

Policy Development & Review Committee	
Meeting Date	3 September 2014
Report Title	Review of Community Asset Transfer Policy
Cabinet Member	Cllr Mike Whiting Cabinet Member for Localism
SMT Lead	Mark Radford
Head of Service	Anne Adams
Lead Officer	Anne Adams
Key Decision	No
Classification	Open
Forward Plan	Reference number:
Recommendation	1. That the Committee considers and comments upon the revised Community Asset Transfer Policy.

1 Purpose of Report and Executive Summary

- 1.1 The purpose of this report is to set out the revised Community Asset Transfer Policy. It explains the reasons for the changes and seeks views on the revised version.

2 Background

- 2.1 The first version of the Community Asset Transfer Policy was approved by Cabinet in August 2009. It was developed out of a need for a clear framework within which to structure the transfer of community assets, the principle of which was beginning to emerge as a corporate priority for the Council.
- 2.2 The policy was revised and updated in April 2013 following comments made by the Council's external auditors in their 2011-12 Annual Governance Report. This is covered in more detail elsewhere in this report.
- 2.3 Since the April 2013 update a number of asset transfers have taken place that have highlighted the need for some further amendments and clarifications.

3 Proposals

- 3.1 The proposed changes to the policy fall into the following key areas:
- Clarification as to when the policy should be applied,
 - Links with other policy documents,
 - Forms of tenure for asset disposals,
 - Rent and rent reviews,

- Arrangements for heritage assets,
- Valuations, and
- Decision making process.

Clarification as to when the policy should be applied

- 3.2 The earlier versions of the policy assumed that the asset was currently being managed by the Council and that a third party organisation would be taking over the management. This did not expressly allow for a situation where the asset is already being managed by a third party group under an annual management agreement or short term lease. A new clause 2.4 has therefore been inserted in the policy which confirms that the policy will apply in this situation.

Links with other policy documents

- 3.3 The section in the policy that refers to other linked policy documents has been updated. It now includes a section on the Volunteering Strategy and the Local First Policy. Reference to the former VCS Strategy has been removed.

Forms of tenure for asset disposals

- 3.4 There has historically been a divergence of views within the Council on the relative merits of freehold versus long-term leasehold transfers. The 'default' position has always been a preference for leasehold, with paragraph 5.4 of the Policy as it currently stands stating unambiguously that: *'Transfers will normally be in the form of a lease...rather than the transfer of the freehold...There is no evidence to suggest that an organisation will be at any disadvantage with a leasehold transfer.'*
- 3.5 However, this statement is qualified by the following paragraph, which leaves the door open to an argument for freehold transfer: *'In certain circumstances the Council will consider freehold transfer...[which]...would be subject to the interested party making a case for a freehold...Any case submitted would need to set out both the financial and non-financial considerations within the stated aims and objectives of the organisation and reflect the particular nature of the asset under consideration.'*
- 3.6 This wording has recently been criticised by Faversham Town Council, which is *'concerned that SBC's policy has a significant gap in that it fails to explain clearly...what the exceptional circumstances are in which a freehold application could succeed.'* FTC's letter of 25 March goes on to state FTC's view that *'if no exemptions are ever considered...Swale could be challenged on the basis that it is fettering its discretion'*.
- 3.7 From SBC's perspective, the main reasons for preferring leasehold to freehold are that it allows the Council to retain an influence over the future use of the asset in the event that it is no longer needed by the community, while also providing a straightforward and low-cost 'exit strategy' in the event that the leaseholder is unable to continue to run the asset. This means that the asset would automatically revert to the Council,

enabling it quickly to bring it back into community use, rather than having to re-acquire the freehold before it can be brought back into use. Council intervention following a freehold transfer would generally be more complex and more costly.

- 3.8 Based on Swale officers' knowledge and experience, it is difficult to identify any substantive reasons for a potential transferee to argue that a freehold transfer offers enhanced community benefits compared with a long-term leasehold. Freehold transfer is usually simply perceived by the transferee as offering greater security or independence, but a 125-year (or longer) lease offers the leaseholder exactly the same ability to attract grant funding and otherwise raise capital as freehold ownership.
- 3.9 In addition, while a freehold transfer does potentially offer more freedom to improve or redevelop an asset, SBC would be unlikely to block such plans on the part of a long-term leaseholder as long as the community interest was appropriately protected.
- 3.10 The last major freehold transfer undertaken by the Council was the transfer of the Alexander Centre to the Alexander Centre Trust CIC in 2012. This subsequently drew criticism from the Council's external auditor, whose comments included:
- *'It is not clear that the Council secured the best possible VFM as a result of this transfer. However members were provided with sufficient information to inform their decision-making process.'*
 - *'The Community Asset Transfer Policy as originally drafted reflected best practice in asset disposal, but key elements such as the merits of leasehold as opposed to freehold transfer and the difficulty in enforcing restrictive covenants were removed following consultation. These elements should be reinstated, and the policy strengthened to incorporate, for example, the emergence of community interest companies.'* **(This recommendation has since been implemented to the auditor's satisfaction.)**
- 3.11 In view of the above, the default position of preferring 125-year leasehold transfers remains the most appropriate one for Swale, but there seems to be little reason arbitrarily to rule out in advance the possibility of ever agreeing to any alternatives to this: with reference to the FTC letter of 25 March, this would fetter the Council's discretion more than the current policy. However, while it would be beneficial to improve the wording in the Policy, it is not possible to include a finite list of the exceptional circumstances in which a non-standard transfer would be considered, on the simple grounds that such circumstances would need to be exceptional and could not be definitively determined in advance.
- 3.12 Instead, it should be for the applicant to make the case as to why the circumstances are exceptional and why the community interest would be better served by a longer or shorter lease or an alternative form of tenure. The wording in the Policy would be improved by making this – and the reasons for it – more explicit, and officers' suggestion is to amend the relevant paragraphs as follows:
- 5.5 While being clear that assets will normally be transferred on a 125-year leasehold basis as described in paragraph 5.4 above, the Council does not wholly exclude

