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## **REVISION OF THE COMMUNITY ASSET TRANSFER POLICY**

**Report by Executive Director Finance and Regulatory**

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### **SCOTTISH BORDERS COUNCIL**

**17 JUNE 2021**

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#### **1 PURPOSE AND SUMMARY**

- 1.1 This report seeks approval for an amendment to the Council's Community Asset Transfer Policy along with necessary changes to the Schemes of Administration and Delegation.**
- 1.2 On the 29<sup>th</sup> of November 2018 Council approved a Community Asset Transfer Policy through which it would comply with the provisions of Part 5 of the Community Empowerment (Scotland) Act 2015. That Act gives community bodies a right to make requests to a Local Authorities for the transfer of any land or buildings they feel they could better utilise.
- 1.3 The Act creates a timeline for processing an application and requires applications to be determined within six months of a valid application being received. It also established a 2-tier process – whereby an Authority is required to establish decision making procedure and an appeal procedure too.
- 1.4 The Council's procedure provides that an Officer group (the Asset Transfer Group) makes the initial decision and that any appeal will be heard by an Ad Hoc Asset Transfer Appeals Committee. The law then provides a further appeal to Scottish Ministers.
- 1.5 Scottish Borders Council received its first Community Asset Transfer Request for land held by the Common Good earlier this year. In considering how to best progress that application it was recognised that the best decision making body in respect of Common Good issues is perhaps Common Good Trustees, and not Officers.
- 1.6 This report therefore recommends that the Asset Transfer Policy is amended to provide that any Community Asset Transfer Request in respect of Common Good Assets is determined in the first instance by the relevant Common Good Fund Sub-Committee. It is further recommended that any appeal should thereafter be determined by Asset Transfer Appeal Committee, acting as Common Good Trustees.

## **2 RECOMMENDATIONS**

### **2.1 Council is asked to:-**

- (a) approve the revisions to Community Asset Transfer Policy detailed in paragraphs 5.6 to 5.8 of this report;**
- (b) agree to amend the Schemes of Administration as detailed in paragraphs 5.9 to 5.11 to reflect those changes.**

### **3 BACKGROUND**

- 3.1 The Community Empowerment (Scotland) Act 2015 (the Act) gives community bodies a right to make requests to all Local Authorities, Scottish Ministers and a wide-ranging list of public bodies, for the transfer of any land or buildings they feel they could better utilise.
- 3.2 The background to this legislation is the belief that empowering communities is essential to creating a more prosperous and fairer Scotland and that it is the role of central and local government to work in partnership with communities to support them to lead change for themselves. The legislation is designed to support the view that community ownership or control of land and buildings can make a major contribution towards strengthening communities in this way.
- 3.3 In November 2018, Scottish Borders Council adopted a then new Community Asset Transfer Policy to enable it to comply with the legislative framework. That Policy has been in operation since that time. Only one asset transfer has progressed fully through that process as other requests have been able to be agreed through less formal processes.

### **4 EXISTING ASSET TRANSFER PROCESS**

- 4.1 The Community Asset Transfer Policy is a multifaceted document and is contained in Appendix 1. It deals with matters such as the requirements of a valid transfer request, the factors Scottish Borders Council will have regard to in determining a request and the processes to be followed. This report does not seek to change any of those matters other than to amend the decision-making bodies for requests for transfer of Common Good Assets.
- 4.2 As noted above the legislation requires the Council to establish a two –tier process, being an initial decision making procedure and an internal review procedure thereafter.
- 4.3 Stage 1 of the current process provides that an Officer Asset Transfer Group assesses and determines a request. This Group is chaired by the Service Director Assets & Infrastructure and includes the Service Director Customer & Communities, the Chief Financial Officer, the Chief Legal Officer and the relevant Service Director.
- 4.4 Any review of the Group decision is to be heard by an Ad hoc Committee of Council called the Asset Transfer Appeals Committee. All Members of Council are Members of this Committee and if required 5 Members will be selected for any review hearing. This Committee has never yet been called upon to determine a review.

### **5 COMMON GOOD MATTERS**

- 5.1 Common Good property is a distinct part of the property that was owned by the former Burghs. It is now owned by the Council, but is held in its

capacity as Trustees of the Common Good and must be administered for the benefit of the residents of the former Burgh. Given that unique status, it is considered that any decisions regarding the disposal of this property should not be made by Officers but should, rather, be made by the Common Good Trustees. It is therefore proposed that the Community Asset Transfer Policy is amended to ensure that this is achieved.

