Asset Transfer Background Research: Produced by David Marshall (January 2013)

Mount Edgcumbe - Community Asset Transfer – the basic building blocks?

This paper is designed as a catalyst - a starting point intended to trigger discussion and response – especially in terms of the legal, democratic governance and financial processes that might be involved in such a project.

Mount Edgcumbe Trust

The management of public perception following asset transfer to a new governance regime for Mount Edgcumbe will be the key to the long term success of the new organisation. It is very important to start the process with the right 'message' (see Torbay Coast and Countryside Trust case study below).

The key messages of change must be simple, straightforward, and appear to be a natural progression for the 'story' of the asset (Mount Edgcumbe).

The public readily understand the general concept and reasoning behind a 'Trust' – as distinct and more familiar to them than any other type of Third Sector Organisation (TSO). A 'Trust' does not need explanation. Mount Edgcumbe Trust – 'it does exactly what it says on the tin'.

In the light of present financial constraints on local authority budgets the move to form a 'Trust' to ensure the future of Mount Edgcumbe will be widely understood as a prudent move to protect the landscape and buildings.

The idea of 'Trust' status fits comfortably with the public image of Mount Edgcumbe. This will save the new organisation many battles, questions, resistance and recrimination. It will also make recruitment and retention of key Trustees with the relevant skills required more likely – as it will lend status to individuals joining an organisation retaining its kudos.

What is a Trust?

At its most simple a Trust is a legal arrangement where one or more appointed 'trustees' are made legally responsible for holding specified assets (buildings, land, paintings, furniture, money).

The Purpose of a Trust?

A Trust (in England and Wales) must demonstrate a charitable purpose and provide a public benefit. The fundamental purpose of the Trust is set out in its mission statement (and a code of conduct) which will be considered binding to the organisation and its charitable status.

Creating a Trust

Key points:

- Defining the purpose
- What are the advantages and disadvantages of Trust status?
- How will the wider community be involved?
- What are the critical success factors?
- What core skills, funds and infrastructure are required at start-up?
- Sustainability – how will the Trust be maintained?

Critical success factors will include:

- A clear objective and shared core values
- A clearly understood and Trustee supported Business Plan
- Community involvement – local accountability
- Environmental awareness and an adherence to best practice
- Commitment and clarity of relationship with key partners (LA's)
- An investment in targeted people and skills
- An ability to attract and secure external funding
- A commitment to the long term
- The central drive to develop a robust Trust Fund
- The ability to be flexible and responsive
- Effective communication – a strong and consistent exposition of 'core value'
- The ability to take calculated risks
- The development of an asset base
- A strong joint working agreement (see below)
- The commitment and long term support of both Councils

How would assets be transferred from Local Authority control to a Trust (Powers to dispose)?

There are powers in place through which local authorities can transfer the management or ownership of assets to communities or trusts. One route is via the Public Request to Order Disposal (PROD).

Obviously any such transfer will be scrutinised and as such the local authority asset transfer policy or asset management strategy (or similar) should be considered at the earliest point in this process. Local authorities need to dispose of underused, surplus or unaffordable assets and they will be looking at a balance between either their community use transfer, commercial lease or the outright sale of such assets.

In addition the proposed transfer of assets will need to fit with the local authority's core strategies and any local development framework. This will need to be researched and drawn out to provide a clearly stated case in line with the relevant strategies in support of the asset transfer.

The key assessment criteria that should be applied would be:

- The benefits to the local community of transferring the asset
- The ability of the voluntary or Trust organisation to sustain the asset over the period of the lease

This might mean that before any such proposal could be properly considered by a local authority the trust organisation would have to outline its potential use of such assets and identify the specific undertakings, organisational structures, outcomes and objectives it would engage in whilst in control of the assets. The relationship between a Trust and any potential commercial sub-structures, trading companies, partners, and franchises etc. would have to be mapped out.

Certainly the trust organisation would have to prove that the use of the asset would be genuinely primarily for the benefit of the local community and the wider public – and that it would offer a real opportunity to create a successful, independent and sustainable third sector organisation.

The trust would also have to show a fundamental awareness of its role as a resource for local groups, working with disadvantaged communities and be (where possible within heritage restrictions) compliant with the Disability Discrimination Act. The trust may also be required to show environmentally sustainable strategies with plans to reduce any carbon footprint and adherence to best practice in energy efficiency.

The trust would also have to satisfy the local authority of its being ‘fit for purpose’ in terms of financial capability and facilities management and to that end it would have to satisfy the following criteria:

- The financial viability of the transfer – the organisation may need to show a five year cash flow and budget forecast that demonstrate that the project is sustainable and that assets would be maintained adequately
- Experience of and a commitment to partnership working – demonstrating that the assets would be put to a variety of uses to benefit the public and local community
- The organisation and key individuals, managing the assets and associated projects, have appropriate skills, knowledge and expertise to sustain the project in the long term
- Clearly defined structures, roles and responsibilities within the organisation appropriate to deliver the project, whether voluntary or paid. The inclusion of local authority representation within the governance committee associated with the assets.
- Clarity of decision making processes – adequate constitution, governance arrangements and management controls in place. In the case of a charitable trust – compliance with Charity Commission guidance
- Clarity of aims and objectives as set-out in the organisation’s mission statement (and that these meet the local authority key community plan objectives or similar)
- All legislation and regulatory controls are in place – meeting equality standards, child protection, health and safety and licensing requirements.

