



Report to the Scottish Ministers on a community asset transfer request

COMMUNITY EMPOWERMENT (SCOTLAND) ACT 2015

Report by David Buylla, a reporter appointed by the Scottish Ministers

- Case reference: CAT-260-1
- Site Address: 285 Wallacewell Road, Glasgow, G21 3RP
- Appeal by Beatroute Arts against the decision made by Glasgow City Council regarding the application to purchase buildings and land under Part 5 of The Community Empowerment (Scotland) Act 2015
- Application for asset transfer dated 2 August 2018, approved subject to conditions on 9 August 2019 and, on review, approved subject to conditions on 29 May 2020
- Other parties: Barmulloch Community Development Company; Ms B Hewitt

Date of this report and recommendation: 11 September 2020



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The Scottish Ministers
Edinburgh

Ministers

In accordance with my minute of appointment dated 10 August 2020, I conducted a review of the written submissions made in connection with an appeal concerning an asset transfer request under the Community Empowerment (Scotland) Act 2015 at 285 Wallacewell Road, Glasgow, G21 3RP.

As the matters in dispute are clear and as the parties' initial written submissions provide sufficient information, I concluded that no further procedure would be required prior to writing this report.

The issues in dispute did not require me to inspect the appeal site.

CHAPTER 1: BACKGROUND

1.1 Part 5 of the Community Empowerment (Scotland) Act 2015 (the 2015 Act) allows "community transfer bodies" to make requests to a wide range of public bodies, to acquire any land or buildings that are owned by those public bodies. They can request ownership, lease or other rights and the public body is required to assess the request transparently against a specified list of criteria, and to agree the request unless there are reasonable grounds for refusal.

1.2 Beatroute Arts (the appellant) is a Scottish Charitable Incorporated Association. Under the terms of the 2015 Act, this makes it a community transfer body and therefore eligible to make an asset transfer request under that Act.

1.3 The appellant provides free, high-quality creative activities for young people and the wider community in an area identified in 2016 as being within the 10% most impoverished in Scotland. It provides weekly drop-in workshops in music tuition, song-writing, film-making, sound-production, art, fashion design, gardening, woodwork, drama, science and yoga as well as structured learning opportunities such as a weekly stringed instrument tuition programme. In 2019/20 it provided services to almost 1500 local people.

1.4 The appellant wishes to acquire ownership from Glasgow City Council (the council), of premises it has occupied under a lease since 2010. The council is willing to transfer ownership of the asset, but only subject to a number of conditions. Some of these

conditions are unacceptable to the appellant and this appeal asks Scottish Ministers to confirm the asset transfer with some of the conditions either modified or removed.

1.5 The premises comprise a single storey building, formerly the Balornock East Youth Centre, set within a garden area. Photographs submitted by the appellant show that significant improvements have been made to the decorative condition of the building and to its garden since 2010.

1.6 The original acquisition proposal was made to the council in August 2018. On 9 August 2019, the council resolved to approve the application subject to certain conditions. The appellant was not in agreement with some of the proposed conditions and asked the council to review its decision, which it did on 29 May 2020. In this review decision, the council accepted some, but not all, of the appellant's requested changes to the terms of the asset transfer. Therefore, on 30 June 2020, the appellant exercised its right under section 88(2) of the 2015 Act, to place the matter before Scottish Ministers for determination.

1.7 This report summarises the arguments of both parties and the observations made by others. It then makes a recommendation as to the decision Ministers should take.

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CHAPTER 2 THE APPELLANT'S CASE

2.1 As a preliminary point, the appellant argues that the terms of the council's 2020 decision in respect of the request to review the council's original (2019) decision, are so different to those of the original decision that the council exceeded the modification powers that are conferred by section 86(5)(b) of the 2015 Act. It does not regard the review decision as the substitution of a different decision (which would be permitted by section 86(5)(c)) because the decision (to agree the transfer request) did not change, merely the conditions that the council proposed to attach to the transfer.

2.2 If Ministers do not agree that the council's review decision was unlawful then the appellant objects to two of the conditions (Conditions 3 and 4) to which the council insists the asset transfer should be subject, and also seeks reimbursement of expenses which it argues it incurred unnecessarily on account of the council's unreasonable and obstructive behaviour.

