

COMMUNITY EMPOWERMENT ACT REVIEW

November 2023



Community
Ownership
Support Service

Development Trusts Association Scotland

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Delivered by the Development Trusts Association Scotland (DTAS), the Community Ownership Support Service (COSS) is funded by the Scottish Government to deliver a national support programme that provides a focal point and central resource for sustainable asset transfer and community ownership activity in Scotland; providing information, expert advice and guidance to community groups and public bodies.

This paper has been written as a briefing for the Scottish Government to highlight the experience of community groups going through the asset transfer process, general trends and specific issues that have emerged since the Part 5 Community Asset Transfer went live in January 2017. This paper is written from the perspective of an organisation that is wholly supportive of asset transfer and community ownership, and is committed to seeing the legislation work well in practice.

One of the unintended consequences of the Community Empowerment Act (CEA) is that where an asset transfer, particularly in relation to leases, would historically have been negotiated directly, we are seeing primarily local authorities pushing everything through the legislative route rather than negotiating outwith the legislation. From a community perspective, this can make things overly bureaucratic and disproportionately onerous in terms of an asset transfer process.

Within the guidance, encourage proportionate approaches to transferring outwith the CEA legislation, particularly in relation to leases where the agreement of both parties can be reached. This can be further reinforced by extending the reporting requirements to include details of the assets transferred on the basis of ownership, management or lease under the CEA and outwith the legislation.

ASSET TRANSFER

Asset Registers

The information on the relevant Authorities' asset registers varies from being an Excell spreadsheet with limited search function to interactive maps. While having this information is important, providing context on current use of assets would be helpful. This particularly for communities of interest who may not be as familiar with current operations as geographic communities. In the mainly non-local authority relevant authorities, there continues to be those who do not have assets registers published online.

Consider current requirement for asset registers in relation to NPF4 – identified assets of community value in Local Place Plans.

Audit all relevant authorities for compliance with the requirements of the CEA; publishing the findings to encouraging compliance.

Asset Transfer - General Process

1. Eligibility – Communities

Given that community bodies eligible for community right to buy are also eligible to submit asset transfer requests, the difference in the required membership numbers between an eligible community transfer body for asset transfer requests (minimum of 20 members) and an eligible community body for a community right to buy registration (minimum of 10 member) should be aligned.

Recommended that the minimum be reduced to 10 members.

2. Eligibility – Arms Length Management Organisations (ALEOs)

Where relevant authorities are not specifically designated within Schedule 3, community groups have considerable difficulty in even starting the asset transfer process. Examples of this include Lothian Buses (where a group was interested in the Tramway Bowling Green), City Property in Glasgow and Jobs and Business Glasgow. Although the Community Empowerment Act is clear that Scottish Ministers can add new relevant authorities, this power has only been used once – to designate Historic Environment Scotland.

78 (5) In subsection (4)(C), “publicly-owned company” means a company that is wholly owned by one or more relevant authorities”

78 (6) For that purpose, a company is wholly owned by one or more relevant authorities if it has no members other than –

- (a) The relevant authority or (as the case may be) authorities*
- (b) Other companies that are wholly owned by the relevant authority or (as the case may be) authorities, or*
- (c) Persons acting on behalf of –*
 - (i) The relevant authority or (as the case may be) authorities, or*
 - (ii) Such other companies*

78 (7) In this section, “company” includes any body corporate.

As was demonstrated by Lothian Buses, the organisation (which is wholly owned by Edinburgh City Council, West Lothian Council, East Lothian Council and Midlothian Council) refused to accept that it was covered by the Community Empowerment Act as it wasn't specifically designated as a relevant authority and sold the bowling green to a private individual. For other ALEOs, any discussions with community groups tend to be framed under being a 'voluntary' process by the public body and therefore none of the community rights under the CEA actually apply in practice. Where a body isn't listed in Schedule 3, there is no clear route for communities to make a request to have them designated, other than lobbying the Scottish Government directly. In time sensitive asset transfers this is unlikely to be successful in an acceptable timeframe, causing the asset to be lost to the community - as happened with Lothian Buses.

Given the changing structures of ALEOs over time, it is recognised that it may be difficult to formally designate all the existing ALEOs as relevant authorities. Therefore, it would be beneficial for a review of ALEOs to be undertaken to determine which fall under the definition in Section 78 and can then be

designated as part of a Ministerial order. This would bring clarity for communities and ALEOs as to what rights and duties they have with regards to asset transfer.

