

ASSET TRANSFER REQUESTS

Community Empowerment (Scotland) Act 2015

Guidance Notes

January 2017



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ABOUT THIS GUIDANCE

This guidance has been written to support community bodies make an Asset Transfer Request to Highlands and Islands Enterprise (HIE).

Asset Transfer Requests (ATR) legislation creates a right for community bodies to request to buy, lease, manage or occupy any land or buildings owned or leased by HIE. It requires us to assess ATRs against a specified list of criteria and to agree to the request unless there are reasonable grounds for refusal.

The guidance explains how we will fulfil our Asset Transfer Request obligations under Part 5 of the [Community Empowerment \(Scotland\) Act 2015](#) (the Act). The guidance is set out in the following four key stages:

- Section 1 Before your Asset Transfer Request
- Section 2 Making your Asset Transfer Request
- Section 3 Assessment, Decision and Appeals
- Section 4 Concluding an Asset Transfer Request

This guidance has been developed with regards to the [Guidance for Relevant Authorities](#) published by Scottish Government. The accompanying [Guidance for Community Transfer Bodies](#) provides a detailed account of the ATR provisions and procedures for community bodies. You may also wish to refer to the Scottish Government's website for more information on the Act.

This guidance applies only to the procedures for ATRs under the Act. The Act does not prohibit property transactions out with this legislation. Thus, sales and leases of HIE property that are not subject to a live ATR will continue as normal. Our standard asset disposal practices can be found on page 5.

We welcome informal discussions in advance of receiving an ATR. If you wish to discuss a potential ATR or if you have any questions regarding our ATR procedures please [contact us](#).

INTRODUCTION

About Highlands and Islands Enterprise

HIE is the Scottish Government's economic and community development agency for a diverse region which covers more than half of Scotland and is home to around 470,000 people.

Our role is to develop sustainable economic growth across the region. To achieve this we create infrastructure for future investment, assist large and small businesses and social enterprises with growth aspirations and have a unique role strengthening communities, particularly in fragile areas. HIE also invests in transformational projects across the region, such as the roll-out of fibre broadband, to make the Highlands and Islands a more competitive and attractive place to live, work, study and invest.

Strengthening Communities

The Highlands and Islands is recognised as a region in which communities take responsibility for shaping their future, where social enterprise as a sector is innovative, strong and growing, where community asset ownership and service delivery are well established, and where unique cultural assets, including Gaelic, play a significant role in creating vibrant, strong, inclusive communities.

Supporting communities to develop and grow is a central focus for our organisation. Our approach to strengthening communities is threefold: we **invest** in building community capacity and confidence; **empower** communities to acquire, manage and exploit community assets for community benefit; and **enable** sustainable growth in the social economy through strong social enterprises.

Community asset ownership is an essential component of our work to support resilient rural communities. Assets provide a base from which to generate income, deliver services, stimulate development, and grow confidence and ambition. We tailor our support to match the needs of communities from initial idea, through the acquisition process, and on to sustainable development. A strong focus on community enterprise underpins our work to ensure ongoing delivery of social and economic impacts – particularly in the most fragile communities.

We also deliver the Scottish Government's [Scottish Land Fund](#), in partnership with the Big Lottery Fund. This supports communities across Scotland, both urban and rural, to become more resilient and sustainable through the ownership and management of land and buildings. Community bodies can apply for funding to work up a project proposal, in addition to capital and revenue support to acquire and develop the asset.

To discuss a community asset project or to find out more about the Scottish Land Fund please contact our [Community Assets Team](#).

HIE's property portfolio, objectives and standard asset disposal practices

Provision of property and infrastructure in the presence of market failure is one of HIE's key economic development tools.

We develop and maintain a diverse property portfolio. In addition to the 13 offices we use for our own purposes, this includes over 130 industrial and office buildings and almost 10,000 acres of land. The bulk of the land comprises two large rural land holdings but the remainder, approximately 350 acres, is spread across some 40 commercial development locations across the region.