- 5.2 It is therefore proposed that any Community Asset Transfer Request made in respect of Common Good Property should be determined by the relevant Common Good Sub-Committee. It is proposed that any review would be made to the Asset Transfer Appeals Committee, and in this instance the Committee would be acting as Common Good Trustees.
- 5.3 In any Community Asset Transfer, there may be occasions when an Asset Transfer Body will seek transfer of the property at less than market value. There may therefore be occasions when a Common Good Sub-Committee is minded to agree to do so. Given the particular nature of Common Good property and the potential complexities of managing legal duties under the Act while also complying with the over-riding legal duty to manage the Common Good for the benefits of the residents of the former Burgh, it is considered that it would be helpful to provide a further tier of scrutiny in that scenario. It is therefore proposed that, should a Common Good Sub-Committee be minded to agree a Community Asset Transfer request and be minded to transfer property at less than market value, *the value* of that transfer should be referred to another committee for ratification. It is therefore proposed that a new function is added to the remit of the Asset Transfer Appeals Committee to undertake that ratification process. If the Committee ratifies the decision of the Sub-Committee the matter will simply progress. If it does not the matter will be referred back to the Sub-Committee to reconsider the value at which the Asset should be offered for transfer.
- 5.4 In concluding that such further scrutiny is appropriate for assets held as Common Good, it was further noted that all other property assets held by the Council are held subject to the Council's duty to achieve Best Value. It is therefore considered that adding this further layer of scrutiny would be valuable in any other Community Asset Transfer where the Officer Asset Transfer Group concludes an asset should be transferred at less than market value.
- 5.5 Even in circumstances where the ratification process has been followed, the Asset Transfer Body retains a right of review when the decision has been made. However, if the Asset Transfer Appeal Committee has already been involved in the process, it cannot then also deal with the review. It is proposed that in such situations, any review would be determined by Council. Appendix 2 contains 2 flow charts detailing the steps in these decision making processes.
- 5.6 It is therefore proposed that a new Section 8A is added to the policy and that it provides as follows:

“8A Where the asset transfer request relates to Common Good property, the following procedure will apply, following the informal pre-application discussions:

- (a) Stage 1 – a valid community asset transfer application is considered by the relevant Common Good Fund Sub-Committee:
  - (i) regard is made to all relevant issues including the benefits of the asset transfer and the benefits of any alternative proposal (including existing use or potential disposal in the case of surplus assets) and the Council’s ability to carry out its functions;
  - (ii) regard will be had to benefit of the residents of the former Burgh
  - (iii) if the Sub-Committee form a preliminary view that they are minded to agree the asset transfer request in some form then a further consultation will be held where the proposal would result in any change of use of the land.
  - (iv) the application is accepted or refused (including reason(s) for refusal);
  - (v) if accepted **and** the Sub-Committee are minded to transfer land at a value less than market value, the matter will be referred to the Asset Transfer Appeal Committee for ratification. The only part of the decision which is subject to ratification is the value at which the transfer is being offered.
  - (vi) if otherwise accepted, the terms of agreed offer for transfer are given to the Community Transfer Body;
  - (vii) if the Asset Transfer Appeal Committee ratify the decision of the Common Good Sub-Committee, the terms of agreed offer for transfer are given to the Community Transfer Body
  - (viii) if the Asset Transfer Appeal Committee does not ratify the decision, the matter will be referred back to the Common Good Sub-Committee to reconsider the value at which the transfer is to be offered.
  - (ix) for the avoidance of doubt the ratification process will be required again if the Common Good Sub-Committee again determine to transfer the Asset at a value less than market value
  - (x) if the terms of an agreed offer for transfer are unacceptable to the Community Transfer Body or if the application is refused, the Community Transfer Body will be given details of the appeal process.
  
- (b) Stage 2 – a Community Transfer Body has a right of review which will be heard by the Asset Transfer Appeal Committee acting in its capacity as Common Good Trustee. The right of appeal applies:
  - (i) if their request is refused;
  - (ii) the request is agreed but the terms and conditions in the decision notice are significantly different from those in the request;
  - (iii) no decision notice is issued within the required period; or

(iv) once an asset transfer request has been agreed, no contract has been concluded within the period allowed."

