

# Community Asset Transfer

## Legal process map

Community Ownership and Management of Assets

# Table Of Contents

Explanatory notes .....	4
Disclaimer .....	4
1. Getting started .....	5
2. Investment readiness.....	11
3. Property development .....	13
4. Take a stake in an asset .....	15
5. Premises Management .....	17

## Introduction

This legal process map forms part of a series of legal guidance notes and documents produced by Anthony Collins Solicitors for the My Community programme, which is funded by the Department for Communities and Local Government.

This paper is aimed at both local authorities and third sector organisations to promote good practice in community asset transfer with a view to making transfer more achievable in practice and more cost effective. *Third sector organisations* are referred to throughout the guidance as *TSO* for the sake of consistency.

Successful asset transfers involve a broad set of processes. This guide only deals with the legal aspects. The aim of this legal process map is to set out the legal implications and the necessary documents at each stage of the asset transfer process. In any given transaction, these may not be sequential or precisely as set out here; this is a guide not a prescription.

## Explanatory notes

The legal process map follows the typical stages of an asset transfer, being the following:

- getting started, which covers preparatory work up to agreement on heads of terms and the overall scope of the transfer ‘deal’
- investment readiness, which includes key elements that a local authority might look to have in place, such as a robust business plan for the asset or assets in question, reassurance on TSO governance, and State aid
- property development, including procurement and managing development
- taking a stake in an asset, including the process of negotiation of documents
- premises management, including monitoring after transfer and long term use.

For each stage, we have identified issues for the public sector and for TSOs. In the third column, on legal costs, we have put in an indicative figure for TSO costs for that element. These are broad guidelines of a likely minimum figure only, and actual costs may be more or less than those indicated, depending on the work involved at each stage. They are based on previous experience of carrying out this type of work for TSOs in this sector.

## Disclaimer

This document is intended to be used as general guidance only. Neither Locality nor Anthony Collins Solicitors can accept any responsibility for any liability arising from its use in any given context. We would recommend that further legal advice is taken before application of the guidance/use of the documents in specific circumstances.

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>1. Getting started</b>			
<b>Impetus</b>	<p>Public sector may start process with:</p> <ul style="list-style-type: none"> <li>• review of single assets or wider property portfolio.</li> <li>• disposal of a class of assets (e.g. community centres).</li> <li>• disposal of assets in a given neighbourhood</li> <li>• disposal of assets by service (e.g. youth services).</li> </ul>	<p>TSO may seek to start process by:</p> <ul style="list-style-type: none"> <li>• registering asset, or a number of assets, as of community value under the Right to Bid.</li> <li>• direct approach to the owning body.</li> <li>• asking DCLG to consider exercising Public Right to Order Disposal.</li> <li>• consulting with the community on their appetite for your proposals.</li> </ul>	
<b>Property</b>	<p>Public sector gathers information to inform decision making:</p> <ul style="list-style-type: none"> <li>• review asset register.</li> <li>• assessing each asset.</li> <li>• understand each asset's potential for development or alternative use.</li> <li>• understanding what is owned and for what purpose.</li> <li>• reviewing use and planning status.</li> </ul>	<p>Establish land ownership, knowing what is being transferred, and any limitations on the use of the land.</p> <p>Review any planning restrictions or current permissions, understanding planning status, rights of way. Your local authority may be able to supply this information; an independent solicitor will be able to verify.</p>	£350 for initial review of legal title and covenants.

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		<p>Visit the site, possibly with a surveyor, to take stock of the condition of the asset and any potential liabilities, i.e. contamination, listed building status, presence of designated invasive plants on the site, such as Japanese Knotweed.</p>	
<p><b>Powers</b></p>	<p>Establish under which powers the public sector body is seeking to transfer, in the light of developing case law and relevant permissions that they have, including consideration of transfer at an undervalue.</p> <p>Ensure there is a clear pathway for obtaining the authority for the proposed transfer (see <a href="#">flowchart on powers to dispose, requirements on disposing at less than market value</a>).</p> <p>Consider impact of any procurement of services or TUPE implications associated with the asset.</p>	<p>Establish the extent of the TSO's powers to own property, with reference to its governing document.</p> <p>Understand the limitations for the public sector - local authorities can only do things where they have a power in statute that enables them to do so.</p> <p>Consider the role of other relevant public bodies, including parish or town councils, alongside district or county authorities.</p>	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		Seek to register asset as of community value under the 'Right to Bid'? (see <a href="#">asset transfer and the Right to Bid compared</a> ).	
<b>Obtaining support</b>	<p>Contact legal services department in the Council at an early stage, so that they are aware of proposals and can provide initial advice. This will help shape discussions and avoid delay later in the process (see <a href="#">good practice in negotiations factsheet</a>).</p> <p>Ensure that there is a continuing dialogue between the Council's legal team and its estate managers who are responsible for the asset(s) in question.</p>	<p>Consider obtaining independent legal advice (see <a href="#">good practice in negotiations factsheet</a>).</p> <p>Get at least three estimates and ask for evidence of knowledge of asset transfer, or at least working with local authorities and TSOs.</p> <p>Consider whether tax advice from an accountant might also be useful.</p>	
<b>Formal process</b>	<p>Follow due process, including dealing with approvals.</p> <p>Understand member approval process including timescale for decisions required by Cabinet or full authority meetings.</p>	<p>Be aware of public sector timescales, factoring this into planning and development schedules.</p> <p>Transfers often require formal approvals from Council committees which require reports and agendas to be set, often well in advance</p>	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		(sometimes months). Council contacts should be able to give details.	
<b>Policy</b>	<p>Understand the link between policy and transfer, including community strategy/plan, asset management, service transformation, relevant national and local policy issues.</p> <p>Document the policy justification for transfer.</p> <p>Link to duties around list of assets of community value.</p>	<p>Ensure planned work is complementary to public sector strategies; developing appropriate partnerships.</p> <p>Become familiar with the relevant Council policies (usually on the Council website) and an awareness of the list of ‘assets of community value’.</p>	
<b>Managing the process</b>	<p>Use the memoranda of understanding and other legal tools to clarify how each organisation will work with the other (see <a href="#">example expectations memorandum and explanatory note</a>).</p> <p>Develop strong working relations with TSO to avoid a ‘them against us’ mentality developing.</p>	<p>Use the memoranda of understanding and other legal tools to clarify how each organisation will work with the other. These can be fairly informal but need to set out clearly who is going to do what by when, and how the TSO and the Council are going to work together (see <a href="#">example expectations memorandum and explanatory note</a>).</p>	£600 to prepare draft memorandum of understanding from template.



Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		It is beneficial to develop strong working relationships with key individuals at the Council to ensure that the project is kept on track and runs smoothly.	
<b>Heads of terms</b>	Provide clarity on what is to be transferred, to whom, on what terms - recorded in heads of terms document. Including review of comparative benefits of freehold or leasehold transfer (see <a href="#">heads of terms</a> ).	Provide clarity on what is to be transferred, to whom, on what terms - recorded in heads of terms document. Important to seek legal advice by this stage to ensure that the heads of terms written up do accurately reflect what has been agreed (see <a href="#">heads of terms</a> ).	£450 for review of heads of terms prior to agreement.
<b>Timescale</b>	Draw up a timeline including relevant approvals by members or cabinet. Where more than one asset is being transferred, reflecting this realistically in the timescale and communicating this to the TSO.	Draw up a timeline including consideration by the board or lead steering group.	£500 to establish governance parameters and prepare timeline of approvals.
<b>Repairs/ refurbishment</b>	Undertake condition survey, agreeing works to be carried out prior to transfer to put property into acceptable condition or how any work is going to be carried out.	Review condition survey, agreeing works to ensure minimum liability, and consideration of further refurbishment.	£ variable.

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		<p>Consider any necessary planning permissions/amendments.</p> <p>Clarify development objectives (see <a href="#">development and procurement and on construction contracts</a>).</p>	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>2. Investment readiness</b>			
<b>Governance</b>	<p>Understanding good practice in community governance.</p> <p>Ensure that you:</p> <ul style="list-style-type: none"> <li>• put appropriate accountability in place</li> <li>• recognise that TSOs are diverse: some serve communities of interest, others particular neighbourhoods or wider areas</li> <li>• make the governance reflect the aims and aspirations of the TSO</li> <li>• review equality and diversity obligations where necessary or relevant.</li> </ul>	<p>Consider:</p> <ul style="list-style-type: none"> <li>• potential legal structures for community organisations, governance standards and helping community organisations be ‘fit for purpose’</li> <li>• whether a new legal entity needs to be created in order to receive the asset(s)</li> <li>• where TSOs are neighbourhood based, and look at: <ul style="list-style-type: none"> <li>○ achieving community accountability</li> <li>○ understanding how organisations are accountable to their communities.</li> </ul> </li> <li>• amending governance arrangements accordingly if needed, including compliance with Right to Bid criteria if relevant (see the <a href="#">Right to Bid</a>)</li> </ul>	<ul style="list-style-type: none"> <li>• Review of current constitution and report £500</li> <li>• Updating constitution including drafting changes and filing £950</li> <li>• Incorporation of new structure £1500.</li> </ul>

