

Cydweithio i gael y gorau o'r ystad gyhoeddus
Working together to make the best use of the public estate

Due Diligence

As part of the Community Asset Transfer (CAT) process, due diligence will help protect the Transferring Body as well as the Community Group/Third Sector Organisation, its clients and the community.



Anyone applying for a CAT will need to check factors like governance, financial resilience, relevant knowledge and skills, and experience of delivering in the community.

This is for guidance only as actual running costs could vary as particular groups may have the ability to reduce some outgoings such as using volunteers for cleaning/ caretaking or being entitled to a reduction in rates. To accurately forecast any future costs, recipients should also be provided with condition surveys; historical maintenance and running costs; and the energy rating and consumption data for the asset. Ensure that any repairing responsibilities, planning conditions, restricted covenants, access requirements etc. are clear and are fully understood by the group, particularly the legal liabilities.

The Transferring Authority should expect to see an outline Expression of Interest (EOI) and business plan from the Town or Community Council, Community Group or Third Sector Organisation setting out its plans for future use management or ownership; governance and funding of the venture.

Request written documentation to demonstrate that they have considered all factors and have planned for them such as business rates, maintenance, insurances, staff payments, pension requirements, and on-costs; including TUPE obligations (it may be useful and or appropriate on occasions to seek professional advice from HR specialists, Wales TUC or Advisory, Conciliation and Arbitration Service (ACAS)), utilities, vandalism risks and statutory compliance, including State Aid and VAT.

Development of the EOI and business plan

You will need to consider the following points:

- Ensure this is done in a way which is relevant and proportionate to the nature/size of the opportunity i.e.: EOI, full Business Case or written submission; and
- A strong business plan will set out clear objectives that demonstrate the achievability of the stated income streams to at least meet the projected costs of the building over a defined period e.g. 3-5 years. This would ensure that the Community Group has properly considered finances and is not, for example, relying solely on an upfront capital grant.

Remember that you will need to consider the differences between leasehold and freehold options and their application:

- Individual Authorities have differing approaches but must be clear about what is offered and why. The methods of transfer may include:
 - Management agreement;
 - Licence to occupy;
 - Short-term lease;
 - Long-term lease; and
 - Freehold transfer.

Make sure that adequate time is allowed to research ownerships and any restrictions/ covenants that may exist. Do not build up expectations; ensure this information is correct at the start. The Transferring Body/ Authority should share this information with the applicant where feasible.

- Consider adding covenants, claw backs or restrictions to any transfers to protect the interests of the Transferring Authority and Community in the future. This requires careful consideration as their inclusion can

have unintended consequences. In the case of projects requiring significant capital investment, asset recipients often have to assemble complex funding packages, which will often include loan finance. In these instances should the transferor place a restrictive covenant, or require first charge, the lenders are unlikely to lend because:

- In the case of restrictive covenants they would have limited disposal options should the loan default;
- In the case where the first charge goes to the transferor, they would be unlikely to recover their capital in the case of default;
- Many lenders require a minimum lease term for a transfer, before they would consider financing an asset. It is therefore important to understand the potential impact of issuing a lease that is too short to allow the recipient to raise funds to develop and improve the asset; and
- For some lenders and grant providers, this can make them ineligible for said funding, and therefore an impact assessment of the possible unintended consequences of the above should be carried out.

Other things to consider

These issues would be of particular importance to Social Enterprises, Mutual Organisations, etc.

- Consider issues such as open space advertising which will add a cost and time element to any transfer;
- Ensure that the property is not subject to any funding claw backs;
- Consider whether the proposal will require State Aid Assessment; and

- There needs to be an appreciation that some transfers can take some time to be completed. This will particularly apply to large projects, which may be subject to complex funding packages. A transfer could take anywhere between 12-24 months to resolve all issues and finalise funding packages.

The Transferring Body/Authority must identify and deal with any staff matters such as TUPE, redundancy and management of change issues in line with employment law. They should ensure that all relevant information is appropriately shared in a transparent and timely fashion to aid the decision making of the recipient organisation regarding the future of the asset.

Devolved Public Sector Bodies should take account of the Code of Practice on Workforce Matters 2014 (the Two tier Code), when considering the future of their assets and whether a service will be transferred alongside a physical asset. The Action Plan on Alternative Delivery Models in Public Services, published March 2016 reflects four key pre-conditions which should be met when considering alternative delivery models:

- Accountability to Local Government or other relevant Public Body;
- Protection of employee terms and conditions;
- Continuation of Trade Union recognition; and
- Consideration of the requirements of the Welsh Language Standards as provided by the Welsh Language (Wales) Measure 2011.

These matters should be concluded as part of a Public Authorities' internal consultation process on potential surplus assets. Where a transfer of a service is foreseen; every effort

should be made to confirm the associated requirements to the recipient of the Asset Transfer and include provisions made to support the protection of employee terms and conditions.

The Transferring Body should apply a consistent but also proportionate approach on a CAT. The level of assessment and due diligence to be applied will vary depending on the nature of the asset being considered for transfer. There are other factors that could be included here. It is important to be prepared to face potential challenges, either in application of policy or legally, if an incident occurs and someone is injured, for example or a Community Enterprise ends up in financial difficulties.

When a Public Body is considering transferring premises or land it must satisfy itself the Community Group fully understands what they will be taking on in terms of:

- The likely cost;
- Their ability to resource it;
- The legal liabilities that they would face in the event of failing to make the initiative financially viable;
- Other legal liabilities associated with the transfer such as responsibility for compliance issues together with health and safety.

- Risk assessments and mitigation should be considered for some types of assets e.g. swimming pools and playing fields have a higher risk of possible serious injury or even death. Recipient Bodies need to be aware of all their responsibilities and obligations e.g. corporate manslaughter; the Transferring Body/Local Authority must also be satisfied that its ability to transfer the premises/land is clear; and
- That the responsibility for any service delivery (SLA/contracts for delivery) is clearly understood by all parties and appropriately documented.

Local Authorities/Public Bodies are encouraged to develop a partnership approach to Community Asset Transfer. Officers from a wide range of services will be actively working with Community Groups to build capacity and provide them with the confidence and skills to take on the ownership and management of assets.

It is important that Local Authorities/ Public Bodies ensure that all relevant information regarding an asset is made available to interested parties sufficiently early to inform planning and decision making on the future operation of said asset and the likely implications on the recipient Body. This will include details of its condition, maintenance costs and title deed restrictions.