- The project has the support of the local community – and can demonstrate local need, community support through consultation, and that the proposed organisation is not aligned with a single interest group.
- Monitoring and evaluation processes are in place to demonstrate successful delivery of objectives and targets – and that proper financial controls are in operation to prevent impropriety.

Commissioning Meeting

It will be vital for local authority officers (especially with two authorities involved) to understand who is leading the process in considering asset transfer. At the outset all involved need to be clear about their individual terms of reference, the role that each officer will be expected to play and the independent work streams that will need to be brought together to complete the process.

This needs to be defined and agreed at a senior level within each Council. During this process the key people with the relevant skills and level of authority need to be identified (in both Councils) to assist in the smooth transfer of assets (especially in relation to democratic governance and legal and financial scrutiny).

This body of officers will not only be responsible for the process of transfer, they must also undertake a role in scrutinising the Third Sector Organisation (TSO) to ensure that the organisation will be fit for purpose.

Community Asset Transfer – From Local Authority Control to a Third Sector Organisation (TSO)

Legal advice

Local authority officers should seek to involve in-house legal teams at the earliest possible moment in the process.

TSO's should seek independent legal advice on the proposed terms of transfer – this should be done before undertaking the business planning process as these terms may create significant restrictions for business opportunity and business planning.

It should be noted that no matter how helpful local authority officers may wish to be they cannot ignore legal advice given by their own lawyers. Only after in-house legal advice has been given will a TSO truly know the council's position.

There are examples of a 'legal process map' for local authority asset transfers available – they include sections on: Impetus; property transfer and property law; powers; obtaining support; formal processes; policy; managing processes; Heads of Terms; timescales (memoranda of understanding); repairs and refurbishments; governance; state aid; contractual matters; risk management; procurement; development; managing development; property use and covenants; lettings; employment; premises management; business rates; insurances and accountability.

The Scope of the Asset

The first task for any legal team is to ascertain the legal title to an asset or assets and to identify whether the asset is constrained in any way (for example if the public body holds the asset in trust). The definition of any constraints will be a key determining factor in any Heads of Terms agreement.

It will be crucially important to involve any future funding stakeholders for the TSO (Trust) in this process from the outset – with Mount Edgcumbe it may be relevant to include the Heritage Lottery Fund, the Big Lottery Fund, Natural England and English Heritage – and any other future funders identified in the scope of the Trust's business plan (European agencies?).

These stakeholder funding bodies will have their own comprehensive policies on asset transfer which they will expect to see confirmed in the detailed documentation of any agreement.

Powers and Policy Considerations in Relation to the Transfer Transaction

With a public sector transfer it will be vital to establish at the earliest opportunity whether the authorities have the power to transfer assets at less than market value (in other words at nominal levels). This will have to relate to both PCC and CC and their policy considerations. Both Plymouth and Cornwall will need to be clear about:

- Whether this can be a community asset transfer at a nominal sum
- Whether this might fall under considerations as a community asset purchase further to the Right to Bid under the Localism Act 2011
- The power on which they (PCC and CC) are relying to take this action (Section 2 of the Local Government Act 2000?)
- The clear link with the relevant policy frameworks for both Council's (Asset Management Strategy or Corporate Plan) – and the ongoing commitment to a defined relationship with the TSO thereafter

Timescales

There may be little to prevent the creation of a Trust or other TSO organisation – other than the need to consult with future funders. The complexity and delay will be with the local authority transfer of assets.

Ian Berry and I have arranged a meeting with Dominic Ackland of the Torbay Coast and Countryside Trust (TCCT). Over a number of years they have transferred similar assets from local authority control to the TCCT. Even from initial discussion by phone the answer seems to be 'think of how long you would expect such a process to take – and double it at the very least'.

For such a process to be successfully completed we need to inject a healthy dose of realism into our thinking – the process is bound to be longer and more involved than we currently anticipate.

Let's plan with that realism in mind – albeit framed by the necessary consideration of the wider local government funding situation – but we must ensure that the scheme is achievable if we are to undertake it. As has already been pointed out – if the process is under way – and the planning is sound – then the future funding scenario should be secure as it will show decreasing financial liability for both authorities over a defined period of time.

Please see below for the TCCT report

Condition of Assets

It is very likely that the TSO (through its own proper governance considerations) will be required to complete an independent condition survey before accepting lease responsibility for any asset (this may be a basic requirement made by external funding organisations – they may not accept a local authority instigated condition survey – this needs to be checked ASAP).

