

**Wiltshire Council**

**Cabinet**

**7 November 2017**

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**Subject: Asset and Service Devolution and Community Asset Transfer Policy**

**Cabinet Member: Cllr Philip Whitehead, Cabinet Member for Finance**

**Key Decision: Yes**

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## **Executive Summary**

The refreshed Service Devolution and Asset Transfer Policy will enable the Council to consider the transfer of packages of services and assets to town and parish councils

This report seeks an endorsement of the policy framework and process to facilitate such package transfers, noting that in doing so it will not affect the current process for individual Community Asset Transfers to community groups as facilitated through Community Area Boards.

## **Proposal**

Cabinet is recommended to:

1. Endorse the Service Devolution and Asset Transfer Policy and principals as set out in this report for the transfer of appropriate packages of services and related assets to Town and Parish Councils.

## **Reason for Proposal**

Following the completion of a substantial package of services and assets to Salisbury City Council, a revised approach is being proposed to streamline the process, reduce the cost, time and resources required to facilitate future package transfers of services and related assets

**Dr Carlton Brand, Corporate Director**

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**Purpose of Report**

1. To seek Cabinet's endorsement of the draft policy and principals (annex A) for the transfer of appropriate packages of services and related assets to Town and Parish Councils.

**Vision**

2. Wiltshire Council is committed to continuing to improve and enhance the outcomes of people's lives and businesses in Wiltshire working closely with its communities and partners. The council's business plan 2017 – 2027 emphasises the desire for communities and residents in Wiltshire to continue to feel they can take responsibility for their well-being, have positive relationships with each other to get involved and influence and shape their own communities
3. This draft policy supports this commitment encouraging local town and parish councils to take responsibility for their well-being, build positive relationships and to get involved, influence and act on what's best for their own communities. It sets out a framework to enable the devolvement of those services and assets best placed to be delivered by local communities at the Town Council level.
4. The council recognises that the devolution of assets and services to local communities, town and parish councils makes a significant contribution towards enabling them to be stronger, more resilient and sustainable. Experience gained from a number of asset and service transfers completed to date, has shown that the development of this policy presents significant opportunities to create stronger, more cohesive and sustainable communities. It enhances the role of town and parish councils; enables the use of buildings to be enhanced with the ability to modify them to embrace local needs; the ability to source and secure additional resources from sources not available to Wiltshire Council to do so as well as the ability to deliver and modify services to match the needs and expectations of local communities.

## Background

5. This draft policy builds on relevant policies developed over the last 5 years. It also recognizes and considers significant legislative requirements and supports central governments commitments to devolve assets and services to local community groups.
6. The objectives for the council in reviewing this policy are to:
  - Enable Town and Parish councils to be stronger, more resilient and sustainable, providing the opportunity for buildings to be enhanced with the ability to modify them to embrace local needs; the ability to source and secure additional resources from sources not available to Wiltshire Council as well as the ability to deliver and modify services to match the needs and expectations of local communities. (i.e. markets; grounds maintenance; grass cutting; play areas, parks and open spaces)
  - Agree a package of services and assets that is agreeable to both parties

## Main Considerations for the Council

7. The intention is to identify a single block of services and assets for our main town councils, thereafter to be followed by smaller packages for our parish councils
8. The types and nature of assets and or services that will transfer are set out in the policy. The Transfer of property assets are likely to be associated with transfers of services, where agreed between the parties. Assets that are unlikely to be considered for devolution are:

Assets held for investment purposes - both assets that generate an immediate income to Wiltshire Council and those held for future capital realisations
Assets of a rural nature - given Wiltshire Council's roles as a small holdings authority
Assets held with Wiltshire Council's Housing Revenue Account (HRA) - utilised to deliver the statutory housing functions
Vacant land or buildings that can generate a capital receipt in excess of de-minimus level for capital accounting purposes - with capital receipts required to fund the capital programme of Wiltshire Council
Land held for future development of Wiltshire Council or partner schemes - as it would not be financially prudent to devolve the land and be required to repurchase in the future
Education and statutory early years premises - due to Wiltshire Council's roles as a Local Authority for education purposes
Car parks defined by Wiltshire Council for retention under the 2015 Parking Review or any subsequent reviews
Land held or adopted as public highway - due to Wiltshire Council's role as Highway Authority

9. When considering the freehold transfer of the asset, the decision-making process should include a statement qualifying the economic, social or environmental well-being generated from the disposal. This should be

quantified as much as possible to ensure that the *General Consents Order* requirements have been met. In circumstances where services are being delegated, the value of the service will be offset against the value of the assets.