2.3 Condition 3 provides the council with a right of pre-emption in the event that the appellant wishes or is required to dispose of the premises to a party other than a voluntary or community body intending to use the premises for the same or similar use.

2.4 The appellant believes that a right of pre-emption is unnecessary, inappropriate and disproportionate given that the council has no current or planned use for the premises. It questions the logic of the council agreeing to dispose of the premises and yet raising loss of a community asset as a reason for imposing a right of pre-emption. It requests that Scottish Ministers set aside in its entirety the council's right of pre-emption as set out in condition 3 of the decision notice of 29 May 2020.

2.5 If Ministers do not agree to removal of the council's proposed right of pre-emption, the appellant requests a modified right of pre-emption in the following terms:

"A right of pre-emption in favour of GCC is agreed on the following terms:- if at any time during the 5 years following the date of agreement of these terms, Beatroute decide to dispose of the asset other than to another voluntary/community body for a similar use, then Beatroute must send GCC an offer to sell the property, which offer is to be open for acceptance within 21 days from the date of the offer only (time being of the essence); failure by GCC to deliver written acceptance of the offer to Beatroute during the 21 day period shall be deemed a refusal and both the offer and the right of pre-emption shall accordingly be extinguished after that date; the price GCC shall pay for the property shall be (i) the full market value of the property at the date the offer is made (to be set by a joint valuation) (ii) with the use of the property restricted in terms of the Economic Development Burden to be imposed, (iii) plus, in addition to the foregoing, the verified costs of any improvements or other works carried out to the property by or on behalf of Beatroute prior to the date of entry under the disposition transferring the property back to GCC. The preemptive offer shall be made one time only and only to GCC as owner of the adjacent Wallacewell Day Care Centre and shall not apply to any successors in ownership of the Day Care Centre during the aforesaid 5 year period.

2.6 The appellant's proposed right of pre-emption differs from that specified by the council in that it would subsist for five years (rather than the 25 years the council has stipulated), would require the council to decide whether it wished to exercise its right of preemption within 21 days, would only operate in the event of a voluntary disposal of the premises and, in addition to securing market value for the premises (reflecting the use restriction imposed by an agreed Economic Development Burden), would allow the appellant to recover the cost of any improvements it had made to the premises.

2.7 The appellant believes that condition 3, in its current form, could potentially make it impossible to secure finance to acquire the asset and carry out further improvements. In support of this view, it has submitted excerpts from email correspondence with the Scottish Land Fund.

2.8 The appellant objects to condition 4, as it wants the transfer to include only the extent of the existing lease and not the adjacent footway or road, which are included in the red line boundary that is referred to in that condition.

2.9 The appellant also seeks the addition of a clause requiring the council to make a contribution to the appellant's legal costs over the past year, which it believes have been increased on account of what it regards as the council's unreasonable handling of this matter. It raises a wide range of criticisms of the council including the time taken for it to consider the transfer request and review, the council's reliance upon standard practice rather than adopting a flexible approach and its adoption of procedures that made it more difficult for the appellant to engage.

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CHAPTER 3 THE COUNCIL'S CASE

3.1 The council points out that, in reviewing its original decision, it was entitled not only to consider modifications to that decision, but to substitute a different decision. Therefore, its decision on the review application was not unlawful.

3.2 The right of pre-emption that is proposed by the council in condition 3 is argued to be essential if the transfer is to take place, in order to balance support for community organisations with the council's duty to secure best value and take responsible decisions. The council highlights the importance of protecting former council assets for future community and public use and points out its ownership of the adjacent Wallacewell Day Care Centre.

3.3 Condition 3 is worded as follows:

"In the event that the property is to be sold, the Council will have a right of pre-emption. The price to be paid by the Council will be the market value of the property at the date of the offer, on the basis of the use restriction to be imposed (set by a joint valuation). The right will not be exercisable where the property is being sold to a voluntary or community body for use in terms of the use restriction or a similar use, approved by the Council. The right will only be available to the Council, as owner of the adjacent Wallacewell Day Centre, and not to any successor in ownership of the centre and will last for a period of 25 years.

Reason: The Council considers that it requires to balance its support for community organisations with its duty to secure best value and take responsible decisions, with a key driver for the Council being to protect former Council assets for future community and public use.