Review all the existing Local Authority Arms-Length External Organisations to determine which should be classified as relevant authorities. Bring forward a Ministerial Order to designate those bodies that meet the criteria.

3. Expression of Interest (Eoi)

Prior to the drafting of the Community Empowerment Act, the majority of local authorities were operating a voluntary 2- stage process which included an expression of interest. While the CEA legislation is a single stage process, the guidance encourages community organisations to flag their interest in a particular asset and for the relevant authority to provide information (where known) on the condition of buildings, usage levels burdens on title etc.

1. It continues to be difficult for groups to access information from relevant authorities on the condition of assets and running costs etc. While some of this can be down to combined energy costs across an authority – in other cases, it is perceived as a reluctance to engage with community bodies.
2. Where a relevant authority has adopted an Eoi stage, particularly if this involves a comprehensive application form, it can be easy for communities to assume that they have submitted their asset transfer application rather than this being a **preliminary Eoi stage**. The fact that this does not constitute an asset transfer request, and that the community rights therefore do not apply until the validation date is triggered can be missed by applicants. This **lack of clarity** can lead to communities understandably thinking that they have started the process to secure an asset and that the asset transfer rights apply to their situation. Going from this type of comprehensive preliminary EOI stage to a full asset transfer can seem disproportionately bureaucratic.
3. Notwithstanding the points raised, the key area of misunderstanding at this pre-asset transfer stage is **what constitutes a ‘complete’ asset transfer request**. The flow chart within the Guidance Notes asks if all the information is complete and if this is not the case then the relevant authority sends a notice to identify missing information. Despite Section 9.4 making it clear that **only outline information** under each heading is required for a request to be accepted as complete (and that if further information is required this can be sought at a later stage), many relevant authorities are interpreting this as a complete application, often requiring the inclusion of a full business plan before the validation is triggered. In addition, COSS is seeing relevant authorities interpreting the 6 months’ timescale as their timescale to make a decision.

While everyone would accept that it is within community groups’ interests that they submit as complete an asset transfer request as possible, there is of course a balance to be struck on the amount of information that is detailed at this stage in the asset transfer process. Communities are often submitting outline bids where they feel that an asset may be being disposed of and they have to act quickly or that there could be other interest in the asset, including the private sector.

4. From a community perspective, **the lack of defined timescales** for relevant authority responses in the EoI stage is incredibly frustrating: community bodies can be caught in a cycle of requests for further information **without recourse to the rights** provided when a formal asset transfer request has been accepted as being complete and a validation date issued. It is at this pre-application stage that most community groups experience delays; from anonymous automated responses with either no timescale given for response or a standard 20-working days.

Where a relevant authority is supportive and flexible at this EoI stage, community groups are able to approach funders and secure funding to develop business plans and other supporting documentation. However, funders in this area tend to require an in-principal agreement that the asset is available. If this is not forthcoming then the insistence on business plans, and other supporting documentation at the stage before the asset transfer application is submitted, makes it almost impossible for community organisations to be able to access the necessary funding, such as Scottish Land Fund Stage 1 grants.

The uncertainty over asset transfer timescales, and whether the asset might not be available for transfer, makes funders understandably nervous to invest

Section 9.2 the guidance to include clear details of support available to community groups on governance and eligibility criteria as a community transfer body. Including signposting to external support organisations such as COSS.

Introducing a 10-working day response time to a formal asset transfer request with details of any missing information required to trigger the validation date would alleviate some of the issues in this informal stage and clarify the situation for relevant authorities. Further timelines should be introduced for the supply of additional information to the validation date.

It should not be acceptable for an asset transfer to be rejected because of a lack of information, without there being a paper trail demonstrating that this was sought from the community group ahead of the decision-making process and that the requirement for this information was proportionate to the scale of asset transfer request.

Improved guidance for relevant authorities on seeking additional information from communities after the asset transfer request has been validated would also be beneficial.

4. Requests from other Community Transfer Bodies

Where there is interest in the same asset from competing groups it can be one of the most challenging situations for the relevant authorities to manage the process. In this situation, it is rarely option for the groups to work together to secure the asset.

Section 8.6 Strengthen the guidance to include, for example, a flowchart on how this process is managed and where the prohibition applies and is extinguished for the competing groups.

