

# Somerset West and Taunton Council

## Scrutiny Committee – 17<sup>th</sup> July 2019

### Watchet Library Asset Transfer Negotiations

#### Report of Localities Manager – Chris Hall

(This matter is the responsibility of Executive Councillor Chris Booth)

#### 1. Executive Summary

This report was requested by Scrutiny Members to support a discussion on the progress to transfer the freehold of the Watchet Library following the Executive decision published on 3 January 2019. The key point for discussion should be whether the council should follow legal advice or disregard it in this instance.

#### 2. Recommendations

This committee is recommended to note the content of this report.

#### 3. Risk Assessment

##### Risk Matrix

Description	Likelihood	Impact	Overall
Risk: The library fails to be protected and is lost to the community of Watchet.	Possible (3)	Major (4)	Medium (12)
<i>Mitigation: The lease remains in place for up to a further 31 years for the use as a library. WTC have worked hard to instigate a new way of operating that protects this for the people of Watchet but are not bound to do so on expiry of the lease.</i>	Unlikely (2)	Major (4)	Medium (8)
Risk: The lease expires and no protection of the library exists.	Possible (3)	Major (4)	Medium (12)
<i>Mitigation: In this instance the freehold owner has no restriction on them in how the asset is used. Either party could look to continue the library or cease it.</i>	Possible (3)	Major (4)	Medium (12)
Risk: The building is used for an alternative purpose without the District being in control of any future use or development for the benefit of the community.	Possible (3)	Moderate (3)	Medium (9)
<i>Mitigation: Both potential freehold owners are public bodies and are duty bound to serve the public with any increased value or use of the asset.</i>	Possible (3)	Minor (2)	Low (6)

Risk: To allow this transfer to be undertaken without the protections identified could be considered to set a precedent in asset disposal practice.	Likely (4)	Moderate (3)	Medium (12)
<i>Mitigation: The council would not be bound by such a standard or tradition but may be forced to defend why legal advice in not being universally applied.</i>	Possible (3)	Moderate (3)	Medium (9)

#### 4. Background

- 4.1 The building was purchased from Watchet Urban District Council by a private individual, before being passed back in trust to Watchet Urban District Council with a 99 year lease to Somerset County Council for its use as a library. This is confirmed by the recitals in the lease that was granted to SCC.
- 4.2 The property was leased to SCC as a library from 1951 for 99 years. Upon the natural expiry the asset would have been held by WUDC with nothing to suggest that the library had to continue beyond this point.
- 4.3 The Council has not seen a copy of the trust deed and the terms of the trust, therefore its continued existence can only be assumed.
- 4.4 There is no copy of the conveyance to the trust or private individual who provided funding, or copy of the conveyance back to WUDC and no evidence that a covenant was imposed at this time to restrict the use of the property to that of a library.
- 4.5 The Council has been trying to negotiate the continued use of the building as a library at Watchet for some time, and in January 2019 the decision was communicated to Watchet Town Council (WTC) that a transfer of the freehold was approved. ***“The decision is to transfer the freehold of the Watchet Library Building from West Somerset Council (WSC) to Watchet Town Council (WTC), with detailed terms to be finalised by the Asset Management team in consultation with the Cabinet Member for Resources and Central Support.”***
- 4.6 The negotiation has stalled as the protections that West Somerset Council sought to put in place were considered unacceptable to WTC.
- 4.7 It is in the interest of the people of Watchet that the library continues to operate and that a suitable compromise is reached.
- 4.8 SCC can terminate the lease if there is a cessation of funding for the library and this implies that SCC are not under an obligation to maintain the library status. It is suggested that there is no evidence of an intention for the property to be used as a library in perpetuity and if funding failed the use as a library could come to an end.
- 4.9 During exploration of the options the asset management team discussed with SCC their ability to sublet the property to WTC for the remainder of the 99 years. Under

this arrangement SCC would remain, as they are currently, responsible for the ongoing maintenance of the building.

## **5. The Trust**

- 5.1 From documents provided by WTC we recognise the existence of the trust at the time of the lease, but without the trust documents the content of the trust and its intent at the end of the lease period with SCC cannot be proven. It is possible that at the time of the trust's creation the documents that we may consider normal now, were never produced.
- 5.2 We have however reviewed the documentation available to us which includes the lease and information from members of the Stoate family, and consider in good faith the information provided that the library was to be protected for the people of Watchet. What it does not provide evidence of is any everlasting effect, there is no statement that it is to be retained in perpetuity. SCC have a lease structured in such a way that it can be broken without protection of the library. No protection of this building as a library beyond the lease is therefore assumed. Furthermore the property register contains no restriction on the use of the asset now or on expiry of the lease.
- 5.3 SCC had confirmed to WSC that should the funding cease then the lease would break and the asset return to WUDC's successor SWaT.
- 5.4 The council have written to the survivor of the family to confirm that there is no intention to put at risk the current library arrangements, it is in fact our intention to protect the asset whilst it is covered by the lease.