10. The transfer will not normally include a provision to offer the asset back to Wiltshire Council **if it is no longer needed for community use** (“the reverter”) unless there are compelling legal reasons for doing so.

If the transfer needs to contain the reverter in the circumstances referred to above, Wiltshire Council will not be under any obligation in the transfer to accept the asset back. However, Wiltshire Council will need to assess at the time if there are still wider legal issues that mean Wiltshire Council should take the land back. If Wiltshire Council decides to take the asset back it will be under no obligation to continue to use it for community purposes, furthermore if Wiltshire Council disposes of the asset at a future date there will be no requirement to split the capital receipt with the Town or Parish Council.

11. The transfer will include a provision whereby should town and parish councils dispose of those assets for non-community uses, a 50% split of the capital receipt will be payable to Wiltshire Council.

12. Should any land or building that would not normally be devolved, as set out in the draft policy, be requested by a town or parish council and the devolution considered acceptable to Wiltshire Council, an exception report will be produced for Wiltshire Council’s Cabinet setting out the reasons for the transfer. The report should include considerations of an economic, social or environmental well-being nature.

### **Open Space Land**

13. A local authority has a statutory duty to advertise its intention to dispose of open space land in a local newspaper for two consecutive weeks and to consider objections. This should be done before any final decision is taken on the disposal, so that proper consideration is given to the responses that are received. This process will need to be factored into the transfer programme for each town and parish council.

### **Service Delegation**

14. There are many types of land maintained by the council which cannot or should not have the ownership transferred to the local community, but the service on them could be delegated. The reasons for which are set out in the policy. In these cases a **service delegation** on those areas will allow the local community to set the standard and deliver the Amenity Maintenance Services within their defined boundary.
15. It should be noted though that whilst the service delegation will facilitate the quick hand over of the delivery of the service by the town or parish council it will not resolve legal issues, such as:

- a. any historic land issues, for example, outstanding land transfers to the former districts (now Wiltshire Council as statutory successor). Therefore, access to the land for maintenance will be at the risk of the town and parish council (they will not have any legal property interest in the land in question) with Wiltshire Council providing as much information as it has available in respect of any such historic issues.

Depending on requirements of the parties, Wiltshire Council can then work with the town and parish councils to resolve any such issues.

- b. entering into this type of agreement without the obligation to transfer would mean that the town or parish council would have a right to terminate if they for whatever reason chose to step away (we would be unlikely to be able to enforce an indefinite contractual obligation). If such termination was exercised then there is a real risk that the maintenance obligations and attendant costs would fall back to Wiltshire Council and we may be obliged to honour these due to public expectations. This would defeat one of the purposes of the transfer. However, in such cases there is a possibility that the council would only commit to undertake the minimum statutory level of provision
  - c. Land ownership responsibilities remain with the Council. Therefore, even though the town or parish council will have taken over management responsibilities for the land Wiltshire Council will remain the registered owner at the Land Registry and could still be liable for any injury/damage caused by a failure to maintain the land.
  - d. Over time the underlying status of ownership becomes blurred and when some legal requirement needs to be exercised there could be confusion and/or dispute. The ambiguity over ownership could lead to significant officer/member time at a future date if a dispute arises.
16. The delegation of the services will not affect any rights Wiltshire Council may have to dispose of, transfer, assign, lease or otherwise deal with its amenity land in its capacity as freehold owner.
  17. Following the date of transfer of service responsibility this council would not be responsible for delivering any of the services listed in appendix 3 and 4 of the policy. The town or parish council will perform the services within the boundary indefinitely on and from the transfer date to the minimum standards required by any relevant legislation.
  18. The decision thereafter on enhancement to the legal minimum standard of provision of services will be delegated to the relevant town or parish council.
  19. The town or parish council would take responsibility for all consequences: financial, contractual, safety or otherwise for the services delivered and the management of the amenity asset and their services provided on the highway.
  20. In applying the Service Devolution & Asset Transfer Policy it is anticipated that there may be instances where transactions be classified as a *Disposal at less*

*than best consideration*, as market value of the individual asset or package of assets will not be obtained by Wiltshire Council. These will need to be considered on a case by case basis.