We (PCC and CC) will be completing 'independent' condition surveys via E.H. Harris (subject to cost and agreement on budget allocation) and will make these available to a Trust or TSO. However we need to be aware that the survey itself may highlight issues that will hamper the process; reduce the likelihood of a TSO accepting asset responsibility or indicate works required before a particular asset might be considered fit for purpose by the TSO.

Collateral warranties also need investigation (the residual local authority liability). These may be insisted upon in the case of Mount Edgcumbe (especially in relation to the ancient monuments and listed structures). A collateral warranty generally defines an agreement ancillary to another principal contract. It would impose an extended duty of care and a broader liability on the two or more separate parties involved in the contract. The need for collateral warranties exists when the party that accepts responsibility for an asset may not carry the final 'duty of care' in the event of fundamental defects or failures.

Documentation (This is a General Sub-Heading – There will be More Detail in Other Sections Below)

Background information required:

- Details of the title to the property/land/asset
- All planning matters relevant to or affecting the site
- The full name, constitution and mission statement of the TSO
- The names of the relevant contacts and identification of those authorised for sign-off/negotiation on both sides

- The details of any external funders along with their terms and conditions (including European funding) and the inclusion of any security or guarantees that they may require
- Any physical or development work proposed for the asset either before or after the transfer
- A robust and scrutinised business plan for the TSO
- A scope of the licenses to trade required and involved in any transfer
- A route map of the key milestones for the ratification of decision making through the democratic governance within each authority
- HR advice and timescales on staff consultation and the inclusion of a TUPE process
- An overall project plan outlining delivery and timescales

Formal documentation:

- The **leasehold transfer** documentation itself
- A **development agreement** covering the broad scope of what the authorities would deem reasonable as improvements; adaptations; changes of use under a TSO led business development process
- A **service level agreement** (or perhaps a **joint working agreement** – see below) setting out the minimum requirements for local engagement and public benefit to be provided by the TSO – probably against a **management fee** levied by the TSO against the LA's over an agreed period – with milestones and review dates built in (this needs to be looked at carefully – it might be an issue of 'procurement')
- An inclusion of any **funding documentation** and the associated obligations therein received prior to any transfer of assets
- All existing **licenses or leases** relevant to the transfer of the assets (and their terms and conditions)
- **Staff** – are they transferring to the TSO? Is a TUPE transfer to take place? Existing staff will need to be managed and consulted as an integral part of the transfer process. If so clauses in the documentation will have to address this specifically.
- **Transferred rights** – the TSO's rights to the governance of pubic behaviour and activity across its assets – its ability and powers to police those assets; or to work jointly with the local authorities to enforce?

Joint Working Agreement – Balancing TSO Interests and Public Sector Concerns

In the context of an asset transfer the TSO and the local authorities will want certainty and reassurance about the management of the relationship going forward.

A Joint Working Agreement (JWA) is designed to be used to help both the local authorities and the TSO to work together over the long term. It should be entered into at the same time as the asset transfer and should be prepared **before** the transfer.

Whatever the circumstance the TSO would be automatically involved in a number of key strategic relationships upon their acceptance of the assets. These will include the local authorities themselves, local stakeholders, external funding bodies and any existing framework agreements.

A JWA can help to consolidate these relationships in a more formal way – they are common in regeneration partnerships. The JWA is a contract between the TSO and the local authorities which can set the parameters for the work of the TSO in relationship to the assets in the long term – ensuring that the TSO is appropriately accountable to the local authorities whilst also allowing it to have the freedom to pursue its aims as an organisation.

A model agreement will acknowledge the fundamentals – namely that both Councils and the TSO are working together for the successful transfer and alternative governance of the asset.

The JWA would commit all three parties to the following:

- Working together for the success of the TSO
- In particular working together on the business plan for the assets in question
- The appointment and commitment of named contacts on both sides (successor bound to ensure continuity)
- An agreement in principal committing the Councils and the TSO to work together for the good of the asset and the community should financial difficulty be experienced
- Key obligations will be included for the TSO – adopting the business plan for the asset and working jointly with local authority representatives on business planning in the future
- The TSO will be obliged to carry out its work in a proper and transparent way providing full reports on its business and the transferred assets on a regular basis to both Councils
- The TSO would be obliged to promote equality of opportunity
- The JWA would also provide a clause that would prevent certain decisions from being made without the consent of, or notice to, both Councils – these would include changing the structure of the TSO and changing the membership or board structure of the TSO
- The JWA would also include a positive obligation on the TSO to prepare plans for its assets in conjunction with its local authority partners and any local area agreements and community plans.
- The JWA will have a finite duration – and during the lifetime of the existing JWA a further JWA can be worked up. During the period that the JWA is relevant neither side can transfer their obligations. The JWA would represent a binding legal commitment to which the assets would be attached as a schedule, with a further attached schedule that would outline dispute resolution procedures.