It also considers that the price will be market value of the property which will properly reflect the condition of the property and any works carried out to it, and the pre-emption right should apply in any circumstances where the property is to be sold, whether voluntarily or at the instance of a funder, or on the dissolution of Beatroute Arts.

The period of 25 years represents a period during which the council may reasonably expect to own the Wallacewell Day Care Centre and may therefore have an interest in reacquiring the property if it was being sold."

3.4 The council argues that it only agreed to dispense with certain earlier requirements on the basis that there would be a pre-emption clause, and is disappointed that the appellant now argues that it should be removed.

3.5 It is also not in agreement with the terms of the appellant's proposed alternative preemption clause. It believes that its agreement to pay the (restricted-use) market value for the property would adequately reimburse the appellant for any improvements it had made to the property, as these would be reflected in the market value of the property at that time.

3.6 The council regards the proposed five year duration for the right of pre-emption as inadequate, as it is likely to retain ownership of the adjacent Wallacewell Day Care Centre for well in excess of that period and it points out that a 25 year period is not uncommon.

3.7 The council believes the right of pre-emption should apply not only in the event of the appellant voluntarily wishing to dispose of the premises, but in situations such as where a funder required the property to be sold or upon the dissolution of the appellant.

3.8 The council also points out that its proposed right of pre-emption would not apply if the appellant intended to sell to a voluntary or community body intending to use the premises for the same or similar use.

3.9 The council has not responded specifically to the proposed 21 day period for the exercise of its right of pre-emption. However, as its favoured wording omits any such time restriction, I have assumed that this point too is unacceptable to the council.

3.10 In response to the appeal against condition 4, the council states that the area bounded by the red line, which is not within the green shaded area, is part of the adopted road. It is the council's standard practice to dispose of an asset in its entirety so that it does not retain small and unusable land parcels. As the land beyond the green shaded area is adopted, it will remain within the council's maintenance responsibility and there would be no additional burden upon the appellant.

3.11 The council refutes the appellant's claim that it has acted unreasonably in its negotiations with the appellant and points out that it has made a number of concessions. It does not accept the appellant's description of the interaction between the parties as entirely accurate.

3.12 With regard to concerns expressed by the appellant over procedural fairness, the council confirms that it was not possible to conduct the review hearing in person due to Covid 19 restrictions. Instead, two meetings of the City Administration Committee took place by conference call. At that time, the council did not have the ability to conduct remote meetings in public using videoconferencing. It could have deferred consideration of the review request. However, the appellant advised that a decision had to be made by 29 May 2020 in order for it to make a funding application to the Scottish Land Fund. The appellant was given the opportunity to make written submissions to the committee, which it did.

3.13 The council contends that, in any event, there is no scope within the appeal process to consider the appellant's request to be reimbursed its expenses.

CHAPTER 4 COMMENTS FROM OTHER PARTIES

4.1 Barmulloch Community Development Company confirms that it has enjoyed an excellent working relationship with the appellant for over 11 years. It notes that the appellant has, over the past two years, expanded its services and is attracting increasing numbers of youths and adults. It also offers a range of activities for older people including yoga and keep fit and is a joint member in the Barmulloch Balornock Initiative – working with other groups towards the social and economic development of the area.

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4.2 Ms Bernadette Hewitt strongly supports the proposed asset transfer. She is particularly pleased with the appellant's continued delivery of art and music for youth at a time when provision in schools has diminished. Diversification into other areas is also welcomed. She believes that acquiring the asset would enable the appellant to expand its offer.

CHAPTER 5: REPORTER'S CONCLUSIONS AND RECOMMENDATION

5.1 There is no dispute between the parties over the principle of transferring ownership of this asset to the appellant, of the sale price, or of the proposed Economic Development Burden, which would restrict use of the premises to: the provision or organisation of recreational activities; the advancement of education; the promotion of social inclusion and mental health and wellbeing; the advancement of the arts primarily within the Balornock and Barmulloch area.

5.2 The principal dispute between the parties is over whether, and if so how, the council should retain an option to reacquire the property in the event that it is no longer to be used by a voluntary or community body for the same or similar use to that proposed by the appellant.

5.3 The next point of disagreement is whether the transfer should include land within the road boundary that the appellant has no use for.