We seek to lease or sell our property assets to third parties as our objective is to stimulate and generate economic growth rather than to be a long-term landlord. Thus we undertake property transactions on a regular and ongoing basis.

If you are interested in making an ATR you are encouraged to contact us at an early stage to establish whether or not the asset is currently being marketed for sale or if we are in a sale or lease negotiation as this is likely to impact on your request (see Section 3). If a competent ATR has been made for an asset we are not marketing or in the process of selling or leasing, we are not allowed to transfer the property to anyone until the ATR process has been completed.

The income generated from our property activities is reinvested into other projects to deliver our organisational priorities:

- Supporting businesses and social enterprises to shape and realise their growth aspirations
- Strengthening communities and fragile areas
- Developing growth sectors, particularly distinctive regional opportunities
- Creating the conditions for a competitive and low-carbon region

We usually seek the best possible price in any sale or lease. In most cases sales are to sitting tenants. Where a sitting tenant does not want to buy, or if the asset is vacant, we may place the asset on the open market and assess offers on a best consideration basis. The successful bid is usually the highest price but we will also take account of other factors which are aligned with our organisational priorities where this will deliver *best value* for public money (see page 10).

When considering the lease or sale of an asset we will advertise the opportunity through our property agents, currently Graham & Sibbald. Such opportunities are usually marketed via the [Co-Star](#) property portal as well as on-site advertising boards and, sometimes, newspaper advertising. Marketing particulars will give details of the size and layout of the premises, the Rateable Value and will state an asking rent or asking price above which offers are sought. Please note that all HIE property sales and rents are subject to VAT at the prevailing rate (20% at time of writing).

The period for which a property is marketed varies and depends on the level of interest expressed. Once we are satisfied that the market has been adequately tested, and one or more potential bidders has expressed a definite interest in submitting an offer, a closing date will be set for receipt of offers. This date will be notified in writing to all parties who have formally expressed an interest.

SECTION 1

BEFORE YOUR ASSET TRANSFER REQUEST

This section sets out the key things a community body should consider when developing an ATR. It focuses on matters specific to the ATR process rather than the wider considerations regarding community-led development and community ownership or control of assets. Our Community Assets Team can provide such support and we have developed [Ten Steps to Community Ownership](#) to guide you through the process. You may also wish to contact the Scottish Government funded [Community Ownership Support Service](#) (COSS) which provides dedicated advice to communities on projects involving the transfer of public assets.

Please note that our assessment of requests is a distinct and separate function from the support we provide to community groups interested in the ownership and development of assets for community benefit. Assistance towards the development of a community assets project or proposal will not have any impact on or influence over our assessment of an ATR.

In addition to ATR, there are other options available to you to seek ownership or control of HIE assets. These are:

- Bidding for HIE assets when offered for sale or lease on the open market – see page 5
- Registering in interest using the Community Right to Buy provisions of the [Land Reform \(Scotland\) Act 2003](#) - a successful registration will give the community a right to buy should the asset be offered for sale

To make an informal ATR enquiry or to discuss the various options available to you please [contact us](#).

Key provisions of ATR

The ATR process is somewhat complex and technical. By way of an introduction, we have summarised its key provisions below. Please refer to the Community Empowerment (Scotland) Act 2015 and Guidance for Community Transfer Bodies for the Act provisions and detailed guidance.

- Only a community transfer body can make an ATR. The eligibility requirements differ depending on whether you wish to use, occupy, lease or own the asset. See page 7.
- A request can be made in relation to any land or building that is owned or leased by HIE. Our property register provides details of all the property HIE owns and leases.
- When making an ATR the community body must set out the reason for making the request, the benefits of the proposal, and the price it is prepared to pay.
- Once a competent ATR has been made, we are not allowed to transfer the property to anyone until the request process has been completed. However, the transfer prohibition

does not apply where we have advertised the property for sale or negotiations have started to transfer the property to someone else before the asset transfer was made. See page 13.

