COMMUNITY
OWNERSHIP
SUPPORT SERVICE

Development Trusts Association Scotland

Managing risk in Community Asset Transfer

A guide for public bodies

www.dtascommunityownership.org.uk

The Scottish Government
Riaghaltas na h-Alba

The Community Ownership Support Service is funded by the Scottish Government to support the transfer of assets into community ownership. This advisor-led service provides advice and support on every stage of the asset transfer journey.

1. Purpose of the guide

The introduction of the asset transfer legislation in the Community Empowerment Act gives community bodies a right to request to buy, lease, manage or use land and buildings belonging to local authorities, Scottish public bodies or Scottish Ministers (relevant authorities).

This short guide has been designed to complement and enhance relevant authorities' own approach to risk. It will help facilitate successful Community Asset Transfer by providing information and guidance on management of risks relating to asset transfer. It will set out some simple approaches to risk management and outline the more common risks encountered and how to mitigate them.

2. Background

Community ownership of assets is neither new nor unusual across Scotland. The Community Empowerment Act was introduced in 2015, but many local authorities already had asset transfer policies in place, transferring a wide variety of land and buildings to communities before the Act defined a legal process.

The many successful examples of communities running assets demonstrate that there are clear benefits from community ownership, which can be realised without significant risk to public assets. Community ownership and the empowerment it can bring should be seen as simply another type of public ownership of assets, adhering to the principle of subsidiarity, where democratic decisions are made at the most local level possible.

The benefits that will be delivered to the community through an asset transfer should outweigh the risks. The challenge is to ensure the risks are identified, assessed and managed, whilst being focussed on delivering the biggest benefits possible for the community. This involves relevant authorities and community groups working together throughout the process.

► 3. What do we mean by risk?

The Treasury defines risk in the following way:

"The delivery of an organisation's objectives is surrounded by uncertainty which both poses threats to success and offers opportunity for increasing success. Risk is defined as this uncertainty of outcome, whether positive opportunity or negative threat, of actions and events. The risk has to be assessed in respect of the combination of the likelihood of something happening, and the impact which arises if it does actually happen. Risk management includes identifying and assessing risks (the 'inherent risks') and then responding to them."

Good risk management allows an organisation to:

- Have increased confidence in achieving its desired outcome
- Effectively constrain threats to acceptable levels
- Take informed decisions about exploiting opportunities

Good risk management also allows stakeholders to have increased confidence in the organisation's corporate governance and ability to deliver.

[1] https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/pages/14/

► 4. Considering the risks

There will be risks inherent in all courses of action in relation to asset management. Not transferring an asset to a community group may mean that the local community risks missing out on the social, economic and environmental benefits that can result.

There will also be risks in terms of the benefits that can be derived for an area through sale on the open market to the private sector. Private organisations are not immune to failure and not all their developments deliver benefits for the community.

Community groups should take time to consider the inherent risks involved with asset ownership and the process of acquisition. By the time a community group submits an Asset Transfer Request they will have invested a great deal of time (and often considerable financial resources) and may stand to lose significantly if the organisation runs into difficulty or the transfer is not successful.

It is also important to remember that it will not be possible to eliminate all risk. The aim should be for risk management to be 'cost-beneficial' (i.e. the cost of managing a risk must not outweigh the benefits). Any action must be proportionate to the level of risk exposure that the organisation can accept (i.e. the 'risk appetite').

► 5. Common risks and how to mitigate them

Although each relevant authority will have its own approach to risk management, the majority are based on similar principles. To help inform this process, the tables below outline some of the main risks typically encountered in asset transfers, the actions a relevant authority can take to help mitigate them, and the agencies that might support them.

