

## Good practice in negotiations: factsheet

*A good practice note on negotiating the transfer of an asset from  
a public body to a community organisation*

### 1. Introduction

This good practice factsheet forms part of a series of guidance notes and documents produced by Anthony Collins Solicitors for the Asset Transfer Unit. The aim of the series is to promote good practice in community asset transfer for both the public sector and third sector organisations, with a view to making transfer more achievable in practice and more cost effective. Third sector organisations are referred to throughout the guidance as TSOs for the sake of consistency.

The purpose of this guidance note is to set out practical points on dealing with negotiations. Working through the process of a transfer requires first extensive discussion, and then formal negotiation of legal documents. This note reviews the stages of the process and reflects the experience of those who have been through it. The stages mentioned are set out in the **Legal Process Map** and, as we acknowledge in that document, a number of stages may overlap or take place at the same time. We start at the beginning, which is the best place to start .....

### 2. Initial Considerations

**Legal Advice** TSOs and local authority officers will often wait to obtain legal advice until the “deal” is done. Officers should involve in house legal teams early in discussions. At the very least, we suggest that before TSOs agree to the main terms of a transfer, they seek independent advice on the key elements of those terms. There may be an initial cost to this, but it will save time and hassle later on. If, for example, a 20 year lease is being offered by the local authority, then this is very different from a 99 year lease, and the scope of what a TSO will be able to do with the site will be significantly lessened. It is vital to understand the implications of what is on offer at an early stage.

**Officers and lawyers in local authorities** TSOs need to be aware that the nature of local authorities means that it is very difficult indeed – and professionally unwise – for officers to ignore the advice that they get from the Council’s own lawyers. However helpful officers may want to be, their lawyers should be involved early on so that TSOs get a clear and realistic sense of the Council position.

**The scope of the asset** It is important to review the legal title to the asset very early in the process of transfer, to identify the asset and the extent of what is actually owned by the public sector body in question. TSOs should consider obtaining advice on title independently.

**Case Study** In one transfer, it became clear during the negotiations that although the centre to be transferred belonged to the Council, the car park next to it (which was essential for the centre’s use) in fact belonged to the neighbouring school. This significantly affected the negotiation process and meant that the school and the education authority had to become involved, and a separate licence prepared

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governing the use of the car park. If a review of title had been carried out at the start of the process, time and legal costs would have been saved.

**Other parties involved** Where there are other stakeholders in a particular transaction, especially funders, then they (and their lawyers) should be involved in detailed discussions as soon as possible. In one example, where a funder was involved but not their lawyers, detailed heads of terms were agreed between the Council, the TSO and the funder, but when the funder's lawyers became involved the heads of terms had to be revised considerably. Some funders (such as Big Lottery Fund) have detailed policies on asset transfer which they will expect to see confirmed in the detailed documentation, so again it is best to be aware of this early in the process.

**Powers and policy considerations** For the public sector, it is vital to establish at an early stage that the authority has the power to transfer at less than market value (if this is what is envisaged), and how this relates to policy considerations. Often the "well being" power in section 2 of the Local Government Act 2000 will be relevant, but if this power is to be relied upon, the case to do so will be strengthened by the policy aims of CATs being reflected in the community strategy, and also by reference to the Local Area Agreement.

**Timescales** A healthy dose of realism is needed here. All those that we spoke to who have been through transfer said that the process was longer and more complex than they had expected. As one of them said, "think of how long you expect it to take – and then double it". For local authorities it is important to establish early in the process what approvals will be necessary, and then factor those into the overall planning of the transfer. If, for example, the transfer will have to be approved by the Cabinet, then time will be needed for reports and comments from colleagues in legal and finance departments.

**Condition of the property** Again, before agreeing the scope of the deal, TSOs should be aware of the condition of the asset. If the local authority has carried out a condition survey, it would be good practice to make this available. There may be major works needed before a building is fit for the purpose a TSO has in mind; will any of these be carried out before transfer? If so, there should be collateral warranties in place so that the TSO can directly enforce any problems against contractors rather than having to go through the Council, once it is in occupation.