- In assessing the ATR we must consider:
 - The reason for the request
 - Whether agreeing to the request will promote or improve:
 - Economic development
 - Regeneration
 - Public health
 - Social wellbeing
 - Environmental wellbeing
 - Whether agreeing to the request will reduce socio-economic inequalities
 - Benefits that might arise from alternative proposals regarding the asset
 - Any obligations that may prevent, restrict or otherwise affect our ability to agree to the request
- We must set out our decisions for agreeing to or refusing an ATR
- If we agree to the request there is a process to negotiate the final contract. Where an asset is to be acquired a timescale is agreed to enable the community body to raise the funds and conclude the purchase
- There are various review and appeal processes where:
 - The request is refused
 - No decision is given within the time allowed
 - The community body does not agree with our conditions of occupancy, use, sale or lease
- At the end of each financial year, we must publish a report on the number of ATRs received and the number which have been agreed, refused or appealed and the steps we have taken to promote ATRs and to support communities to make such requests.

Community body eligibility

To make an ATR, your organisation needs to meet the requirements for a '**community transfer body**', as defined in section 77 of the Act. If you wish to own the asset there are additional requirements as outlined below.

A community transfer body can either be a:

- **community controlled body** (section 19), or
- **body designated by the Scottish Ministers** (section 77)

A **community controlled body** must have a written constitution that includes the following:

- a definition of the community to which the body relates
- provision that the majority of the members of the body is to consist of members of that community
- provision that the community body is controlled by members who belong to the defined community
- provision that membership of the community body is open to any member of the defined community
- the community body's aims and purposes must include the promotion of a benefit for the defined community
- provision that any surplus funds or assets of the body are to be applied for the benefit of the defined community

The legislation on ATR does not define what a 'community' can be. A community can be '**community of interest**' as well as a '**community of place**'. If your community body represents a community of interest you should consider engaging with local people where the property is located and consider how your proposals may affect them.

A **body designated by the Scottish Ministers** can be an individual body or a class of bodies. Scottish Ministers can do this by making an order; this is a type of secondary legislation. A designated community transfer body is only entitled to make a request for ownership if this is provided for in the designation order.

If your organisation meets the current requirements for any of the **community rights to buy** under the Land Reform (Scotland) Acts 2003 or 2016 you will be eligible to make an ATR. This is because Scottish Ministers have made an order designating such bodies as community transfer bodies with powers to request asset ownership.

Additional requirements when requesting ownership of the asset:

Section 80 details additional requirements a community transfer body must meet if it wishes to buy a property through ATR.

Your organisation must be incorporated as a company, a SCIO (Scottish Charitable Incorporated Organisation) or a BenCom (Community Benefit Company) or be designated by Scottish Ministers as detailed above.

Further, your governing documents must include the following provisions:

- the body must have not fewer than 20 members
- [for companies only] on the winding up of the company and after the satisfaction of its liabilities, its property passes:
 - to another community transfer body
 - to a charity
 - to a community body or crofting community body (as defined in Parts 2 and 3 respectively of the Land Reform (Scotland) Act 2003) as may be approved by Scottish Ministers
 - or to such charity as Scottish Ministers may direct

If you wish to **lease an asset** from us it is most likely that we will require your organisation to be incorporated as a company, SCIO or BenCom. Incorporation gives the community organisation status as a legal entity and is considered best practice when an organisation takes on responsibilities such as entering into contractual arrangements.

Please contact us at an early stage to determine if your organisation is meets the appropriate ATR eligibility requirements. We can also provide you with guidance should you need help setting up a community transfer body.

SECTION 2

MAKING YOUR ASSET TRANSFER REQUEST

Overview

Before making an ATR we request you read Sections 8 and 10 of the Guidance for Community Transfer Bodies. These sections detail the information you need to submit to make an ATR and the matters we must consider during our decision-making process.

We encourage you to discuss your proposals with us at an early stage. We can provide information and guidance to help you prepare your ATR. You are of course able to make an ATR at any time and are not obliged to share your plans with us in advance.