Risk	Mitigation
The community organisation does not have the skills or capacity to manage the asset transfer process successfully	Community groups looking to take on assets vary considerably in their skills and capacity. The group may already be running successful services but don't have the specific skills required for the process – project management, feasibility, business planning etc. A skills audit of the group that is focussed on what is required for the duration of the process can help identify specific skills gaps. It may be appropriate to split a large asset project by developing a sub-group focussing on the transfer itself. Members of the sub-group would be selected for their specific short-term skills and the group would report directly to the main management board. A short-term advisory group could be established to support the board throughout the process. This could have individuals from external agencies and local businesses or individuals in the community who have skills in required areas such as project management, finance or business development. Where a relevant authority is concerned that a community is lacking in a particular area, but the community benefits that may arise are highly desirable, the relevant authority may provide some technical assistance e.g. funding officer to scope out grants.
Additional support	COSS can work closely with communities all through the asset transfer process and has tools and templates to help determine skills gaps. Community groups can take the opportunity to access local capacity building training run by Third Sector Interfaces and other organisations. Highlands and Islands Enterprise's '10 steps to community ownership' is an important resource for communities looking to take on assets. Scottish Land Fund advisors can support groups seeking to own an asset through feasibility stages to ownership.

Risk	Mitigation
The community organisation does not have the skills or capacity to manage the asset in the long term	Additional engagement with the community is often a good way of attracting people who can bring the fresh perspectives, skills and capacity needed for the project's long-term success. Encourage the group to think about implementing sustainable governance procedures in areas such as membership development, board recruitment, succession planning and financial sustainability. Ensure that support to the community does not end with the conclusion of the asset transfer process.
Additional support	Third Sector Interfaces provide advice on topics such as governance, finance and organisational development. Intermediary organisations such as the Development Trusts Association Scotland, Community Woodlands Association and Senscot can also provide advice. The Community Learning Exchange Fund may be available through COSS (and other Scottish Community Alliance partners) to allow less experienced groups to visit and develop a mentoring relationship with more experienced community organisations.

Risk	Mitigation
Absence of key personnel means the relevant authority does not have the knowledge or experience to manage the asset transfer process successfully	Discussing asset transfer with other relevant authorities who have greater experience can be helpful as they may have tools and documents you can adapt for your own use or be able to identify the potential challenges from their experience. It is helpful to have a defined point of contact, ideally with a community focus, for interested groups to speak to. This must be more than a 'paper contact' and should be someone able to speak to groups on their own terms and work with them to present as strong a case as possible. Is there someone in your authority with scope to meet groups and support their journey? There needs to be good systems of communication internally as groups progress their applications. Groups may need advice from property, planning, legal, finance, community development and economic regeneration departments. Ensure you can organise this so that groups access appropriate advice at the right time. Be mindful of the asset transfer timescales if the application is being made under Part 5 of the Community Empowerment Act e.g. a relevant authority has six months from the validation date to make a decision on the Asset Transfer Request.
Additional support	COSS can support relevant authorities with all aspects of asset transfer, from the process defined in the Act through to the development of appropriate policies, tools and documents. All aspects of best practice in this area can be covered. COSS typically arranges annual workshops for relevant authorities to share best practice. The Improvement Service may be able to offer support and guidance.

Risk	Mitigation
The community body is unsuccessful in delivering the benefits it forecast	To help the community assess the viability of running the asset successfully, the relevant authority should provide as much information as available on the current condition of the building, the running costs, the cost of utilities, current income from users, and the cost of other outgoings. Providing as much information as possible at the outset can help communities assess the viability of their operating model and be realistic about what can be achieved. It is important that the asset transfer does not signal the end of contact with the community group. The relevant authority can offer support in the initial stages while the group hone their business skills and networks and develop their income streams. Support for facilities management, service level agreements with the community body or the delivery of local services from the asset can strengthen its chances of sustainability and maximise community gain. This also tends to develop a valuable community-based partner for the relevant authority to consult on the design and delivery of local services. Where there is an asset that is being transferred at less than best consideration, a clawback clause could be included to protect the discount. It is important that any use of clawbacks complies with government guidance i.e. is 'flexible and imaginative and should not create barriers to wider policy objectives.' See section below on 'Protecting the Discount' for further details.
Additional support	Communities can gain support from organisations such as COSS or Third Sector Interfaces on business planning. Funding may be available to bring in external consultants to work with communities to produce robust business plans. Accelerate, Just Enterprise, Business Gateway, Senscot, and Highlands and Islands Enterprise can also provide support. The Scottish Land Fund can provide grant support for business planning and other feasibility work.

