

## **Asset transfer after the transaction's over**

Community organisations are being exhorted to take on community assets. Much is rightly made of the process and procedures. Legal, practical and financial constraints can often lead to long delays in achieving the objective. There is a danger that in the course of the process some of the desirable objectives can be lost. The following are some of the asset transfer conditions to avoid.

### **Clawback: leases**

The transferring body or the funding body will usually seek safeguards for performance of the undertakings and the objectives that the community organisation has agreed to achieve. Often this will potentially give rise to a penalty whereby the ownership of the community organisation can be terminated. Long leases remain the usual vehicle for asset transfer, and this is most usually sought by inclusion of break clauses in favour of the landlord.

However because conditional break clauses can sometimes be defeated by the tenant under forfeiture law, landlords will often seek unconditional break rights. At the very least, such rights should not be enforceable against secured capital funders, and it should be possible to cancel them if such organisations seek to enforce their charge.

Unconditional break clauses are generally undesirable for reasons of strategic planning, which feed directly into the sustainability of a community project. If community organisations do not have unrestricted ownership of their assets, it is unreasonable to expect unrestricted commitment to the project.

### **Clawback: generally**

There are all kinds of other legal mechanisms that can secure undertakings intended to protect the interests of the transferring or funding bodies. None of them were designed for asset transfer purposes and all are riddled with potential unintended consequences. They may include restrictive covenants, freehold rights of re-entry, options, rights of pre-emption, trusts, Land Registry restrictions and contractual obligations, and mechanisms relating to the membership and trusteeship of the community organisation itself. At any stage in the negotiation where a legal proposal for protection for the transferring body is mentioned, community organisations should stress that this will be subject to legal advice not just as a matter of legal structure but also as to the principle of whether the mechanism will dilute or actually defeat the project itself.

## **Restrictions on use**

Transferors and funders have a legitimate interest in how property is used by community organisations. However, too often the restrictions reflect the position at the time of the transfer with no thought given to the flexibility that is needed to develop the asset over a long period of time. If community organisations are to be able to use their property in an imaginative and entrepreneurial manner and attract further funding it is essential that use restrictions are no more than is absolutely necessary, and, crucially that they take into account the need for the community organisation to adapt to changes in local needs and general social developments.

## **Restrictions on disposition**

There are two areas where problems commonly arise with respect to the ability of community organisations to pass on property to others. The first relates to the transferability of the asset itself.

For various economic and organisational reasons, merger with another organisation may become appropriate. There should always be a mechanism permitting the community organisation to transfer the property in connection with a merger with a similar body. The second area relates as much to use of the property as to disposing of the property.

The community organisation should always have wide power to enter into short leases with partner organisations and, to a reasonable extent, for commercial purposes. Too often this is unreasonably restricted in transfer documents with the result that there is extra delay, cost and administrative stress for the community organisations.

For more information please contact:

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