantage, and if it does, then the other proposers should be informed.

5. The committee should recommend more than one firm for the council to consider.
6. The council should pick what it considers to be the best proposal.
7. The administration should then negotiate with the top proposer until an agreement is reached (or until negotiations fail). That final agreement should then be submitted to the council and the public for a complete review, public hearing, etc.

Throughout the process any member of the council should be welcome to participate at any meeting with any party, so the council can be assured there is complete access to all information upon which they will base their decision.

There is a real conflict between the public purposes to be served by public meetings (open decisions openly arrived at) and the process of negotiation where the parties are trying to get the best possible deal. The same sort of policy issues that are present when negotiations between management and labor and public are present.

NEGOTIATION

The most flexible, the most conducive mechanism for private development is the so-called "disposal by negotiation." In this process, the local government and the private party sit down in the same way two private parties might in an effort to structure a deal that is good for both sides.

There are good reasons to have this procedure in the local government's repertoire of disposal mechanisms.

A typical situation might involve a private developer who has the idea to develop a new

business in town (a self-service gas station, a bowling alley, a port facility to export a new commodity like coal). Ideas are the raw materials for businesses. Without the idea a new business can't be developed.

And yet once the idea is disclosed, it loses its competitive value, for anyone can then use it. Patents and copyrights protect some forms of ideas but ideas on which businesses start aren't capable of being protected.

If the response of the city to this innovative idea is to auction the land for the construction of a bowling alley - or even to solicit proposals for the development of a bowling alley - the competitive value of the idea to the person who thought of it is lost. There is an underlying feeling here that private parties ought to be able to benefit from their good ideas, and yet, the traditional disposal techniques of public land involve so much disclosure that the idea will most likely be made public long before a deal can be structured and there isn't any way to protect a competitor from using that same idea on private land in the meantime.

The competition, during the time the innovator is dealing with the city, could well tie up a private parcel to accomplish the same thing. In that case, the innovator loses the advantage of his idea while the local government loses any input it might have in the development.

One way to avoid this situation is to allow private proposals to be made, negotiations conducted, deals "made" and THEN disclose them to the public for approval by the local governing body.

This allows the private party to maintain the competitive advantage until a deal is struck even though he is dealing with a public agency.