(c) If the Asset Transfer Appeal Committee has taken part in Stage 1 of any Community Asset Transfer request, the Stage 2 review will be heard by Full Council, acting as Common Good Trustee."

5.7 To add the further layer of scrutiny to all other Community Asset Transfer requests Section 8 of the policy will also be amended to add the following paragraph in Stage 1:

"(iv) if accepted **and** the Asset Transfer Officer Group are minded to transfer land at a value less than market value, the matter will be referred to the Asset Transfer Appeal Committee for ratification. The only part of the decision which is subject to ratification is the value at which the transfer is being offered"

And in Stage 2 the following:

"(c) If the Asset Transfer Appeal Committee has taken part in Stage 1 of any Community Asset Transfer request, the Stage 2 review will be heard by Full Council"

5.8 To implement this proposed changes, it is suggested that further amendments to the policy are necessary. They are as follows:

(a) A new paragraph 7 (e) is added which provides " the Community Asset Transfer Body will be asked to meet informally with the relevant Common Good Fund Sub-Committee to hold a preliminary informal discussion on their proposal"

(b) Paragraph 9 is amended to read: "The Community Transfer Body has a right to be represented at and address the Asset Transfer Officer Group, or Common Good Fund Sub-Committee, and the Asset Transfer Appeal Committee or Council all as appropriate"

(c) Paragraph 10 is deleted as its provisions have been incorporated into new clause 8A.

5.9 To achieve the proposal recommended in this report, there will be a need to changes to the Councils' Scheme of Administration. The Scheme of Administration currently sets a value limit of £20,000 on the ability of the Sub-Committees to agree property transaction. Transactions above that value are deferred to Council for a final decision. Since the legislation requires a two stage process and the second stage, this will require to be amended. It is therefore recommended that an additional function is added to the remit of the Common Good Fund Sub-Committees as follows:

"to determine any Community Asset Transfer Request made in respect of Common Good Property. For the avoidance of doubt, there is no financial value limit to the exercise of this function. However in the event that a Sub-Committee is minded to transfer property to a Community Transfer Body,

the matter will require to be referred to the Community Asset Appeal Committee for ratification.”

5.10 A new function will be added to the functions of the Community Asset Appeal Committee in the following terms:

“2. Determining whether to ratify the value at which a Community Asset Transfer is to be made, where the Asset Transfer Officer Group or a Common Good Sub-Committee has determined to agree to that transfer at a value less than market value.”

5.11 A new function will be added to the functions of Council in the following terms:

“In situations where the Community Asset Appeal Committee been engaged in Stage 1 of any Community Asset Transfer request, the consideration and determination of reviews by any Community Transfer Body made under Section 86 of the Community Empowerment (Scotland) Act 2015, where the Asset Transfer Officer Group or a Common Good Fund Sub-Committee has:

- (i) refused the request; or
- (ii) agreed to the request but the decision notice relating to the request specifies material terms or conditions which differ to a significant extend from those specified in the request; or
- (iii) failed to issue a decision within the statutory period.”

## **6 IMPLICATIONS**

### **6.1 Financial**

There are no costs attached to any of the recommendations contained in this report.

### **6.2 Risk and Mitigations**

- (a) there is a risk that if the recommendations contained in this report are not agreed the Council will suffer reputational damage for allowing decisions regarding the disposal of Common Good Assets to be made by Officers and not Common Good Trustees.
- (b) there is a risk that the Council could suffer reputational damage for creating a process which is inconsistent by enabling Common Good Sub Committees to dispose of assets with no financial limits in respect of Community Asset Transfer Requests when the Sub-Committee are bound by financial limits in all other disposals of property. This risk is mitigated by having clear rationale for the approach and is further mitigated by the process proposed in paragraph 5.3.

### **6.3 Integrated Impact Assessment**

As this report only modifies the decision making process, it is considered that its proposals do not give rise to any impact under the Equality Act 2010.

#### **6.4 Sustainable Development Goals**

The recommendations could have a positive impact on Sustainable Development Goals 1, 3 and 16. The proposal is that these decisions should be made locally which not only directly contributes to goal 16, but could also contribute to goal 1 by reducing the cost for people to attend decision-making meetings and also to goal 3 by encouraging people to take the shorter journey to these meetings by public transport or even walking.