## **6. The Remaining Terms**

- 6.1 All other terms have been agreed, leaving only the issue of overage and pre-emption unresolved.
- 6.2 WSC have been negotiating the transfer with an overage and/or a pre-emption clause as it was felt that this best protects the asset or any value in it should WTC decide to dispose of the asset in the future. These were considered by WSC and now SWaT as normal and reasonable protections given the status of the lease.
- 6.3 **Overage** – This is an agreed payment back to SWaT in the event that the asset grows in value due to a change in use, which is possible on expiry of the lease. Overage is proposed on the basis that the asset is being transferred at a rate that is under its potential market value, in this case £1.
- 6.4 Overage could be considered as inappropriate whilst the lease is in place. Whilst it could provide a financial return it appears to suggest that we would approve of a change of use which goes against the spirit of the Trust, to protect the library for the people of Watchet.

- 6.5 However should the lease break naturally or at an earlier date, the use of the building could change as there are no restrictions on the title and at that point the value of the property could increase.
- 6.6 A matter for consideration is should any increase in value be realised should this be held by SWaT or if WTC? Either party could use any realised funds effectively for the people of Watchet.
- 6.7 **Pre-emption** – this is a contractual right of first refusal in the event of a disposal. It would give SWaT the opportunity to repurchase the property for the original consideration of £1. It has also been suggested that a covenant could be imposed which would limit the use of the property to public purposes. Whilst it is noted that covenants can be released this should give some protection and it supports the intention to retain the property for use by residents of Watchet.
- 6.8 WSC and subsequently SWaT consider that a right of pre-emption would be a suitable means of protecting the spirit of the Trust during the period of the lease. It would not be to the detriment of WTC with their stated intention to retain the asset as a library for the people of Watchet. It would not impact on the operation of the asset and would only ever be of significance if disposal was to be considered by WTC.
- 6.9 Both of these terms would actively discourage WTC from using the asset for anything other than as a library and therefore it could be argued that these serve as an additional protect for the building's continued use as a library.
- 6.10 WTC have resisted both of the terms of overage and pre-emption proposed on the basis of the building was transferred by means of a trust to Watchet Urban Council and therefore they consider that no party should benefit financially as that was not the spirit of the Trust as they see it. They also consider themselves able to protect the asset for the people of Watchet and should not need the pre-emption to return it to SWaT.
- 6.11 Through the proposed clauses the Council is not trying to make an income but protect the asset from other uses as is our view of the spirit of the trust.
- 6.12 At the end of the lease period, naturally or otherwise the disposal of the asset and any financial benefit could be realised with any financial gain being retained by a public body, either SWaT or WTC. This would then be used to support the community as that is the nature of a District or Town Council. It could be considered that should this occur the community is protected through the benefits from the asset being administered by a public body regardless of which body that is.
- 6.13 WTC state that the continued involvement of SWaT is unnecessary as they too are a publicly accountable body and therefore have the same level of transparency in protecting this asset for the people of Watchet. They further argue that a decision to retain some level of control goes against the principles of localism which are to deliver services as the most appropriate government level for the people of that community.

- 6.14 WTC propose that the freehold should be transferred without provision for overage or a right of pre-emption in favour of SWaT on the grounds that they are equally able to ensure the protection of the asset for the people of Watchet as a tier of local government. Furthermore they argue that the existence of a trust means that the asset is not therefore owned by the council in the traditional sense and should not be subject to what we would consider as normal commercial terms.
- 6.15 SWaT acknowledge that they are the custodians of the asset and therefore it is for them to consider how they reasonably protect it for use as a library.
- 6.16 The lack of protection beyond the current lease term and with the opportunity of a break clause in the lease means that a change of use could occur much earlier than was initially envisaged, should SWaT decided to transfer the freehold of this asset without a right of pre-emption then any future use or regeneration of the building or the land on which it sits would not be in their control.
- 6.17 This final aspect that is being negotiated would become relevant in the event that the lease expires and that the body responsible for the freehold wishes to dispose of the asset or change its use. WTC have proposed the following in order to mitigate some of our concerns around the future use of the building were it to be transfer to them without the overage or pre-emption:
- WTC will relist the building as an Asset of Community Value
  - Should WTC be in a position of disposal then they would consult with the descendants of the trust, the people of Watchet and SWaT.
  - Keep the lease extent to acknowledge the existence of the Trust.
- 6.18 Whilst relisting the building as an Asset of Community value shows their intent it provides only limited protection.
- 6.19 WTC believe that accepting SWaT as a consultee in the future is a further step to show their transparency. This is appreciated but does not offer the level of protection that a right of pre-emption would.
- 6.20 During the negotiations WTC have expressed concerns that in the District's desire to protect the asset, we have been asking to see documented evidence of the trust and raised concerns over its current status. As part of this it is considered that through the evolution of councils, Watchet Urban District to West Somerset Council to Somerset West and Taunton Council, the council's responsibilities as a trustee may not have been fully understood. We would have reasonably expected to hold the paperwork ourselves and not have to ask a third party for it. This places doubt in the minds of WTC's Members as to the importance the council places in the trust status of this building.
- 6.21 Officers have exhausted their ability to negotiate as legal opinion is to include the terms of overage and pre-emption whilst WTC have expressed that they are unable to move on these clauses.