5. State Aid

With the UK exit from the EU, the State Aid rules no longer apply.

Section 11.8 - The Guidance to be updated to cover the replacement Subsidy Control Framework.

6. Asset Transfer – Joint Valuation

While there is no statutory requirement, guidance notes 12.15 suggest that parties share the cost of a joint valuation equally. However, the experience of some communities has been that even when they do commit to a 'joint evaluation' the assessor reports to the local authority, with no regard for the community body, who has met half the costs.

While the original principles were based on the approach being taken by Forest Enterprise in their National Forrester Land Scheme (NFLS) and was designed to reduce cost and create a stronger basis to reach agreement. In practice we are not aware of this being a particularly common approach and where it is used, it appears to cause confusion and effectively weaken the communities' negotiating position.

In terms of independent valuations, there are groups who get an independent RICS red book valuation and the Relevant Authority does not accept it. A recent example of this is the Concrete Gardens in Glasgow who have an independent valuation which is not accepted by Jobs and Business Glasgow. The group is now caught between the Scottish Land Fund, who will only fund on the basis of a percentage of market value, which has been provided by the group's surveyor and the value that the relevant authority place on the site.

A review and strengthening of the guidance in this area is recommended.

Chapter 12 of the guidance can cause confusion – it is titled “Obtaining a joint valuation of the asset” but contains general information on valuation that would sit better in chapter 11. As it stands, it can be interpreted that sections in chapter 12 such as ‘what is market value’ and ‘who should value the property’ are applicable only when a joint application is being considered. Merging these two chapters would reduce any potential confusion.

Decision Making

Price, Valuation and Non-financial benefits

Over the past 5 years, various pieces of work have been undertaken on capturing the benefits delivered by community asset transfer. This includes the papers produced by both the Scottish Government Community Empowerment Team and COSS. In the recent Appeals to Scottish Ministers the Reporter has also produced considerably more detailed analysis on the economic development, regeneration, public health, social wellbeing and environmental wellbeing being delivered by the community proposals.

The Guidance on the non-financial benefits of asset transfer in Section 10 to be updated to reflect this increased knowledge and experience to provide a clearer pathway for relevant authorities to assess asset transfer requests.

Negotiations

Negotiating the terms of the asset transfer is proving to be one of the most challenging and expensive areas within the asset transfer process for community groups.

- 1. Clawback Arrangements** - there continues to be a high sense of risk within the relevant authorities associated with the transfer of public assets into community ownership. Rather than work through a process of checks to establish the genuine level of risk associated with particular transfers, the approach being taken by many is to introduce often excessive clawback arrangements on the terms of transfer – even where virtually market value for community use is being paid. Examples of these disproportionate terms include 100% uplift in the value of the asset in perpetuity or 100% for years 1-15 and 50% years 16-40.

Where the community organisation is a charity there are concerns that these types of arrangements may well be contrary to the interest of the charity with potentially charitable funds being expended to add value to an asset which ultimately may be returned to a non-charity (i.e. public body) under clawback provisions. COSS has had previous dialogue with OSCR in relation to this area, with OSCR continuing to have an interest in this area.

The Scottish Land Fund, who is the key funder for acquiring assets, has strengthened their policy in relation to the clawback terms being applied by relevant authorities. They are keen that assets being transferred into community ownership do not have onerous terms applied. If agreement cannot be reached for proportionate terms and timescales, then SLF may elect not to fund the acquisition.

For communities to enter into protracted negotiations over the terms of their transfer is proving to be a very expensive process with legal fees considerably beyond the standard levels for conveyancing these types of buildings.

The legislation does provide the option for a review and/or appeal against the terms of transfer, this negotiating phase can however be arduous for communities with relevant authorities not complying with the timelines and/or repeatedly seeking extension periods. Communities at this stage in the process have to balance seeking a review/ appeal, which could take anything up to 12 months, or accept the ongoing requests for extensions.

Despite the Guidance being reasonably comprehensive on protecting the discount, many relevant authorities continue to seek to apply disproportionate terms to transfer. Further direction from the Scottish Government / Audit Scotland would be helpful. This could include targeted training at legal teams within the relevant authorities.

COSS are currently undertaking a review of the scale of legal costs associated with asset transfer and how these are being funded (or not) by community groups.

Consideration to be given to sourcing additional resource/ creating a separate budget to support communities' legal costs. This is particularly important for when communities enter the review/ appeal process.