#### **6.5 Climate Change**

The proposals in this report create the possibility to play a positive impact in respect of Climate Change. By enabling decisions about local matters to be made locally, by Councillors who live locally reduces the need for travel to meetings (when they take place in person). This reduces the use of fossil fuel and could assist in ensuring optimal efficiency of operation.

#### **6.6 Rural Proofing**

This proposal complies with SBCs rural proofing policy as it drives decision making to local areas.

#### **6.7 Data Protection Impact Statement**

There are no personal data implications arising from the proposals contained in this report.

#### **6.8 Changes to Scheme of Administration or Scheme of Delegation**

This report recommends changes to the Scheme of Administration as detailed in paragraphs 5.7 to 5.9.

### **7 CONSULTATION**

7.1 The Executive Director (Finance & Regulatory), the Monitoring Officer/Chief Legal Officer, the Chief Officer Audit and Risk, the Service Director HR & Communications, the Clerk to the Council and Corporate Communications have been consulted and any comments received have been incorporated into the final report.

7.2 Others to be consulted if required are –

- Corporate Equalities and Diversity Officer – for any new or revised policies/strategies to assure Equality Impact Assessment.
- Procurement Officer – if you are buying any goods or services.

**Approved by**

**Name**  
**Title**

**Signature .....**

**Author(s)**

Name	Designation and Contact Number
Nuala McKinlay	Chief Legal Officer

**Background Papers:** [insert list of background papers used in compiling report]

**Previous Minute Reference:** [insert last Minute reference (if any)]

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## **APPENDIX 1**

### **SCOTTISH BORDERS COUNCIL CURRENT COMMUNITY ASSET TRANSFER POLICY**

1. The aim of this Policy is to make it as simple as possible for community groups to make an enquiry about asset transfer and start the application process to purchase or lease land or property from the Council, in compliance with the Community Empowerment (Scotland) Act 2015 ("the Act"). To make a valid asset transfer request, an organisation must qualify as a "Community Transfer Body", defined in the Act as being either:
  - (a) a community-controlled body; or
  - (b) a body that is designated as a Community Transfer Body by an order made by the Scottish Ministers.Section 19 of the Act identifies the requirements necessary to qualify a community group as a community controlled body. Section 80 identifies further requirements necessary to qualify a Community Transfer Body which can take ownership of property (rather than just lease or acquire other rights in property).
2. The Council recognises that handing over the ownership or stewardship of an asset to a Community Transfer Body can have a valuable role in supporting and sustaining local communities.
3. It further recognises that community ownership of assets can make an important contribution to the range of innovative, bottom-up solutions that community groups can develop to address local needs. Importantly, these solutions not only meet the needs of the local people, they can also contribute to the delivery of Council and national strategic priorities.
4. A Community Transfer Body may apply for the transfer of any land or buildings that belong to or are leased by the Council, including those leased to Live Borders or other users for example. Once a valid transfer request has been submitted, the Council will not transfer the land or property to any other person, other than the applicant body, until the request process has been finalised, unless that land or property has already been made available for sale or lease, or the Council is already in negotiation with another person for transfer of the land or property.
5. The Act provides that a community can be any group of people who feel they have something in common but who also meet the criteria specified within the Act. It may be that they live in the same area or that they share an interest or characteristic. Communities of interest could include faith groups, ethnic or cultural groups, people affected by a particular illness or disability, sports clubs, conservation groups, clan and heritage associations, etc. They may be very specialised or local, ranging up to national or international groups with thousands of members.
6. The Council will fully consider all asset transfer requests on their own merits in accordance with Scottish Government guidelines. In making a decision, the Council will have regard to all relevant issues including the benefits of the asset transfer and the benefits of any alternative proposal (including existing use or

potential disposal in the case of surplus assets) and the Council's ability to carry out its functions.