5.4 Finally is the question of expenses.

5.5 Before considering each point, it is necessary to consider whether the council's review decision was, as the appellant suggests, *ultra vires*.

5.6 Looking at section 86(5), I see nothing to persuade me that, on review, a decision maker not wishing simply to confirm the original decision, is restricted either to modifying it slightly or to reversing the earlier decision. My reading of that section is that the relevant authority has considerable freedom to reconsider its original decision.

5.7 Subsection (5)(b) allows the decision maker to modify its decision or any part of its decision. There is nothing to suggest that such powers of modification are to be restricted as tightly as the appellant suggests, and I am satisfied that the review decision fell within the powers conferred by 86(5)(b). I also agree with the council that the 86(5)(c) power to substitute a different decision would cover the review decision it made, as there is nothing to suggest that "a different decision" has to have the opposite effect to the original decision; it simply needs to be "different".

5.8 Therefore, I find the council's review decision not to be unlawful.

The principle of pre-emption

5.9 In the event that the premises were no longer to be owned by the appellant, the proposed right of pre-emption would give the council, in certain defined circumstances, first refusal.

5.10 The appellant believes the council has been inconsistent on the need for a right of pre-emption and is seeking to apply its standard terms to the transfer rather than adopting a tailored approach as is expected by the 2015 Act. It states that, under the 2015 Act, any conditions must be proportionate in relation to the amount of discount offered, the risk to the selling authority of the project failing to deliver and the likelihood of the project promoting or

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developing matters including regeneration, public health and social wellbeing. Additionally, if the price offered for a community asset is less than market value, the appellant argues

that the authority should also be assessing whether the non-financial benefits justify the reduced price with the result that no conditions on the sale require to be imposed.

5.11 The appellant points to its track record of providing highly valued community services from the premises over a number of years as evidence of very low risk that the proposed asset transfer would fail to deliver the expected community benefits.

5.12 In addition, the appellant notes that the council has no specific plans for the premises in the event that it reacquired them so has no justification for insisting on a right of preemption rather than just relying upon the agreed Economic Development Burden.

5.13 I consider each of these points in turn.

5.14 I am satisfied that any change in the council's position was due to ongoing negotiation with the appellant, which resulted in the council seeking to rely on a right of preemption rather than some of the earlier rights (such as a claw-back of any uplift in property value following redevelopment) to which the appellant was opposed, and as a way of facilitating a sale of the premises (which the appellant desires) rather than a 25 year lease as council officers had, at one point, suggested.

5.15 I note that, at various points in the correspondence, the council has referred to its position being consistent with how it normally would conduct business. I agree with the appellant that the 2015 Act expects a tailored approach to each case with the aim of maximising community benefit. However, the exchanges between the parties confirm to me that the council has made concessions and modified its approach in order to secure a deal and that its insistence upon a right of pre-emption has had regard to the specific circumstances of this case and is not merely the application of standard terms.

5.16 I do not regard it as essential for the principle of a right of pre-emption to be accepted, for there to be a specific proposal or potential proposal that could benefit from that right in the future. The council is a large public sector agency, which provides a wide range of community services, one of which (the Wallacewell Day Care Centre) is situated immediately adjacent to the appeal site. In my view this provides sufficient public interest justification for a right of pre-emption to apply to the disposal of an existing public asset, without it requiring to be demonstrated what, specifically, that right would deliver.

5.17 There is also the issue of the potential inability of the proposed Economic Development Burden to restrict the use of the premises in the long term. The council's concern (not refuted by the appellant) is that, after five years, an application to the Lands Tribunal to discharge or vary that burden could be made. The council accepts that the appellant has a strong track record in providing community services and I note that that the appellant's constitution would prevent it acting as a property developer. However, it would be unwise to take the view that dissolution of the appellant is a prospect that is too unlikely to be contemplated. If that were to happen, the proposed right of pre-emption would ensure that, even if the burden were removed, the premises could not be sold to a party other than a voluntary or community body, without the council first having been given the opportunity to reacquire it.

5.18 I do not accept the appellant's argument that the council, as planning authority, could refuse to grant planning permission for a non-community use of the premises on grounds of conflict with the Economic Development Burden, as the existence of such a burden would not, in itself, be a material consideration to which a planning authority could have regard.