Risk	Mitigation
The community group doesn't have the support of the wider geographic community causing reputational damage to the relevant authority and divisions in the community	The Community Empowerment Act guidance requires that communities carry out an evidence-broad engagement with the community. Where communities of interest are seeking transfer, they should consult with the geographical community and ensure they are 'bought in' to the proposals. COSS produce guidance on community engagement: 'Involving Your Community' helps communities design and deliver community meetings, surveys and other useful early-stage methods of support. Expert facilitation can be used to bring groups together and work through contentious problems e.g. local conflicts of personality.
Additional support	COSS advisors can advise on effective ways to engage with the community. The National Standards for Community Engagement provide a set of principles and resources to guide effective community engagement. The Scottish Land Commission Community Engagement protocol sets out practical advice on how landowners, land managers and communities can work together.

Risk	Mitigation
Following a transfer of title, the community body fails, leaving the ownership of the asset uncertain	The provisions in the Community Empowerment Act which define an eligible Community Transfer Body ensure that if a body is wound up, the asset is transferred to another community or charitable body. This would occur once liabilities have been settled. Pre-emption measures which return the asset to the relevant authority should only be imposed in exceptional circumstances as they can restrict the ability of the community to access funding, raise finance and operate effectively. However, there are circumstances where regionally significant, heritage and iconic assets could be protected in this way, provided there is a compelling rationale. Further guidance on the appropriate use of conditions can be found in the Clawback & Title Conditions section below.
Additional support	COSS legal advisor can provide advice on what is appropriate.

Risk	Mitigation
More than one community group requests a transfer of the same asset	Every effort should be made to encourage community groups to work together to pursue the asset transfer – particularly where their objectives are not in competition. Properly mediated sessions with the groups could resolve tensions and identify shared interest. However, there may be instances where this is not possible, because of incompatible objectives or personality clashes. In those cases, a transparent and staged process should be developed for the benefit of both the relevant authority and community groups. Clear assessment criteria, made available to groups at an early stage, will help them structure their applications accordingly, highlighting community benefit, and making it easier for assessment panels to reach a decision. It will also help relevant authorities to manage competing interests in an asset. Mediation can be used to bring groups together and work through contentious problems.
Additional support	COSS advisors have experience with multiple requests for the same asset and can help with mediation. Third Sector Interfaces can work with groups to develop a partnership approach.

Risk	Mitigation
The asset is not transferred successfully to the community; the benefits are not realised and the asset remains underutilised	Regular engagement and communication with the community group is important to ensure momentum is maintained and that both parties are clear at each stage of the process what is expected of them. For a successful outcome, the asset transfer process undertaken should be flexible and bespoke enough to deal with the large variances in types of Asset Transfer Requests. Proportionality is a key principle to adhere to. When requesting information, considering conditions, costs etc. the size of the asset and the capacity of the group must be central to decision making. So, for example, transferring title of a large building should be handled differently from a lease request for a small tools store on an allotment. For the simplest of leases or transfers of title e.g. for surplus assets in good condition, it may be advantageous for both parties not to use the asset transfer process defined in Part 5 of the Community Empowerment Act. This requires significant trust between the relevant authority and community body but can accelerate the process and deliver the benefits more quickly. Many asset transfers stall or are unsuccessful because of conditions which the community cannot or will not accept. Section 6 below outlines some approaches which can avoid these problems. Considering the timescales and deadlines of funders will be vital to the success of many asset transfers. Ensuring the relevant authorities' process aligns with these deadlines by agreeing key milestones with communities and funders at an early stage will ensure projects do not fail because of poor project planning.
Additional support	COSS advisors can provide guidance on what is proportionate. Third Sector Interfaces can work with groups and networks in the area to develop proposals which ensure the asset is utilised effectively.