21. Funding of delegated services

- a. Wiltshire Council will offer no staged payments to town and parish council on the transfer of the services, with the recipients being responsible for ensuring that revenue budget is available to fund the services.
- b. To support the revenue costs associated with the services, Wiltshire Council will consider the freehold transfer of assets of social value to town and parish councils, being those assets that deliver a community function by a third party.

**Resources**

22. The resources required to deliver a structured programme of Service Devolution and Asset Transfers will be assessed once the policy and approach has been considered by cabinet and a draft programme of package transfers has been developed.

**Overview and Scrutiny Engagement**

23. A rapid scrutiny task group has been scheduled for 2 November to consider the draft policy and will report direct to Cabinet on its views.

**Safeguarding Implications**

24. None

**Public Health Implications**

25. None

**Procurement Implications**

26. None

**Equalities Impact of the Proposal**

27. None

**Environmental and Climate Change Considerations**

28. None

**Risks that may arise if the proposed decision and related work is not taken**

29. Whilst there is a clear intention in favour of transfer of assets to provide local community services in appropriate cases, the Council should consider its statutory and financial obligations as part of any such arrangements.

30. When considering the transfer of assets and land the council will need to consider the effects on other strategic plans.
31. Staffing capacity within this Programme has always been challenging and will need to be considered once the cabinet has considered the draft policy and a draft programme of package transfers has been developed.
32. There may be inequality or perception of inequality and transparency across Wiltshire with varying levels of service being delivered and in some areas local precepts being increased to pay for the additional services in those areas where others have not been increased.
33. Service delegation to town and parish councils without the obligation to transfer would mean that they would have a right to terminate if they for whatever reason chose to step away. If such termination was exercised then there is a real risk that the maintenance obligations and attendant costs would fall back to Wiltshire Council. In such cases there is a possibility that the council would only commit to undertake the minimum statutory level of provision.

### **Financial Implications**

34. The proposals brought forward under this policy will be assessed on individual merits, with the focus being on a reduced level of expenditure to enable savings within the Council's overall financial strategy. If this is not demonstrated then the options will not be able to progress without identifiable alternative funding. Financial assessment and risk will thus form part of all future decision making on individual reviews.
35. Should the freehold of an asset be transferred to a town or parish council, any financial liabilities or obligations will transfer with the building, this includes any grant agreement for funding.
36. In the case of any grant agreements for funding, Legal Services will need to ensure that the original purpose of the funding is continued by the town or parish council with an obligation contained in the legal documentation. In addition, Legal Services will need to ensure that the disposal does not trigger any clawback of the fund (or a proportion of the fund) from the grantor. The position will need to be considered by Legal Services on a case by case basis.

### **Legal Implications**

37. The ownership is unclear on much of the land that is maintained by Wiltshire Council leading to the potential of legal complexities that need to be addressed before the freehold can be transferred
38. **Section 123 Local Government Act 1972**
  - 38.1 Wiltshire Council cannot dispose of its land for a consideration less than the best that can be reasonably obtained in the market, except with the express consent of the Secretary of State.

The power for the Secretary of State to give a general consent for the purpose of land disposals by local authorities is set out in *section 128(1)* of the LGA 1972. Specific consent is not required for the disposal of any interest in land that the authority considers will help it to **secure the promotion or improvement of the economic, social or environmental well-being of its area.**

- 38.2 The model community asset freehold and leasehold documentation is drafted on the basis that the use of the property will continue for the benefit of the local community.
- 38.3 Disposal at less than best consideration is always subject to the condition that the undervalue does not exceed £2 million. Therefore, all proposed transactions where the aggregate of "undervalue" exceeds the £2 million threshold will require the specific consent of the Secretary of State.