7. The Act requires that Community Transfer Bodies must provide certain mandatory information as part of any asset transfer request. Failure to provide that information renders an application invalid. In the interests of consistency and completeness, Community Transfer Bodies will be asked to submit asset transfer requests using the standard application form. To enable the Council to fully consider asset transfer requests and reach a competent decision within the statutory timescale, Community Transfer Bodies will also be asked to provide the following supporting documentation as part of their application:
  - (a) a copy of the organisation's constitution;
  - (b) a business plan (that is proportionate to the nature of the asset transfer request) that typically covers a minimum 5-year operating period;
  - (c) audited accounts (or a financial projection where the applicant has been operating for less than one year);
  - (d) Annual reports (where these are available).
  
8. Following informal pre-application discussions between the Community Transfer Body and relevant Council officers, the formal process for consideration of any asset transfer request is:
  - (a) Stage 1 – a valid community asset transfer application is considered by the Asset Transfer Officer Group:
    - (i) prior to the meeting of the Group to consider the request, local Members are consulted and the additional steps at paragraph 10 will be taken if an asset is held by a Common Good Fund;
    - (ii) regard is made to all relevant issues including the benefits of the asset transfer and the benefits of any alternative proposal (including existing use or potential disposal in the case of surplus assets) and the Council's ability to carry out its functions;
    - (iii) the application is accepted or refused (including reason(s) for refusal);
    - (iv) if accepted, the terms of agreed offer for transfer are given to the Community Transfer Body;
    - (v) if the terms of an agreed offer for transfer are unacceptable to the Community Transfer Body or if the application is refused, the Community Transfer Body will be given details of the appeal process.
  
  - (b) Stage 2 – a Community Transfer Body has a right of appeal which will be heard by the Asset Transfer Appeal Committee, comprising Elected Members, as detailed in the Council's Scheme of Administration. The right of appeal applies:
    - (i) if their request is refused;
    - (ii) the request is agreed but the terms and conditions in the decision notice are significantly different from those in the request;
    - (iii) no decision notice is issued within the required period; or
    - (iv) once an asset transfer request has been agreed, no contract has been concluded within the period allowed.

9. The Community Transfer Body has a right to be represented at and address the Asset Transfer Officer Group, and, if appropriate, the Asset Transfer Appeal Committee.
10. Additional steps below will be required should the land or property be held by any Common Good Fund as an asset:
  - (a) consult with the community;
  - (b) consult with the relevant Common Good Fund Sub-Committee.
11. In all cases involving transfer of ownership/occupation, appropriate legal mechanisms will be put in place to protect the Council's responsibilities as stewards of public assets. This may include clawback and/or standard security provisions to safeguard any discounts applied to market values, or restrictions on changing the use of an asset from the purpose for which transfer was originally intended. A minimum time period will apply for such restrictions, generally five years from date of transfer.
12. From the date of any transfer, by whatever means the transfer takes place, the Community Transfer Body is likely to become immediately and entirely responsible for the property and payment of all costs associated with their occupation and use. The Council will cease to have any financial and operational commitments relative to the property from the date of transfer, unless otherwise agreed in advance. This will include generally, but will not be limited to, costs and responsibilities relating to the following:
  - (a) the upkeep, repair and maintenance of the asset;
  - (b) alterations or improvements to the asset;
  - (c) all other running costs (including utilities, rates liabilities and insurances); and
  - (d) statutory compliance with Health & Safety or other legislative requirements.
13. Any funding support that may be sought by the applicant from the Council in relation to the proposed asset transfer will be considered against the following criteria:
  - (a) the Council can only be considered as the funder of last resort and applicants will be required to demonstrate that they have exhausted all other avenues of potential funding support;
  - (b) the applicant must demonstrate the reasons behind any funding gap, and that costs have been thoroughly reviewed and cannot be reduced;
  - (c) the Council's contribution to capital costs will only be up to a maximum of 5% of the total initial project capital costs, or a higher figure by specific agreement which can be assessed relative to asset condition at the point of transfer;
  - (d) any proposals for borrowing or annual revenue support must be demonstrated to the Council as affordable i.e. contained within any annual savings that can be achieved that are in excess of those that have already been programmed. Annual revenue support should relate only to operational property costs but as a general rule it should be noted that the Council will not provide revenue support in relation to the actual Community Transfer Body; and

- (e) projects will not usually be eligible for any additional financial support from the Council within a period of 5 years from the date of transfer and this will generally include other sources of Council funding including Community Grants, Small Schemes, Quality of Life etc. to avoid multiple Council sources being exploited and to ensure funds are available for other groups.

Appendix 2 – Flow Carts