Reviews and Appeals

The review and appeals processes are some of the most complex areas of the legislation, making them difficult for communities and RAs to navigate successfully. It is often during this part of the process that the stark disparity between a relatively well-resourced Relevant Authority (RA) and a community group relying on volunteer effort is most visible. COSS has experience from a number of cases where the wellbeing of individuals heavily involved in this part of the process has been severely affected. This should be considered when assessing how well the legislation is meeting its objectives and steps should be taken to reduce the significant time pressures currently being placed on volunteers.

An area that requires attention, that would benefit both the RA and community groups significantly, is the time allowed for communities to request a review or appeal following an adverse decision. The current 20 working days is simply insufficient for a community to set out their case and collate all the necessary evidence. Addressing this will lead to better quality applications from community groups and reduce the need for clarifications and additional information to be sought by those carrying out reviews and appeals.

An additional benefit from extending the available time will be to enable improved negotiation following an agreement of an asset transfer request where the terms and conditions are unacceptable to the community. Currently there is only 20 working days to conclude complex negotiations around conditions, often involving the community, the RA and a major funder who has their own requirements. This is not possible within 20 days and in a number of instances the community has felt compelled to appeal, simply to preserve that right, when they would have preferred not to – this also set the negotiations on a more adversarial footing and could easily be avoided if more time were available.

Increase the time available to communities to submit a review or appeal following an adverse decision notice to 3 months from the decision date.

Currently a review by a local authority requires a new decision to be issued within six months. However, a review or appeal to Scottish Ministers has no deadline for decision. There have been positive steps taken recently by Reporters to shorten the time taken for Ministerial reviews and appeals. However, aligning the ministerial reviews and appeals with the local authority process would provide important clarity for community groups and funders. A similar mechanism could be introduced which allows an extension beyond the six months if agreed by the community.

Align the ministerial review and appeals process with local authority review process by introducing a six-month deadline for a decision to be made, with an option for extension if agreed by the community.

The Regulations outlining the process and timescales for the review by Scottish Ministers are not currently easy to follow as they are intertwined with the local authority review regulations. This is not easy to interpret and is causing confusion for communities and RAs.

The current situation with Viewpark Gardens highlights just how challenging it is community groups at this stage in the process.

Disentangle Ministerial review regulations from local authority review regulations and present in two separate documents to aid clarity. An alternative approach would be to make improvements to the guidance to include additional information on the processes, that is currently only contained in the regulations. The addition of a flowchart would also be helpful.

Relevant Authorities should have a responsibility to let communities know when deadlines are approaching which could negatively impact their ability to use their rights. I.e. where a Relevant Authority doesn't issue a decision notice within the allowed time but no extension is agreed – in this scenario, if the community allows time to pass beyond the 6 months allowed for decision, plus 20 days for appeal/review, the community loses its right to review or appeal. This negatively impacts the community even though they may have been acting in good faith by allowing the RA more time to make its decision.

Introduce a mechanism that either requires a relevant authority to notify the community that the six months has now passed and the deadline for appeal is approaching or remove the 20-day limit for reviews/appeals where no decision notice has been made.

Community Empowerment Act - Reporting

Notwithstanding the low level of reporting from the relevant authorities, the recent research undertaken by COSS on the asset transfers to date has demonstrated the richness of the information that can be drawn from more detailed information.

In addition to reporting details of the requests dealt with through the formal asset transfer process, DTAS believes that if relevant authorities were encouraged to also report on asset transfer activity which they've undertaken outwith the Act, this would encourage negotiated transfers, and lessen the pressure on relevant authorities to force every community transaction through the CEA process. Particularly where short terms leases are concerned and the terms are not contested.

Given the volume of asset transfers, rather than only providing details of the number of assets transfer requests, dates and decisions made etc, it would be a relatively easy process for the relevant authorities to detail the community group and the asset involved in the transfer. This would give a stronger basis for analysis.

Interestingly COSS is getting a sense that there is a willingness within local authorities in particular to add more context around their asset transfer activity.

Recommendation is to review reporting requirements, providing guidance to relevant authorities on reporting lease and ownership information on transfers outwith CEA.

Increase the reporting requirement to include details of the community group and assets transferred.

Guidance to be changed to include sending the Scottish Government a copy of the annual report rather than it only being published.