► 6. Protecting the discount, clawback options and standard security

A robust assessment of the risks, their implications and likelihood of becoming a reality can only be carried out through close discussion with the community organisation that is seeking to take on the asset, alongside a rational and thorough analysis of the business case. Only where risks are significant should the relevant authority consider conditions that restrict use or enable the 'clawback' of value.

Protecting the Discount

Relevant authorities have a duty to ensure that best value is achieved from public resources and that they are not misappropriated. Therefore, where an asset is being disposed of at less than best consideration, authorities can seek to identify (and reduce) the potential risks involved, while balancing these against the potential benefits to the public.

Section 14 of the Scottish Government Guidance Notes on Asset Transfer Requests[1] covers the use of conditions to protect the discount – quotes from the guidance are indicated in italics. In the case of asset transfer to community bodies, disposal at less than market value, or with other support or concessions, may be justified by reference to the expected benefits to be delivered by the project.

In that situation, relevant authorities sometimes seek to protect themselves against the risk that the benefits may not be delivered by including clauses in the contract requiring some form of restitution if the project fails.

"It is for relevant authorities to determine whether it is appropriate to include such conditions in the contract (and for community transfer bodies to decide whether to accept the transfer on those terms). The aim of the guidance is to ensure that, if conditions are used, it is done in an appropriate and proportionate way."

"Any conditions which the relevant authority proposes to impose to protect discount should be included in the decision notice, in sufficient detail that the community transfer body is able to decide whether they are acceptable or not. As a result, the community transfer body could seek to challenge them through the review and/or appeal process."

[1] https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/pages/14/

Clawback & Title Conditions

A range of legal mechanisms are used by relevant authorities seeking to protect their interests when transferring assets.

Good practice principles

- Any mechanisms used to protect the relevant authority's interest **must be proportionate**; or they must be appropriate for the scale of the project and take account of the opportunities to deliver community benefit
- Mechanisms must only be included where there is a clear rationale for their use
- The use of conditions must not unduly restrict the ability of the receiving organisation to maximise the asset's potential as a base for a financially sustainable enterprise
- Restrictions around how the asset is used and run on a day-to-day basis are unlikely to be appropriate and may undermine the achievement of the objectives behind the transfer
- Conditions are only likely to be justified where there is a sizeable discount given
- The justification for each mechanism must be clearly explained to the community
- Mechanisms must have unambiguous trigger points and clearly defined processes

"Excessive requirements for repayment or conditions on development or change of use could make a project unviable, or restrict the ability of the community transfer body to increase its capacity and develop new projects over time.

Proportionality should take into account:

- *the value of the concession granted*
- *the scale of the authority's contribution within the overall project, and*
- *the time within which benefits are expected to be delivered."*

Clawback & Title Conditions

Clawback is a general term referring to conditions used to safeguard the financial interests of a relevant authority. It is important that any use of clawback provisions complies with the Scottish Government guidance[2].

Title conditions can be imposed that give the authority first right of refusal over the property should the community organisation look to dispose of it for any reason. These are known as 'pre-emption rights' and can be triggered, for example, when an application is made for planning permission.

However, many key funders of asset transfers feel that a right of pre-emption is often not appropriate for community asset purchases, which by their nature should remain within the community for use in perpetuity. Clauses of this kind could put funding approval for purchases and post-acquisition development at risk. If a pre-emption is to be included, the terms and conditions need to be clear at the point of the valuation, buy-back should be at market value and ideally timebound.