### 3. Starting to negotiate

**Initial negotiation meeting** Before the heads of terms are finalised, experience suggests it would be very helpful to have an initial meeting of all parties involved, around the table, involving both the Council legal department and the lawyers for the TSO as well as officers and the TSO themselves. This meeting should seek to establish two things: the nature of the deal that the Council are prepared to offer, and the key people on both sides who will lead on the process. It is very important that the Council is frank and open at this stage about what it is seeking; for example, a number of authorities are now linking transfer to service level agreements. This initial meeting should enable TSOs to understand exactly what they are getting, and on what terms. TSOs should then, separately, consider whether they really want to proceed.

**Case study:** In the proposed transfer of a community centre, the local authority only made it clear after some months of negotiations that it was looking for a lease back to it of some 75% of the building, at nil cost. This significantly affected the business plan of the TSO and made negotiations very difficult. The TSO suspected the Council of bad faith and this strained relationships.

**Heads of terms** One outcome of this meeting should be a clear set of “heads of terms” (the main principles of the deal), which all involved should be prepared to sign up to. These should be detailed enough to enable the lawyers to begin to prepare draft documents, on the basis of those heads of terms. The heads of terms will only work, however, if both sets of lawyers have had the chance to review them; as mentioned above, if an external funder is involved, they may also have a view.

**Approvals** In each case, at some point the formal approval of the local authority will be needed. When this is sought is a matter of judgement in each case; the more is agreed before approval is confirmed, the less can be changed afterwards. If heads of terms, for example, are agreed by the Council cabinet as an appendix to a report, then it will be very difficult for these to be changed afterwards.

**Who is involved?** Key people who have the skills, time and authority, to assist in a smooth transfer of the asset on both sides should be identified. Officers and Members of the public body who are committed to the aims of the programme can act as champions driving the process. The community organisation should identify someone within their organisation who has the best skills set to understand and negotiate their way through the asset transfer process with appropriate delegations in place (and limitations on the same), to enable negotiations to progress. The view was strongly expressed to us that it is best if someone is paid for this rather than relying on a volunteer, as this person will need to have the time to arrange meetings and drive the process forward, but also, conversely, that: *“more than one key person should have been involved in the detail from day one as when timescales slipped and he went on holiday, Board Members were struggling to get to grips with the mass of detail quickly, as completion of the transfer took place whilst he was out of the country”*.

**Being ready for transfer** Local authorities should be clear at the outset with TSOs what they expect to see in the way of “transfer readiness”. This may include matters such as:

- the governance of the TSO. TSOs should be prepared to allow local authorities to look at their governing documents, and should consider reviewing them themselves beforehand to ensure that they are fit for purpose;
- where TSOs relate to a particular neighbourhood or community, then local authorities may want to assure themselves that there is some mechanism of ensuring accountability back to that community;
- business planning and robust financial projections.

#### 4. Documentation

**What documents are needed, what is the extent of the transfer?** A number of documents will need to be prepared to implement transfer, as the legal process map makes clear. First of all, some background information will be needed from both sides, including:

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- details of the **title** to the property or land in question;
- any **planning** matters affecting the site;
- the **full name** and **constitution** of the TSO;
- the names of **relevant contacts** and those able to sign off / negotiate documents on both sides;
- details of any **funders**, and their terms and conditions – including European funding – and any security or guarantees that they require;
- any **physical or development works** to be done to the asset, either before or after transfer;
- a robust **business plan** for the TSO.

Then a series of **formal documents** will follow. These may include

- the **lease** or **freehold transfer** itself;
- if the asset is in a poor state of repair or there are plans to improve the asset, an initial **agreement for lease**, sometimes called a **development agreement** may be needed to regulate how any repairs and/or improvements are carried out before the lease is granted. This document may also contain provisions about the standard of work and the delivery of guarantees and warranties from those professionals carrying out work to the asset;
- are there **services** to be provided by the organisation on behalf of the transferring public body? This point needs to be considered carefully. The local authority may need to use a **Framework Agreement** or similar instead, to ensure accountability whilst avoiding being seen to be “procuring” services (which may be caught by complex European law issues);
- has any **funding** been received prior to transfer that needs to be considered and are there any obligations that need to transfer across with the asset? Check that the receiving organisation can satisfy these and also that there are protective measures in place between the parties to ensure that the transferring organisation has not breached any conditions and is not doing so by entering into the transfer and if it has or does, the community organisation will not be held responsible for the same and vice-versa;
- are there any **other providers** based within the building to be transferred, for example a local authority nursery? **Licences or leases** may be needed to record the terms of their occupation;
- is there any **grant or gap funding** to be paid by the transferring body? What are the conditions of this and are they reasonable and realistic?
- is **external third party funding** to be obtained and who is to receive this? The funding conditions should be checked in terms of security and any other obligations that may have an effect on the transfer;
- are **staff** transferring? Is there a TUPE transfer taking place? Are there staff who need to be managed and consulted as part of the transfer process?