Governance Documents and Eligibility Criteria

COSS believes that the articles or constitution of a community body are there to provide a sound legal and governance framework for the organisation. In this sense the governance document should very much belong to the community body. However, the current experience of communities engaged in 'community empowerment' activities (such as asset transfer and community ownership) is that they are increasingly being told by the Scottish Government, public bodies and funders that for eligibility purposes they need to change their governance documents in various ways.

There is often a serious lack of understanding about how much work, time and voluntary effort this involves for the community body, and at times the requirements being placed on community bodies are clearly contradictory. Prior to the Community Empowerment Act, funders would have dealt with some of these issues by imposing 'conditions of grant' – post CEA however, some key funders seem to be trying to address these issues by requiring changes to governance documents.

Dissolution Clause

The asset transfer right (but not the community right to buy right) places a specific requirement on the wording of the dissolution clause within those community bodies who are incorporated as companies limited by guarantee, even when they have charitable status. In contrast, this requirement does not apply to community bodies constituted as SCIO's (presumably because of their charitable status and the position of OSCR on disposal of assets). If this is the reason for their exemption, then in the interests of consistency, other organisations with charitable status should also be exempt from this requirement.

The CEA guidance sets out the following requirements in relation to the wording of the dissolution clause, which is legally dubious and creates avoidable confusion:

.....*The property must be transferred:*

(i) to another community transfer body,

(ii) to a charity,

(iii) to such community body (within the meaning of section 34 of the Land Reform (Scotland) Act 2003) as may be approved by the Scottish Ministers,

(iv) to such crofting community body (within the meaning of section 71 of that Act) as may be so approved, or

(v) if no such community body or crofting community body is so approved, to the Scottish Ministers or to such charity as the Scottish Ministers may direct.

DTAS's interpretation of this guidance is that a dissolution clause complies with the guidance if **any one or more** of the above clauses appear in the Articles. The Scottish Government's interpretation however, is that all five parts must be included – the implication of which is that every existing incorporated community body would need to change their Articles at a general meeting to meet the criteria.

In addition, there is a fundamental incompatibility between the dissolution clauses required for asset transfer and that required for the community right to buy, and these apparent contradictions need to be resolved. For example, within the supplementary legislation, any organisation which meets the current CRTB eligibility criteria is deemed to qualify as a community transfer body (CTB) – even when the articles of the community organisation don't meet the dissolution criteria.

For consistency, organisations with charitable status should be exempt from the requirement to have the wording of the dissolution clause.

With those who qualify as a community transfer body under the Community Right to Buy eligibility criteria being eligible for an asset transfer, despite the requirement of only 10 members and different dissolution clause requirements - greater alignment would be beneficial.

Sharing Practice

As legislation providing communities with a framework of rights it is unlikely that the Community Empowerment Act will be tested in court as few communities have the resources to take this forward. The public sector Ombudsman will only consider complaints from individuals rather than groups, as was established by Biggar Men's Shed and their complaint in relation to South Lanarkshire Council.

During the last 6 years since the Part 5 has been in force, the Scottish Government has given direction on the legislation including that, for example, relevant authorities cannot demolish a building while it is subject to a review/ appeal.

In the absence of case law, it would be useful for relevant authorities (and communities) if this information could be shared on an appropriate forum – Scottish Government website/ updates.

Issues for Future Consideration

1. Funding

The expansion of the Scottish Land Fund has been very welcome, and has already assisted many community bodies acquire land and other assets. However, there is a key issue around the lack of post-acquisition developing funding, which is often required to make these assets fit for purpose and financially sustainable. Without financial support for developing assets, increasing the levels of community ownership is likely to stall and ultimately the longer-term sustainability of these assets undermined. **COSS sees this as perhaps the single most important issue if asset transfer/ community ownership ambitions are to be achieved.**

2. Large Scale Public Sites

When considering large scale public assets are concerned, the sheer scale of these sites makes it extraordinarily difficult for community groups to engage with their development, as does the nature of the often-accompanying large scale development processes

In the main this has been on NHS land with the former Murray Royal site and the potential asset transfer requests on the Astley Ainsley site in Edinburgh; involving potentially a community of interest for a particular building and the community councils surrounding the site keen to have a say in the development of the full site.

COSS is also coming across other examples in towns and cities where communities are looking to be actively involved in master-planning processes or wish to access part of a larger development site and **it may therefore be useful to reflect on how the community rights interplay within these situations and often large-scale development processes.**