Another example of conditions comes where the authority places restrictions on changes in use of the property (in planning terms). These should be defined explicitly in terms of what the property can be used for (permitted uses) rather than what it can't.

Care should be taken with these conditions, as restricting a community body to a particular activity following an asset transfer can cause problems for the group and their funders. A group's purposes can shift over time as the community's needs and its operating environment changes. For funders, the norm is not to have these conditions in place. If they are agreed, they should be strictly time limited. If conditions are too restrictive, funding for the purchase of the asset as well as post-purchase investment could be put at risk.

It is important to remember that protection of the asset is provided by clauses in the group's governing document, which has passed the eligibility criteria defined in the Community Empowerment Act specifically for this purpose.

[2] https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/pages/14/

Standard Securities

Standard Securities can inhibit the ability of the community organisation to raise finance against the asset - a key consideration if enterprise and sustainability are to be pursued. Therefore, practice has shown that relevant authorities should take at least second ranking within a ranking agreement between creditors, if a Standard Security is considered appropriate to the nature of the asset and level of discount involved.

In most asset transfer cases, there will be other organisations providing funding to the project in addition to any concession given by the relevant authority. Like relevant authorities, funders have a responsibility to ensure that their grants are used effectively and in accordance with the purpose for which they are granted, and they seek to secure this through a range of legal agreements. Where there are multiple contributors each requiring security for their investment then there is likely to be the need for a ranking agreement so that each party understands its position should the project fail, recognising that such a position may not enable each party to recover in full what it has funded.

Conflict with charitable status

The Scottish Government Guidance Notes on Asset Transfer Requests clarifies the potential for conflict with charitable status:

"OSCR has confirmed that protective mechanisms as described above do not conflict with the requirements for charities. The charity's trustees would need to be satisfied that the arrangements were in the best interests of the charity before agreeing to them. However, on winding up, such arrangements would be dealt with as liabilities or contractual obligations to be settled before any remaining assets are distributed for charitable purposes.[3]*"*

[3]https://www.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-community-9781786527509/pages/14/

Appropriate use of Clawback & Title Conditions

The following table provides an indication of where the use of clawback and title conditions may be appropriate in Community Asset Transfer. The starting point for good practice in asset transfer should be for no mechanisms to be in place, particularly for small scale projects where relevant authorities should consider whether the legal complexities of imposing conditions is worth the potential returns.

However, there may be circumstances where these conditions can be used effectively without being detrimental to the success of the project. Where conditions are used, the community group must be informed at the earliest possible opportunity, ideally as part of the decision notice when approving an asset transfer. This gives the community an opportunity to consider any conditions before accepting the transfer, discuss with the relevant authority and appeal if necessary.

Financial returns to relevant authority	Restrictions on community use of asset	Return of asset to relevant authority
Where used, it is essential to ensure any financial clawback is proportionate to the type and scale of asset transfer	Where used, restrictions should recognise the need for community groups to adapt and change their activities as their circumstances and the needs of their communities change	Where used, conditions must not act as a barrier to communities being able to access the funding they need
• Only appropriate where a significant discount is given, or the transfer is for a nominal fee • The level of clawback must not exceed the 'gift' and must account for any costs incurred by the community – refurbishment, legal etc. • The community benefits delivered following the asset transfer should also be accounted for • Must be time-bound • Rate must reduce each year	• Clauses which allow broad 'community use' of the asset are preferable • Restrictions on type of use may be appropriate where the community has demonstrated a strong desire for the continued availability of a specific amenity such as a park or leisure facility • Where a relevant authority retains a say over type of use, a straightforward and timely mechanism should be in place for the group to apply for change, following consultation with the community	• Only likely to be appropriate for heritage and iconic assets where there is a compelling rationale for a return to the relevant authority. • Any 'buyback' should be at market value and time-bound

► Case Study – Tullibody Community Development Trust, Clackmannanshire

Background

The group came together initially in response to the threatened closure of the local Civic Centre. The Civic Centre was built in 1963 with a large sports hall added some years later. The building required significant upgrading, with asbestos present in the roof.