Section 79(4) of the Act and the Asset Transfer Request (Procedure) (Scotland) Regulations 2016, sets out what must be specified in the request. The ATR must be made in writing and is not treated as having been made until we receive all the required information.

We would prefer you to make your ATR using the Scottish Government's [model form](#). You do not have to use this form to make a statutory request but you must provide all the information required. If you choose not to use this form please state that your submission is an Asset Transfer Request under Part 5 of the Community Empowerment (Scotland) Act 2015.

The kind of supporting information you provide will depend on the nature and scale of your proposals and whether you wish to use, occupy, lease or own our property. If your request is for short-term use only we would not expect the same level of detail as we would for a request to acquire a development site on which to construct a community building, for example. For such a request we would expect to see detailed project planning including an options appraisal, feasibility/technical assessments, a business plan and evidence of strong community support. We would also require evidence regarding the capacity of the organisation to develop and manage the project in the long-term, including information on governance and management procedures.

If your request does not include all the information we require to make a decision we may ask you for further details.

Price, valuation and non-financial benefits

The Act does not say how much should be paid to lease or purchase an asset, or whether it should be at market value or at a discount. The community transfer body has to state in the ATR how much it is prepared to pay, alongside the benefits the project will deliver. We will consider both of these factors when we assess your request.

As a public authority HIE is required to adhere to certain rules and guidelines when selling or leasing our property assets. We have a duty to secure **best value** for public money in our operations, including when disposing or leasing property. We have the ability to dispose of property at less than market value where there are wider public benefits to be gained.

There is not a standard methodology to assess the value of non-financial impacts. It is a question of assessing the financial and non-financial impacts, both positive and negative, of different options. It is a judgement-based approach. Where an offer is made that is below the market value, the community transfer body will need to provide sufficient evidence that quantifies the proposed non-financial benefits offered by the proposal to justify the reduced price. The greater the discount requested, the stronger this case will need to be.

Please be aware that all HIE property transactions are subject to VAT (currently 20%).

Instructing a valuation

We will need to understand the *market value* of the asset before we can undertake a best value assessment. The community transfer body is also likely to require this information for borrowing or funding purposes. The Scottish Government recommends that a joint valuation is instructed by the relevant authority and community transfer body. This will reduce costs and provide a common starting point for discussion and negotiations regarding the price to be paid.

Market value is an International Valuation Standard used by a suitably qualified valuer (a chartered surveyor) to assess what the market might pay for the purchase or lease of an asset after proper marketing of the asset. Section 12 of the Guidance for Community Transfer Bodies explains how market value is assessed and provides guidance regarding the valuation process.

As market value is a key consideration within the asset transfer process, it makes sense for the valuation to be undertaken in advance of submitting your ATR. Our preference would be to jointly instruct the valuation as recommended by Scottish Government. However, the legislation does not require you to undertake a valuation, jointly or otherwise.

Please contact us should you wish to discuss instructing a joint valuation.

Below market value offers

If you decide to make an offer that is below the market value, in addition to assessing whether the proposal provides sufficient public benefits to justify the lower price [assessed against the criteria set out in Section 82(3)], we also need to consider if agreeing to a discount will secure best value for public money and is compatible with State Aid rules.

Best value is a requirement that public authorities across Scotland have a duty to secure. It seeks to deliver continuous improvement in performance whilst maintaining an appropriate balance between effectiveness and economy. It also requires due regard to equal opportunities and to contribute to the achievement of sustainable development. More information on best value can be found in section 13 of the Guidance for Community Transfer Bodies.

EU State Aid rules are in place to regulate financial assistance from public authorities that could distort competition between EU member states. The rules apply to any type of financial assistance, including grants and discounts, where the assistance is awarded to an organisation

carrying out 'economic activity'. This is defined as offering goods or services that could, in principle, be carried out by someone else for payment.