the possibility of longer or shorter leases or different forms of tenure, in exceptional circumstances. It is not possible to determine in advance what could constitute an exceptional circumstance, and the onus will be clearly on the applicant to make the case. This will generally be expected to be by reference to the specific attributes of the asset in question, and it will be necessary for the applicant to **demonstrate** the additional community benefits and any additional financial and non-financial considerations which would result from deviating from the standard 125-year leasehold transfer.

- 5.6 Where an application for a non-standard transfer is made (that is, one for a term of other than 125 years), the Council will consider the application on its merits, balancing the applicant's case and proposal with the interests of the wider community the Council represents. The Council reserves the right unilaterally to reject any application for a non-standard transfer on the grounds that in its view the wider community interest would not be well served. In the exceptional event that a form of tenure other than leasehold is entered into, a 'clawback' or 'asset lock' provision will be placed as a legal condition on the transfer. (An asset lock provision applies to community interest companies and prevents an asset from being used for private gain rather than the stated aims of the organisation.)

Rent and rent reviews

- 3.13 The current version of the policy contains some detailed guidance on financial support and the circumstances in which the Council may continue to provide this. It does not make any reference to the payment of rent, as the assumption was that a nominal rent would be the norm. This assumption is now being challenged and the policy needs to be amended to reflect this.
- 3.14 Whilst in most cases a community asset will transfer on the basis of a low or nominal rent, it is recognised that there could be circumstances in which the financial circumstances of the organisation change over time and a commercially viable and profitable operation could be taking place from the asset. In these circumstances, the Council may wish to reserve the right to review the rent. A rent review clause has therefore been inserted in the policy which allows the Council to review the rent after the first three years and thereafter at five yearly intervals. This will not apply in the case of "new build" assets where VAT has been reclaimed on the construction costs of the asset. In this case, the rent will remain fixed for the duration of the lease.
- 3.15 A further clause has been added in relation to rent that clarifies the principle that any rent charged will be determined on a case-by-case basis. The assessment of rent will take account of both financial and community benefit considerations and will be clearly set out in the report to Cabinet seeking approval to the transfer.

Arrangements for heritage assets

- 3.16 The earlier versions of the policy do not make any specific reference to heritage assets. It has come to light, primarily in connection with the transfers of Minister Abbey Gatehouse and Milton Regis Court Hall, that heritage assets may need to be

treated differently. This is because they are generally listed buildings and the Council has a legal duty to keep them in repair, even if they have been transferred to a third party organisation.

- 3.17 The revised policy contains a section on heritage assets and allows for the term of lease to be reduced to 25 years if this is considered appropriate. It also allows for the Council to retain the responsibility for the structure of the asset to ensure that the integrity of the building is safeguarded.

Valuations

- 3.18 The need for a valuation of the asset to be carried out and the figure to be stated in the Cabinet report was made clear in the 2011-12 Annual Governance Statement. An independent valuation (usually from the Valuation Office) is therefore always obtained and reported. However, there may be circumstances in which an internal valuation could be carried out, thus avoiding the cost of commissioning a private valuer. There may also be circumstances when a valuation is not required. The revised policy now explains this.

Decision making process

- 3.19 The current procedure is for all community asset transfers to be decided by Cabinet. Under the current scheme of delegations this is not necessary and most decisions could be taken by the Cabinet Member for Localism in consultation with the Cabinet Member for Finance. It is therefore proposed that future community asset transfers are decided under the delegated Cabinet member process unless:
- It is a key decision,
 - It cuts across two or more Cabinet member portfolios, or
 - The Cabinet Member refers the decision to Full Cabinet

4 Alternative Options

- 4.1 Any alternative options to the clauses proposed in the revised policy are explained in the body of the report.
- 4.2 There is an alternative option to not transfer community assets to voluntary sector organisations or parish and town councils but this would be in conflict with the Localism priority in the Corporate Plan.

5 Consultation Undertaken or Proposed

- 5.1 Consultation has been carried out with the members of the Asset Transfer Group, SMT and the Cabinet members for Localism and Finance.

6 Implications

Issue	Implications
Corporate Plan	This policy meets the objectives of the Localism priority set out in the Corporate Plan.
Financial, Resource and Property	These will be identified at the approval stage and reported as part of each community asset transfer decision.
Legal and Statutory	None identified at this stage.
Crime and Disorder	None identified at this stage.
Sustainability	The policy seeks to ensure that any community asset transfer is sustainable in the long term by ensuring that the organisation has a sound business case.
Health and Wellbeing	None identified at this stage.
Risk Management and Health and Safety	None identified at this stage.
Equality and Diversity	None identified at this stage.

7 Appendices

7.1 The following documents are to be published with this report and form part of the report:

- Appendix I: Revised Community Asset Transfer Policy
- Appendix II: List of SBC owned Community Assets

8 Background Papers

Annual Governance Report Swale Borough Council Audit 2011/12 (Audit Commission)