The local authority was not able to spend any further funds on upgrading the building, despite the popularity of the sports hall and meeting rooms. The local library was based in the centre and a local heritage museum (an independent charity) also took up the centre's former social club area.

The group began by using a previous community engagement study funded by the Coalfields Regeneration Trust, where key community assets and needs were identified, setting up the new trust as a SCIO and developing the membership base.

Asset transfer process

Early negotiations with the local authority were outwith Part 5 of the Community Empowerment Act, beginning before the secondary legislation was passed.

As a result, the process took four years from starting the process to agreeing the lease terms and then the purchase price – an Asset Transfer Request under Part 5 would have had the clear legislative framework with the much shorter timescale and clear decision milestones.

Measures taken to reduce and manage risk

The group applied to COSS to use the Expert Help Fund (a limited, last resort funding pot) to engage a consultant to help them with further community engagement focussed solely on the options for redevelopment or rebuilding of the Civic Centre. This enabled the group to engage more effectively with people in the area, ensuring the plan for the centre was based on the community's needs and aspirations.

The group applied for Scottish Land Fund (SLF) Stage 1 to explore their options to rebuild the centre. This was granted and the group engaged their preferred consultants to design and cost the work. Having independent consultants brought additional technical expertise, external project assurance and detailed analysis of the options – this ensured the group's decision on how best to proceed was well-informed and costed.

The group began their negotiations with a lease to allow them to take over the running of the centre, managing the bookings system and the cleaner. This allowed them to build up income and gain vital facilities management experience. This also enabled the local authority to withdraw their paid staff from the centre but to carry on renting a space for the library, providing income for the group.

After a year of successfully managing the facility, the group applied for Stage 2 SLF funding and were successful in securing this to purchase the building from the local authority at a significantly reduced price to secure the Civic Centre, some car parking and the old bowling green area. The reduction in price gave their funding bid to SLF a good chance of being successful.

The group have taken a phased approach to the development. By dividing the project in this way, the capital funding required at each stage is reduced, giving them a greater chance of reaching their target. It also allows them to carry on trading throughout, improving their revenue income.

► Case Study – Turriff and District Heritage Society – Municipal Hall

Background

The Turriff Municipal building was built by a local philanthropist Provost Hutcheon in 1908 and gifted to the community. It was built as a town council chambers and was latterly used as a courthouse and council offices. When the council was reorganised in the 1970s it became a Common Good asset. The local authority declared the building as surplus in around 2011.

At that point the Turrif and District Heritage Society were in the building next door with a commercial lease. Following the conclusion of an unsuccessful Asset Transfer Request from another organisation, the society decided to seek an asset transfer once their existing commercial lease ended.

Measures taken to reduce and manage risk

The local authority allowed the group to move in while the asset transfer was being completed. This provided continuity for the group and reduced the additional costs that would have been required to extend their commercial lease.

The local authority connected the group with a number of other communities who had undertaken similar projects. This allowed them to learn from others' experience, avoid common mistakes and build up a network of support.

The local authority arranged the Common Good process at the Sheriff Court and the group assisted with publicity requirements for this process and supported the local authority in their application. Working together in this way ensured a good outcome for both parties.

The group paid £1 for the building which was valued at £80,000. The local authority recognised the benefits of having the group manage this historic asset which enabled the group to protect their own finances and focus their fundraising efforts on improvements to the building and projects.

There were no conditions placed on the transfer and no clawback mechanism in place. The local authority paid their own legal costs and the group paid their own solicitor's fees. The lack of conditions gives the group flexibility to develop over time without restriction.

The group had a named contact at the local authority throughout the process. This helped when any difficulties emerged and helped connect them to the right individuals in departments throughout the local authority.

► Notes

Notes

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