Wiltshire Council should obtain the view of a professionally qualified valuer as to the likely amount of the undervalue applicable to each transfer package.

- 38.4 When considering the freehold transfer of the asset, the decision-making process should include a statement qualifying the economic, social or environmental well-being generated from the disposal. This should be quantified as much as possible to ensure that the *General Consents Order* requirements have been met.

### 39. State Aid

European State aid law is intended to avoid state aided subsidies which could distort competition and affect trade between member states. State aid law can potentially apply to town and parish councils and third sector organisations when they receive community assets and/or financial contributions from Wiltshire Council towards the cost of delivering delegated services. State aid is unlikely to be present where the recipient is engaged in carrying out not for profit activities to meet local community need. However, the use of each individual asset or financial contribution must be considered, and Legal Services must be engaged to advise Wiltshire Council on the State aid implications for each transfer package.

If State aid has been granted without European Commission approval (either through a separate notification or by following the terms of the relevant exemption), this would be illegal State aid. The European Commission can order the recipient to return the illegal State aid to Wiltshire Council. The recipient would be forced to return any assets and repay the value of the aid itself, plus interest from the date of the aid to the date of repayment.

Even where there is no illegal State aid in favour of the recipient, care needs to be taken to avoid accidental leakage of aid in the future when the recipient itself deals with the asset or funding. For instance, care needs to be taken by the recipient to avoid giving a third party a competitive advantage by



letting a community asset at below market rate, and an EU compliant procurement process must be followed by the recipient when engaging any third party to carry out delegated services. There are clauses in the template legal documentation between Wiltshire Council and the recipient to deal with this.

#### **40. Transfer of employees:**

There are two different types of transfer of employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) – Service Provision Change or a Transfer of Whole or Part of an Undertaking.

It will be necessary to consider the application or otherwise of TUPE having regard to the particular circumstances of the case and whether for example redundancy costs may be payable in the event that TUPE doesn't apply. These costs will need to be identified and form part of the financial analysis of the proposed service devolution.

Where the Council is currently delivering services to Town or Parish Councils which will then be delivered by the Town or Parish Council under a service delegation, any staff employed by Wiltshire Council to deliver these services are likely to transfer from the employment of the Council to the Town or Parish Council under TUPE. This is subject to the requirement that the staff are wholly or mainly assigned to the delivery of the services.

If there are services currently being provided to Town and Parish Councils under a contractual arrangement between the Council and a service provider, there will be no transfer of the service provider's staff to the Town or Parish Council or the Council. This is because the service delegation will result in a change of client which means that TUPE will not apply to transfer the service provider's employees to the Town Council, Parish Council or the Council. However the change of client will also terminate the contractual arrangements between the Council and the service provider. Thus there is a risk that termination costs would be payable by the council to the service provider. This risk may be managed by the Parties entering into a Deed of Novation.

If the ownership of an asset is being transferred e.g an open space which the Council currently provides service to, then under TUPE there will be a transfer of the employment of the Employees who are employed by the Council but only if the employees are wholly or mainly assigned to providing services to the asset being transferred.

However if the council has contracted with a Service Provider to provide the same services to the asset then TUPE will not apply to transfer the employment of staff of the service provider to the Town or Parish Council. This is because the service provider's staff are not employed by the owner (i.e the Council) of the asset being transferred. Again there may be risk of termination costs as highlighted above.

If there are Council employees whose employment transfers to a Town or Parish Council then HR should be involved at an early stage to ensure that

the proper processes required by TUPE are observed.

## **Options Considered**

38. Following many lessons learnt undertaking the Salisbury Community Asset Transfer, a revised approach has been developed to improve the speed and clarity with which packages to Town and Parish Councils can be transferred

## **Conclusions**

39. This paper proposes a revised approach to service devolution and asset transfers that are intended to improve the speed and clarity with which packages to Town and Parish Councils can be transferred
40. The implications of implementing these changes are considered to be necessary to provide the most beneficial outcome for both the Council and local Communities.

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## **Appendices**

Draft Policy

## **Background Papers**

None