



# publicly funded assets

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The Finance Hub is delivering to the government's ChangeUp programme to create voluntary and community organisations that are effective and independent because they are financially sustainable.

### **The Finance Hub**

Charities Aid Foundation  
St Andrew's House  
18-20 St Andrew Street  
London  
EC4A 3AY

[financehub@cafonline.org](mailto:financehub@cafonline.org)  
[www.financehub.org.uk](http://www.financehub.org.uk)

**t** (020) 7832 3014

**f** (020) 7832 3001



### **Development Trusts Association**

National Office  
33 Corsham Street  
London N1 6DR

[info@dta.org.uk](mailto:info@dta.org.uk)  
[www.dta.org.uk](http://www.dta.org.uk)

**t** 0845 458 8336

**f** 0845 458 8337



### **acevo**

1 New Oxford Street  
London  
WC1A 1NU

[info@acevo.org.uk](mailto:info@acevo.org.uk)  
[www.acevo.org.uk](http://www.acevo.org.uk)

**t** 0845 345 8481

**f** 0845 345 8482

This briefing provides an introduction to 'clawback', which may affect publicly funded assets, and outlines the main points from recently revised government guidance to funders (HM Treasury, 2006).

## What is clawback?

The term covers a number of conditions used to safeguard the financial interests of public bodies when funding others to acquire or develop assets. While the general requirement to maintain public interest continues, the government's revised guidance states that clawback conditions should be 'flexible and imaginative and should not create barriers to wider policy objectives'.

## Policy context

The revisions to the guidance on clawback are part of a wider review of financial relationships with the third sector (HM Treasury, 2006) but should be seen in the context of other policy developments. *Firm foundations* (Home Office, 2005) introduced the concept of community anchor organisations as sustainable, asset owning third sector organisations with an important role to play in building social capital and providing local service delivery. *Citizen engagement and public services: Why neighbourhoods matter* (ODPM, 2005a) outlines the long-term strategy and importance of effective service delivery at the very local level – sometimes referred to as 'double devolution'. More recently ODPM and other departments combined to produce the consultative report *Communities taking control: Final report of the cross-sector working group on community ownership and management of assets* (ODPM/Home Office, 2006).

A particular catalyst to the review of the guidance on clawback was the report *New Deal for Communities succession strategies* (ODPM, 2005b), which led to the ODPM issuing Programme Note 34 *New Deal for Communities succession strategies and use of assets* to New Deal for Communities (NDC) partnerships in March 2006 (ODPM, 2006).

## General principles

The main points of the new guidance, issued in May 2006, are that clawback conditions should be negotiated in collaboration with third sector partners, be realistic and proportionate to the value of the grant, and take account of achievement of the grant's original objectives.

It states:

*Public bodies must take suitable and proportionate steps to safeguard their financial interests and those of the taxpayer when giving funds to others to acquire or develop assets. Bodies providing such funding should therefore carefully consider setting conditions on their grants that are realistic and proportionate to the value of the grant, the use of the asset being publicly funded and the potential future value, thus safeguarding the funding body's financial interest over the asset.*

(HM Treasury, 2006)

Public bodies are encouraged to consider 'value for money' in more than simply financial terms; to look at broader outcomes than just recouping the value of the grant. They are also encouraged to set more flexible terms and conditions, which increase third sector organisations' ability to work with government bodies to deliver services.

## Imposing clawback

Clawback conditions are usually imposed in one of two ways: through a condition in the grant offer letter, or through a charge or legal condition being placed on any transfer of land or property. Conditions can also vary, from a need to consult before adapting or disposing of an asset and/or using resultant funds, to reimbursement of the initial grant or giving the public body a share of any increase in value on disposal.

The legal status of the third sector organisation is relevant when considering the appropriateness of clawback conditions. While companies limited by guarantee do not in themselves offer a watertight 'lock in' of assets, as members can change the company's objects, those also registered as charities offer such protection, as disposal of charitable assets is regulated by the Charity Commission. The new form of company, the community interest company (CIC), has in part been designed to address this issue, as it can be limited either by shares or by guarantee, but with an integral asset lock and a monitored statement of how it will benefit the community.

In order to implement clawback in the 'flexible and imaginative way' suggested by the new guidance, both the funder and the funded organisation should address a number of questions at the outset:

- Whether, when, how and to whom assets may be sold
- Whether there should be conditions relating to change of use
- Whether there should be conditions to cover the funded organisation's liquidation or winding up
- If a grant is for an improvement or is part of a larger funding package, what proportion of current or future value might be subject to clawback
- How long it is reasonable for the donor to maintain an interest in the asset
- Whether the recipient is an asset locked body, for example a registered charity or a CIC

*Given the different types of public sector funder, and diversity in the population of funded bodies, the terms of grants need to be adjusted to suit the circumstances of the case, if the aim of improving public and community services is to be achieved. Allowing as much flexibility as sensible can enhance recipients' capacity to develop and provide services over the longer term or to become independent of public funding. Terms on grants therefore need to be set in ways that enhance funded bodies' ability to work with government bodies to deliver services: over-rigorous terms may be counterproductive and not achieve overall value for money.*

(HM Treasury, 2006)

## Case study

### Yorkshire Forward and Royds Community Association

Yorkshire Forward, the regional development agency (RDA), and Royds Community Association, a development trust in Bradford, have an arrangement which strengthens the sustainability of the development trust and provides the RDA with a viable partner, delivering outputs against the regional economic strategy in a deprived area of Bradford.