There are state aid 'ceilings' which limit the amount of aid that can be received by an organisation over any rolling 3-year period. Where a discount involves a state aid the receiving organisation will be required to demonstrate that this will not exceed state aid limits. There may be occasions where a discount will not be deemed to be a state aid – i.e. where it does not provide any economic advantage to the recipient.

We can discuss whether or not we consider your proposal has any state aid implications in advance of submitting your ATR. Asset transfers at market value will not involve state aid as no state assistance would be transferred in that event. More information on state aid can be found on the Scottish Government's [website](#). COSS has produced a useful [briefing](#) on state aid for communities.

If a below market value sale or lease is agreed, it is very likely that we will apply **conditions in the contract**. By foregoing market value in expectation of certain benefits we are investing public funds to the value of the discount. To safeguard this investment clawback conditions may be applied. Any clawback conditions will be specific to the benefits to be delivered and will not exceed the value of the discount. Section 14 of the Guidance for Community Transfer Bodies provides additional information on the use of conditions to protect a discount.

SECTION 3

ASSESSMENT, DECISION AND APPEALS

Processing an Asset Transfer Request

When we receive your ATR we will check your organisation qualifies as a community transfer body (and is eligible to make a request for ownership, if appropriate) and that your submission contains all the required information.

Acknowledgement

We will acknowledge receipt of your ATR and provide a timescale by which time we will confirm if your organisation is an eligible community transfer body and whether your ATR is complete. We will not start processing your ATR until we are satisfied you have provided all the information set out in chapter 8 of the Guidance for Community Transfer Bodies.

Once we are satisfied we have a complete request from an eligible community transfer body we will write to you detailing the following:

- the validation date of your request
- the time period within which we will notify you of our decision - this must be within 6 months of the validation date
- information about the right to appeal
- whether another ATR has already been made in respect of the same asset
- whether we consider we are now prohibited from disposing of the land to any other person

Publication, notification and representations

We will publish your ATR on our website (personal information will be blacked out) and take the following steps to make other people aware of your ATR and how they can make representations about it:

- notify any tenant occupier of the asset
- notify the owner, if it is an asset we lease
- publish a notice online
- put up a notice on, or near, the asset

If any representations are received within 20 working days of the notification, we must send you copies. You will be given 20 working days to submit comments, should you wish to do so.

Prohibition on disposal of land

Once an ATR has been made, we are not normally allowed to sell, lease or otherwise dispose of the land or building it relates to, to anyone else until the whole process is completed.

The prohibition on disposal does not apply if, before the asset transfer is made, the land has already been advertised for sale or lease or we have entered into negotiations or begun proceedings to transfer or lease to another person. As we regularly lease and sell assets within our property portfolio you are encouraged to enquire about the status of an asset you are interested in at an early stage.

Assessment

A panel of HIE staff representing our property and strengthening communities functions, together with representation from our Business Improvement & Internal Audit team will assess the requests received. Other staff may assist with this process. The panel will make representation to HIE's [Leadership Team](#) or [Board](#). Decisions on all ATRs will be made by our Leadership Team.

Chapter 10 of the Guidance for Community Transfer Bodies details the matters we are required to consider when coming to a decision as detailed in section 82(3) of the Act.

To summarise, we must consider the reason for the request, the ATR and any supporting information. We will compare the benefits of your proposals with the benefits which may arise from an alternative proposal which could include:

- another ATR
- another proposal by a third party
- a proposal we wish to pursue ourselves, including continuing use of the asset or disposal on the open market

Because our property portfolio comprises, in the main, commercial property for sale or rent, together with offices to accommodate our staff, we do not retain a category of assets we consider to be surplus. Instead, we seek to dispose of properties which no longer fit with our property objectives or operational needs on the open market.

Your request should clearly set out how you will use the asset and what outcomes it will deliver. This could include benefits such as creating new jobs, provision of new services locally or enhancing skills within the community. As noted in Section 1, we have to consider whether agreeing to the request will promote or improve:

- Economic development
- Regeneration
- Public health
- Social wellbeing
- Environmental wellbeing

You may find it helpful to link your benefits with the outcomes above or Scotland's [16 National Outcomes](#) which set out what Scottish Government wants to achieve to make Scotland a better place to live and a more prosperous and successful country.