## **7. Finance / Resource Implications**

- 7.1 The finance comments contained are limited to the overage and pre-emption clauses. They are provided noting the lack of trust documentation and lack of any restrictions on the title of the property.
- 7.2 The Comments do not provide further analysis of the principle of a freehold transfer as this is an existing executive decision. The comments are based on the view provided to finance by officers that the Trust should be acknowledged to have existed at the time the lease was entered into.
- 7.3 The asset's current value is limited due to the existence of the lease and acknowledgement of the trust. However there is a point in time when any related restrictions fall away and the building could have a market value.
- 7.4 The overage provisions proposed by officers would ensure SWaT gain a share of any value gain in the asset should WTC seek to deviate from the current use following termination of the lease.
- 7.5 The right of pre-emption offers protection for the community and in the event that WTC wanted to dispose of the asset SWaT would have the opportunity to repurchase it for £1.00. This means that any value in the asset would also be passed back along with control of the use. It seems a reasonable protection of any future value that this clause is retained.

## **8. Legal Implications**

- 8.1 WTC within their local government role must act in the interests of the public and operate within their constitution.
- 8.2 Previous advice supplied makes recommendations to include overage and pre-emption provisions within the Heads of Terms and documentation for the disposal, although there is an acceptance that the commercial terms may not be necessary where the transfer is to another public body bound by the same public accountability as SWaT.
- 8.3 Legal advice remains that the greatest level of protection for SWaT comes from at the very least a right of pre-emption in favour of SWaT. Protection for the community can be provided by either public body, thus it must be a decision for the council to consider who is best placed to ensure the continuation of the benefit for the community, either as a library or any other use in the future.
- 8.4 Without restrictions on the title or a trust deed which provides details of the terms of the trust on which the property is held, and with the conditions of the lease to SCC allowing for termination, protection of the library in perpetuity cannot be established and therefore future uses of the asset may be permissible on expiry of the lease.

## **9. Environmental Impact**

- 9.1 There are no implications resulting from this report.

**10. Safeguarding and/or Community Safety Implications**

10.1 There are no implications resulting from this report.

**11. Asset Management Implications**

11.1 The Asset Management Team has been involved in the negotiation throughout and support the content of this report.

**12. Data Protection Implications**

12.1 There are no identified implications of this report on data protection.

**13. Consultation Implications**

13.1 There is no formal consultation required in relation to this report. The decision that supports a freehold transfer has already been through a Member decision process.

**14. Equalities Impact**

14.1 There are no identified equalities implications of this report.

**15. Partnership Implications**

15.1 The Watchet Library Partnership need not be at risk as a result of any decision from this report. The freehold has been agreed and it is only final terms that are subject to this report.

**Democratic Path:**

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**Reporting Frequency: One off**

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### Risk Scoring Matrix

<b>Likelihood</b>	5	Almost Certain	Low (5)	Medium (10)	High (15)	Very High (20)	Very High (25)
	4	Likely	Low (4)	Medium (8)	Medium (12)	High (16)	Very High (20)
	3	Possible	Low (3)	Low (6)	Medium (9)	Medium (12)	High (15)
	2	Unlikely	Low (2)	Low (4)	Low (6)	Medium (8)	Medium (10)
	1	Rare	Low (1)	Low (2)	Low (3)	Low (4)	Low (5)
			1	2	3	4	5
			Negligible	Minor	Moderate	Major	Catastrophic
<b>Impact</b>							

<b>Likelihood of risk occurring</b>	<b>Indicator</b>	<b>Description (chance of occurrence)</b>
1. Very Unlikely	May occur in exceptional circumstances	< 10%
2. Slight	Is unlikely to, but could occur at some time	10 – 25%
3. Feasible	Fairly likely to occur at same time	25 – 50%
4. Likely	Likely to occur within the next 1-2 years, or occurs occasionally	50 – 75%
5. Very Likely	Regular occurrence (daily / weekly / monthly)	> 75%