5.19 In principle therefore, I conclude that a right of pre-emption is justified.

Condition 3

5.20 Clearly it is essential that the form of any right of pre-emption appropriately balances the long-term protection of a community asset with the ability of a prospective acquiring party to exercise its rights under the 2015 Act.

5.21 Condition 3 proposes that the right of pre-emption in the council's favour would last for a period of 25 years rather than the five year period the appellant has suggested. There is no evidence to undermine the council's submission that its ownership of the immediately adjacent Wallacewell Day Care Centre is likely to endure well beyond five years and, as I have stated above, I see no need for the council to have devised a specific proposal for that adjacent site that would benefit from the council re-acquiring the appeal site at some future time. It makes sense to me for the council to retain the right, in certain circumstances to have first refusal over the premises given its proximity to a valuable community asset.

5.22 Condition 3 applies the right of pre-emption in all circumstances where the appeal property would be disposed of and not just in the case of voluntary sale. I regard this as important because it is at least as likely that, in a situation of a forced sale, the prospective purchaser would not be a voluntary or community body intending to use the premises for the same or similar use. I also note that the appellant has not disputed the council's statement that the Scottish Charity Regulator's charitable asset lock, which would oblige the property to be transferred to another charitable organisation or sold with the proceeds going to charity, would only apply to a voluntary sale.

5.23 The agreed sale price for the premises is £45,000. This represents a discount of £20,000 from its restricted-use market value. I do not agree with the appellant that the improvements it has made to the property during the period of its lease (which it estimates to have cost in the region of £20,000) mean the council is not really offering a discount at all. The appellant chose to undertake those works and has enjoyed the benefits of them during the time it has occupied the building. There is no evidence before me as to the effect, if any, of those works on the building's current restricted-use market valuation of £65,000. My conclusion is that the proposed sale price represents a substantial discount.

5.24 The council proposes that the right of pre-emption would be at market value (reflecting the restricted use but without any discount). Clearly, this would be to the appellant's advantage. However, the appellant also wishes to be reimbursed for any improvements it may make to the building in the future, in the event of the council exercising its right of pre-emption.

5.25 If it were intended from the outset to transfer this asset only for a temporary period, with the council able, at the end of that period, to demand its return, I would have sympathy with the appellant's position. However, that is not what is proposed – it is proposed to

transfer the asset permanently and if the appellant decided to expend funds on further improving the premises it would enjoy the benefits of those improvements for the duration of its ownership.

5.26 In addition, I agree with the council that the requirement to pay market value at the time of exercising a right of pre-emption right is likely to allow the appellant to recover some of its investment, on account of the likely increase in market value that such investment would have secured.

5.27 I conclude that it would be unreasonable to expect the council to reimburse all of the appellant's expenditure on the property because the proposed right of pre-emption does not give the council the right to demand the return of the premises; rather, it merely enables it to have first refusal in the event of a proposed disposal to a party who was not a voluntary or community body intending to use the premises for the same or similar use.

5.28 The appellant is dissatisfied that, having re-acquired the property through its right of pre-emption, the council could remove the use restrictions imposed by the Economic Development Burden and dispose of the property on the open market as it saw fit (presumably at a significant profit). However, this ignores the fact that the council's proposed right of pre-emption would effectively only apply when no community user could be found, in which scenario, it would not seem unreasonable to me for the council to consider other use options.

5.29 In the event that the council reacquired the premises and resolved to dispose of them on the open market, the only disadvantage I can see for the appellant is that it would have missed out on an opportunity to profit from a property development opportunity. However, it seems to me that the purpose of the Community Empowerment Act is to enable community bodies to acquire premises in order to continue to provide community benefits rather than to obtain financial gain in circumstances when such benefits can no longer be secured. Therefore the loss of any such opportunity is not, in my view, a cause for concern.

5.30 Having giving careful consideration to the views of both main parties and also the submissions from others, I conclude that the terms of condition 3 are proportionate and necessary and that the balance of public interest lies in favour of retaining the right of preemption in the form drafted by the council in condition 3.