We also need to assess your ability to deliver the project. In general, we would expect all ATRs seeking to buy or lease and asset to be supported by a business plan. One of the policy aims of [Asset Transfer Requests – Guidance Notes](#)

the Scottish Government's community empowerment agenda is to acquire assets to further the sustainable development of communities. Sustainability requires an integrated long-term approach to economic, social and environmental development. Our Community Assets Team can provide advice and guidance to help you develop a robust proposal.

We will need to consider how your proposal may impact on our ability to deliver our functions. This includes the impact on our budgets associated with the price you are prepared to pay. There may be obligations and restrictions which prevent us from agreeing to your request. Such matters can be identified at an early stage, and if so it may be possible to find a solution or an alternative option.

Finally, we are required to consider 'such other matters' as we consider relevant. Here, we will consider the community support for your proposal and any potential impact on other community organisations and private or business interests. As part of this we will consider if there is potential for your activities to disrupt or displace existing provision.

The [assessment framework](#) we will use to assess all ATRs is currently under development.

Decision notice

Once we have made a decision on your ATR we will issue a decision notice. This will detail the decision and the reasons for it. We send you this within 6 months of the validation date, unless we have agreed a longer period with you. If we don't meet this timescale you have a right to appeal to Scottish Ministers.

The decision will be published online and we will inform anyone who makes representations where the decision notice can be seen.

If we refuse your ATR the decision notice will tell you what your rights are to appeal. You have 20 working days from the date of the decision notice to submit an appeal.

If we agree to your request the decision notice will state the terms and conditions on which we are prepared to transfer ownership, lease the asset or confer the rights requested. The terms and conditions will include the sale price or rent as appropriate. If our terms and conditions are significantly different from what you set out in your ATR you may appeal against them.

Appeals

A community transfer body can appeal to Scottish Ministers if:

- A request is refused,
- The request is agreed but the terms and conditions in the decision notice are significantly different from those in the request, or
- No decision notice is made within the required period (6 months from validation date, unless a longer period was agreed).

You can also appeal if we agree to your request but no contract is concluded within the required time limit – see Section 21 of the Guidance for Community Transfer Bodies.

The final decision will lie with Scottish Ministers. The only other route of appeal beyond Scottish Ministers is by judicial review. Section 85 of the Act and section 20 of the Guidance for Community Transfer Bodies details the appeals process for relevant authorities, such as HIE, who are not local authorities or Scottish Ministers.

SECTION 4

CONCLUDING AN ASSET TRANSFER REQUEST

If you wish to proceed you must submit an offer to us that reflects the terms and conditions on our decision notice. You may include any other reasonable terms and conditions that you consider to be necessary or helpful to secure the rights requested in a reasonable time. You will be given 6 months from the date of the decision notice to make an offer.

If you do not make an offer within this time, and have not appealed in relation to our terms and conditions, the ATR process comes to an end and has no further effect.

Once you have submitted your offer there can be further negotiations to conclude the contract. The contract must be concluded within 6 months of your offer. This does not mean that the transfer has to take place within this timeframe, but the date of the transfer, price or rent and any other terms and conditions must be agreed.

If no contract is concluded within the 6 months of your offer our ATR process will also come to an end. However, if you take action in advance of the 6 month deadline you may be able to secure the ATR opportunity beyond this date. The three options available to you are:

- Agree an extension with us
- Apply to Scottish Ministers for an extension – this must be made between 4 to 6 weeks in advance of the end of the 6 month period
- Appeal to Scottish Ministers under section 83(6) of the Act to determine the terms and conditions of the contract, which we would then be required to accept

See section 16 of the Guidance for Community Transfer Bodies for further guidance on concluding the ATR contract.

Ends