**Starting points** In some transfers problems have come at the documentation stage because local authority lawyers, having not been involved in initial conversations, have started out with

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a commercial lease which has not reflected the intentions of the transfer. Property lawyers in local authorities may never have done a community asset transfer before, and may not be aware of the policy or its aims. Some of the key terms of a traditional commercial lease simply do not reflect the nature of TSOs, or the policy aims of asset transfer, so if starting with this kind of precedent, local authority lawyers should be willing to accept changes to the core documents – or use a different starting point.

**Bargaining positions** In some transfers, the Council will also be providing some grant funding to the TSO to refurbish the building, or to carry out associated activities. If the transfer is dependent on this funding, this can affect the TSO's ability to negotiate:

**Case study** In one transfer, two TSOs were receiving funding via the Council connected with the transfer. The Council set a deadline for completion of the documents, and told the TSOs that if either of them pulled out, neither would get the funding, and that if documents were not agreed by the deadline, then the funding would not be forthcoming. Despite some grave misgivings, the TSOs agreed the documents in order to get the transfers completed. TSOs should not be naïve about dealing with the public sector!

**Attention to detail** The detail in documentation is key, as it is this that will set out the position of the parties as agreed through negotiations. Both parties will need to be heavily involved in the detail and be prepared to be so. Officers from the local authority and the appointed people from the TSO need to be ready to convene and attend meetings to push things along. Legal support to the TSO is essential at this stage; concern was expressed to us that otherwise TSOs might find themselves “stitched up”.

## 5. Getting it right

Asset transfer is a complex process and both parties must be prepared to journey through it together. If the TSO and the local authority are both committed to achieving the transfer, for the benefit of both organisations, then the process should run relatively smoothly. This has not always been the case up to now, as the case studies and examples in this note have shown.

The reality is that some TSOs are inherently suspicious of their local authority, and move very quickly to an adversarial position, where every communication is scrutinised for bad faith or taken as evidence of a conspiracy.

Equally, some local authorities have officers who are committed to working with community based organisations, and others who are not. Officers may have no interest in community empowerment. Local authority lawyers may see their role as working for the interests of the authority (and therefore against the TSO “on the other side”) and therefore adopt a robust negotiating position of “take it or leave it”.

Neither of these positions are helpful. For transfer to go as smoothly as possible, TSOs and Councils need to recognise that some “give and take” will be necessary on each side. This is not a personal process and people should not take it personally! The process can be time consuming, and will require patience and maturity.

Reading this note and the associated guidance available, and following the asset transfer process in a methodical order, should assist in the negotiation of a smooth transfer of an asset from a public body to the receiving community organisation. There is a real need to start with a fully informed discussion at the outset, as the initial decisions set the foundations of the negotiations and are key in enabling the parties to be aware of what it is they are setting out to achieve, and allowing for informed negotiations to take place.

**TOP TIPS:**

- Involve legal advisers on both sides before the heads of terms are decided, so that the “deal” is one that all parties can sign up to;
- Define the exact scope of the asset early on, including who owns what;
- Involve funders (and their advisers) early in the process, as they will have views on the nature of the deal and on the documents;
- For the public sector, be clear about the powers that enable the authority to transfer, and the link to relevant policies;
- Be realistic about timescale, and the approvals needed;
- Have an initial negotiation meeting involving lawyers, early in the process;
- Find champions on both sides to move things forward;
- Local authorities should make clear their expectations of TSOs;
- Scrutinise the detail of documents to make sure the agreed “deal” is being done;
- Be mature about negotiations, recognising the need for some “give and take”;
- Be patient, and realistic!