Condition 4

5.31 Condition 4 defines the extent of the asset to be transferred. It refers to a plan at Appendix 2 to the review decision notice, in which a red outlined area and a green shaded area are defined. The red outlined area extends to approximately 1487 square metres and is the full extent of the council's ownership of the appeal premises. The smaller green shaded area, which is contained entirely within the red outlined area, extends to approximately 1219 square metres and is the site currently leased by the appellant.

5.32 The appellant requests that condition 4 be modified so as to transfer only the green shaded area.

5.33 It is understandable that the appellant would not want to take on responsibility for land from which it would draw no benefit. However, all of the additional land that is included within the red line boundary forms part of the adopted road. Therefore, it would remain within the council's maintenance and other liability. In my experience, it is normal for the ownership of land fronting a road to extend up to the middle of that road. Such ownership has no implications for the owner, as the roads authority (in this case the council) has responsibility for the road which passes over that land. My view is that there is no need for condition 4 to be modified.

The appellant's request for reimbursement of expenses

5.34 The appellant requests that the council be obliged to pay a contribution of £2500 plus VAT towards the legal expenses it has incurred in pursuing the proposed asset transfer.

5.35 The appellant believes that this claim is justified by the time and effort it wasted over the course of a year, at the culmination of which, conditions that the council had previously insisted upon in the face of overwhelming evidence as to their detrimental effect on the property and the transaction, were simply dropped with no explanation or rationale.

5.36 Looking at the exchanges between the parties, I am satisfied that the council modified its negotiating position in the hope of securing agreement with the appellant. I do not regard that as evidence of unreasonable or obstructive behaviour or as having required the appellant to incur unnecessary expense. On the contrary, it would seem that the legal advice the appellant employed in that regard was productive because it appears to have persuaded the council to concede certain points.

5.37 Had the council's original position on the matters it later conceded been clearly indefensible, my conclusions may have been different, but that is not the conclusion I draw from the evidence. I am satisfied that the council's approach from the outset was to handle the transfer of this community asset in a responsible way, balancing the interests of the appellant with the broader public interest. The fact that it modified the manner in which this objective was to be achieved is not evidence that the original approach was flawed.

5.38 The appellant raises a number of criticisms over the lack of transparency in the council's administrative procedures including the absence in the note of the 21 May 2020 meeting of a record of who took part in the vote or a transcript of any discussion. However, even if the council's minute taking could have been improved, I do not regard this as relevant to my assessment of the terms of the proposed asset transfer.

5.39 I note that the appellant is also dissatisfied with the absence of an oral hearing and with the limited amount of time it had to submit its written case to the review. However, I note that the appellant did make its written submissions and has not suggested that the arguments it put forward would have been different if it had had more time or if it had been able to present its case orally.

5.40 Having considered all of the submissions, I conclude that there is no justification for the appellant's requested expenses contribution from the council. I note that the council asserts that it would not be possible to address this matter through the asset transfer in any

event. That may be so, but as I have rejected the appellant's arguments on their merits, I have not needed to consider how the request might have been secured in practical terms.

5.41 I have had regard to the Scottish Government publication *Asset Transfer: Guidance for Relevant Authorities 2017*. This expects decisions on asset transfer requests to have regard to a range of issues including those required by section 82 of the 2015 Act, alignment with the Scottish Government's National Outcomes and the achievement of best value.

5.42 I find that that the proposed acquisition has the potential to deliver a wide range of benefits including a reduction in inequality due to the socio-economic disadvantage that the area currently experiences. I accept that the appellant has a proven track record in delivering high quality services over a number of years. I also note the importance that is given by the Scottish Government to community ownership, recognising the benefits this can bring to the stability and sustainability of community organisations, allowing them to develop new initiatives and support other developing groups.

5.43 Generally, it appears that there is little between the parties on those issues; instead it is the issue of the council's duty to secure best value and the implications this has for any conditions on the transfer, that is in dispute.

5.44 The Scottish Government's guidance recognises that asset transfer decisions need to balance the financial and non-financial impacts, both positive and negative, of all different options. For the reasons I have set out above, my conclusion is that the conditions that the council seeks to impose upon the proposed transfer, would achieve an appropriate balance, whereas the approach proposed by the appellant would not.

Recommendation

I recommend that this appeal be dismissed and that the council's review decision of 29 May 2020 be confirmed without modification.

David Buylla

Principal Reporter