Royds Community Association, a resident-led community organisation which acted as the accountable body for Single Regeneration Budget (SRB) Rounds 1 and 6, has developed an office building, a healthy living centre and an enterprise park. Yorkshire Forward has a charge over the assets but this is limited to the value of grant paid. It is also for a defined period, based on Yorkshire Forward's assessment of when the benefits will be derived. As the market value increases, and assuming the grant was no more than the original market value, Royds Community Association may use the increasing equity (in this case the difference between the original grant after taking account of inflation and current market value) to support borrowing. Yorkshire Forward has adapted its clawback conditions in order to help third sector organisations move away from a 'grant culture', and sets a clawback condition in such a way that will enable the assets to be used later as security for obtaining loans.

[www.royds.org.uk](http://www.royds.org.uk)

## Clawback periods

As well as considering the type and extent of clawback to be negotiated, a major area for flexibility is the period during which such conditions might apply.

The revised guidance suggests five options for determining the charge and clawback periods.

### **Option 1**

To set terms of charge (including clawback if appropriate) relative to the period over which the community services are expected to be delivered rather than relative to the life of the asset.

For example, a primary care trust might offer a third sector organisation a modest capital grant to improve leased premises to allow the organisation to deliver a contract providing healthy living advice to older people living alone in the community. The initial contract could be for three years subject to performance, and clawback on the capital amount could be confined to the contract period.

### **Option 2**

As for option 1 but also to agree that, if the asset's market value increases (and assuming the grant was no more than the original market value), a recipient might use the difference between the original grant and the latest market value to support its borrowing.

For example, a community anchor organisation occupying an old school building owned by the local authority attracted an SRB grant to purchase a 99-year lease from the local authority at below market value in recognition of the value created by its tenancy. The difference between the SRB grant and the market value is used to secure a capital investment on preferential terms to increase the revenue generating potential of the buildings and so enable the organisation to enhance its own sustainability.

### **Option 3**

To agree that any amounts to be clawed back would decrease by an agreed proportion each year until they vanish to zero, for example 10% each year for ten years, or 20% a year for five years.

This provides a straightforward method that would be suitable, say, for a Big Lottery Fund capital grant to a registered charity.

### **Option 4**

As in Option 3 but based on the estimated time of delivery of the agreed objectives of the grant rather than the life of the asset.

This method might suit a Futurebuilders investment to enhance service delivery capability against a time-limited contract.

### **Option 5**

To base the charge period over the life of the asset – this option is particularly appropriate when working with profit making bodies and where the asset is assessed as being able to be used for a considerable time.

This might apply where an iconic building is transferred under a long-term repair and maintenance lease but where long-term public use is deemed essential.

## Break clauses

The new guidance also suggests including 'break clauses' in any clawback arrangements. This might be useful when granting funds to allow a community organisation with a limited track record to develop an asset. The clawback condition could be renegotiated when the organisation had built up a track record of competent management and had developed a business plan for further development, borrowing money to expand the business, using the value of the asset as collateral. The funder could agree to revise the original clawback provisions to allow this to happen.

As well as being guided by the details of each individual case, clawback also needs to be negotiated in relation to wider strategic outcomes and should take account of other areas of control and influence. Getting planning consent for uses that increase the value of a site or building can be a way of safeguarding public investment. On the other hand, flexible clawback provisions may be appropriate where a grant is used to kick start investment in a deprived community, where there is a substantial risk of market failure.

## Case study

### Radford and Hyson Green New Deal for Communities (R&HGNDC)

R&HGNDC in Nottingham is in the sixth year of a ten year programme to transform one of the most deprived areas of the county. As part of its preparations to sustain its activities beyond 2010, R&HGNDC is seeking to build a portfolio of properties from which to generate long-term income to sustain itself and deliver on its mission.

R&HGNDC purchased an old unused factory from a private developer for £3 million, using its main NDC grant, and after refurbishment re-opened it as Castle Cavendish Works, an enterprise and conference centre. R&HGNDC is negotiating to remove the clawback, in order to raise additional working capital to enable additional asset development work on top of its existing funding allocation. This is being progressed with the Neighbourhood Renewal Unit as part of a NDC pilot, along with Shoreditch NDC.

[www.ndcnottingham.org.uk](http://www.ndcnottingham.org.uk)

## Conclusion

While the overriding duty of public funders of assets is to protect the public interest, this needs to be tempered by the wider policy context. The new guidance clarifies that flexible and proportionate implementation is appropriate in order to achieve wider policy outcomes.

## Further information

HM Treasury (2006) *Improving financial relationships with the third sector: Guidance to funders and purchasers*

Home Office (2005) *Firm foundations*

National Audit Office (2006) *Financial relationships with third sector organisations – a decision support tool for public bodies in England*

Available from [www.nao.org.uk/better%5Ffunding/](http://www.nao.org.uk/better%5Ffunding/)

OPDM (2006) *NDC Succession Strategies and use of assets* Programme Note 34

ODPM (2005a) *Citizen engagement and public services: Why neighbourhoods matter*

ODPM (2005b) *New Deal for Communities succession strategies*

ODPM/Home Office (2006) *Communities taking control: Final report of the cross-sector working group on community ownership and management of assets*