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>State aid</b>	Understand the application of the State aid rules and addressing potential problems in asset transfer (see <a href="#">asset transfer and state aid</a> ).	Avoid future State aid clawback and liability.	Initial assessment £500.
<b>Contractual</b>	<p>Understand TSO funding sources and implications for transactions e.g. length of term of any lease, including possible models such as community share issues and social investment.</p> <p>Recognise that it can be important for TSOs to be able to assign leases and sub-let to make funding commitments and business models work.</p> <p>Recognise that TSOs need flexibility regarding the use they can make of the asset in order to make the project financially viable.</p>	<p>Review funding arrangements, including managing grant conditions and dealing with different forms of investment.</p> <p>Review funding possibilities including community share issues, etc. and adapt or alter legal structures to suit.</p> <p>Have an awareness of new Social Investment Tax Relief and relevance for TSO.</p>	Depends on form of funding and documentation.
<b>Managing risk</b>	Assess the risks in the transaction, taking steps to manage appropriately. Take a balanced view on the allocation of risk.	Assess risks in the transaction, taking steps to manage appropriately.	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>3. Property development</b>			
<b>Procurement</b>	<p>Understand the impact of the procurement rules, including:</p> <ul style="list-style-type: none"> <li>• when property/development agreements must be ‘procured’.</li> <li>• what may be done to promote the use of community enterprises and achieve community benefits.</li> </ul>	<p>Take public sector requirements into account; bidding for contract(s) if necessary.</p>	<p>Depending on need: initial advice on compliance with the procurement process (if it applies) - £250.</p>
<b>Development</b>	<p>Agree on how any development/refurbishment is to be carried out. Enter into development contracts where this is the appropriate model.</p>	<p>Engage with the professional team as necessary.</p> <p>Enter into contracts where needed (see <a href="#">development and procurement and on construction contracts</a>).</p>	<p>£ variable.</p>
<b>Managing development</b>	<p>Ensuring that development risks are managed.</p>	<p>Manage the development process:</p> <ul style="list-style-type: none"> <li>• Liaising with employer’s agent and signing off stages.</li> </ul>	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		<ul style="list-style-type: none"> <li>• Being aware of health and safety obligations.</li> <li>• Ensure relevant planning consents obtained.</li> <li>• Manage the payment mechanisms under construction contracts and ensuring that sufficient funds are available to meet those liabilities on time.</li> </ul>	

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>4. Take a stake in an asset</b>			
<b>Property</b>	<p>Negotiate transfer documents - ensuring that documents maintain community accountability and service levels where applicable.</p> <p>Relate terms back to key objectives for the authority.</p> <p>Review covenants in lease or on freehold transfer to ensure they are appropriate (see <a href="#">model lease and explanatory note</a>), also note identifying key issues of difference.</p> <p>Consider whether any additional documentation is required to govern on-going relationship with TSO post transfer.</p>	<p>Understand the nature of the transfer offered, i.e. understand leases and their terms including enabling the long term future objectives of the TSO.</p> <p>Ensure lease or freehold transfer allows organisation to follow its key development objectives.</p> <p>Understand responsibilities in relation to the land, including completing a ‘due diligence’ exercise on legal title - again separate legal advice is likely to be needed here.</p> <p>Explore existence of warranties and whether the benefit of these warranties will be assigned as part of transfer process.</p>	<ul style="list-style-type: none"> <li>• £2500 freehold transfer</li> <li>• £2500 lease</li> <li>• Searches cost between £500 -£800 per property.</li> </ul>

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		<p>Review of tax issues - accountancy support may also be helpful.</p> <p>See <a href="#">model lease and explanatory note</a>, also note identifying key issues of difference.</p>	
<b>Lettings</b>	<p>Recognising importance of sub-lettings to business model where necessary (see <a href="#">options for renting out space</a>).</p>	<p>Dealing with sub-leases, including agreements to lease (see <a href="#">options for renting out space</a>).</p>	<ul style="list-style-type: none"> <li>• Sublease £2500</li> <li>• Licence £950.</li> </ul>
<b>Employment</b>	<p>Understand any staffing implications, reviewing impact of transfer (see <a href="#">extended note on TUPE issues</a>).</p>	<p>Advice on the impact of the <a href="#">Transfer of Undertakings (Protection of Employment) Regulations (TUPE)</a> where there is an asset transfer.</p> <p>Managing transfer.</p> <p>Dealing with pensions (see <a href="#">extended note on TUPE issues</a>).</p>	<ul style="list-style-type: none"> <li>• Advising on the process to be followed to comply with TUPE - £500</li> <li>• Other costs £ variable.</li> </ul>



Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
<b>5. Premises Management</b>			
<b>Long term management</b>	Enable an appropriate range of long term uses.	Deal with future use including enterprise and trading activity.	<ul style="list-style-type: none"> <li>Licences to alter or sublet £950 depending on lease terms.</li> </ul>
<b>Employment</b>		Good practice in employment for community organisations post transfer including awareness of obligations under the <a href="#">Equality Act 2010</a> .	
<b>Business Rates</b>	Consider position in relation to TSO reliefs.	Consider application for either mandatory or discretionary relief.	
<b>Insurance</b>		Limit liability including on employment and premises issues.	
<b>Accountability</b>	<p>Monitor after transfer, including appropriate use and achieving success for all parties.</p> <p>Consider use of joint working tools for codifying productive working relationships (see <a href="#">template Joint Working Agreement</a>).</p>	<p>Report to the community and to the public sector (see <a href="#">template Joint Working Agreement</a>).</p> <p>Ensure compliance obligations are met including: Health and Safety, accessibility, environmental health, fire regulations,</p>	<ul style="list-style-type: none"> <li>£ variable</li> </ul>

Process element	Public sector issue	TSO issue	Indicative legal costs for TSO
		servicing and testing of electrical and gas equipment, Disclosure and Barring Service (DBS) checks if relevant, planning regulations, building regulations and Construction (Design and Management) Regulations.	

©2016

Visit the My Community  
website to find out more:

<http://mycommunity.org.uk/>

Follow us on twitter: @mycommunityhelp