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Environment, Climate Change and Land Reform Committee

Comataidh Atharrachadh Clìomaid is Ath-leasachaidh Fearann

The Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 [Draft]



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Environment, Climate Change and Land Reform Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Environment, Climate Change and Land Reform.



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Introduction

1. The draft SSI was laid on 7 February 2020 and referred to the Environment, Climate Change and Land Reform Committee with a reporting deadline of 26 March 2020.
2. The affirmative parliamentary procedure is set out in Chapter 10 of the Parliament's [Standing Orders](#). Instruments subject to the affirmative procedure cannot come into force unless they are approved by the Parliament.

Purpose of the regulations

3. The purpose of this instrument is to bring into force [Part 5 of the Land Reform \(Scotland\) Act 2016](#)¹ (The Act) which creates a new right to buy land and, according to circumstances, an associated tenant's interest, for the purpose of furthering sustainable development.
4. It is a compulsory purchase power, meaning that a properly constituted community body may seek Ministerial approval for the transfer of land or, a tenant's interest even where the owner of the land or tenant does not wish to sell the land or tenant's interest – both private and public land may be sought.
5. The Act sets out in broad terms what is “land”, “eligible land”, and “excluded land”. The Regulations define the following—
 - Eligible land: types of occupancy or possession that are to be treated as a tenancy
 - Excluded land: land pertaining to land occupied by an individual's home
 - Excluded land: land held or used by a Minister of the Crown or government department
 - Specified types of area for defining a community
 - Restrictions on dealings while application pending
 - Effect of right to buy on other rights

6. The [Draft Policy Note](#) states that—

The policy objective is to empower communities to acquire land to further Sustainable Development. This will add to the range of right to buy powers already in force to assist communities to own land. These are—

- The [community right to buy](#) under Part 2 of the Land Reform (Scotland) Act 2003. This is a pre-emptive right to buy which can be exercised by a compliant community body where the owner of land seeks to sell the land.
- The [crofting community right to buy](#), which may be exercised by a crofting community, for croft land, under Part 3 of the Land Reform (Scotland) Act 2003. This is a compulsory right to buy, meaning that, if an application is approved, a crofting community can seek to exercise the right without the consent of the owner, but it is limited to crofting communities and croft land.
- Part 3A of the Land Reform (Scotland) Act 2003, the [community right to buy abandoned, neglected or detrimental land](#). This part was inserted into the 2003 Act by the Community Empowerment (Scotland) Act 2015 and came into force in June 2018. If an application is approved, this also gives a community body a compulsory right to buy.

Delegated Powers and Law Reform Committee

7. The Delegated Powers and Law Reform Committee considered the instrument on 18 February 2020 and had no comment to make on the draft regulations.

Consideration by the Environment, Climate Change and Land Reform Committee

8. In considering the draft regulations, the Committee heard from the following stakeholders, in roundtable format, at its meeting on 3 March 2020—
 - National Trust for Scotland
 - Scottish Land and Estates
 - Community Land Scotland
 - Scottish Property Federation
 - James Hutton Institute
 - National Farmers Union Scotland
 - Community Woodlands Association
 - Highlands and Islands Enterprise
 - Scottish Land Commission
9. Following that meeting, the Committee wrote to the Cabinet Secretary for Environment, Climate Change and Land Reform (see Annexe A for the letter and the Scottish Government response).
10. The Committee considered the letter and took evidence from the Minister for Rural Affairs and the Natural Environment at its meeting on 17 March 2020. The Minister moved motion S5M-20927. Following debate, the motion was agreed to.

The Environment, Climate Change and Land Reform Committee recommends that the Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 (SSI 2020/draft) be approved.

Annexe A

Letter to the Cabinet Secretary for Environment, Climate Change and Land Reform

05 March 2020

Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 [draft]

As you know, the instrument is one of several that are rooted in Part 5 of the Land Reform (Scotland) Act 2016 (The Act). The draft instrument was laid on 7 February 2020 and the Environment, Climate Change and Land Reform Committee (ECCLRC) must report by 26 March 2020. The Minister for Rural Affairs and the Natural Environment is expected to move the motion recommending the ECCLRC approves the draft instrument at a meeting on 17 March 2020.

However, at its meeting on 3 March 2020, the Committee heard evidence in a roundtable format on the above affirmative instrument. Some stakeholders raised some outstanding questions about the draft and the Committee agreed to write to you seeking clarification. As the draft instrument cannot be amended but only approved or rejected in its entirety, the Committee would be grateful for a response by close of Thursday 12 March. This will enable the Committee to take your response into consideration when it hears from the Minister at its meeting on 17 March.

The draft Regulations define, amongst others, the following—

Eligible land: types of occupancy or possession that are to be treated as a tenancy

Excluded land: land pertaining to land occupied by an individual's home

Excluded land: land held or used by a Minister of the Crown or government department

Specified types of area for defining a community

The Committee notes the proposal to exclude land used or held by a Minister of the Crown or by a UK government department, on the basis that such land is reserved. Stakeholders queried this exclusion and the issue was also raised in written responses to the Scottish Government consultation. The Committee is seeking to understand specifically what is excluded (what falls within this definition, what is reserved and what is devolved) and what the rationale for each exclusion is. The Committee would welcome further information on this.

The Committee also seeks clarification as to the relevance of reserved status as it relates to the community right to buy (CRTB). The Committee is also interested to understand the process for considering how land that is reserved e.g. in the ownership of the DVLA, that forms a small part of an overall site, would be treated. In this case, would a local authority have the power under the proposed provisions to acquire this to further sustainable development? Would this scenario also relate to land owned by the Ministry of Defence?

The Committee is unclear as to why land owned by the Crown by virtue of bona vacantia, or its having fallen to the Crown as ultimus haeres should be excluded. The Committee

understands that often the reason land is abandoned or neglected is because the land is now owned by the Crown. It was most probably 'ownerless land' and under Scots law has fallen to the Crown (as a result of bona vacantia or by virtue of ultimus haeres). Including 'ownerless land' within these provisions could facilitate the land being put to more productive use as well as resolving its ownership status. Stakeholders made the Committee aware of issues that some organisations have encountered in attempting to buy 'ownerless' land and the Committee wonders why such land should not be eligible for inclusion within a CRTB application and is seeking to understand why land owned by the Crown, by virtue of bona vacantia or ultimus haeres, should be excluded under Part 5.

The Committee is also concerned about consistency of approach in relation to the treatment of land and exclusions, across the suite of regulations providing community and crofting rights to buy. The Committee asks why different approaches have been taken with respect to this.

The Committee understands that some stakeholders remain concerned about the exclusion of land that is used to home pets and the scope to create mischief here. The Committee would welcome your view on this and the need for tighter regulation or for further guidance.

The Committee would also like clarification on what remedies would be available to a former landowner or to Scottish Ministers if a community body does not sustainably develop the land. Further clarification would also be helpful on what types of restrictions or conditions Scottish Ministers envisage would be put in place to protect the land and how it would be ensured that compliance with the proposed use etc would be monitored following a transfer.

As a final point, the Committee notes the criteria for 'Specified types of area for defining a community' and the use of the *Population Estimates for Settlements and Localities in Scotland, Mid-2016* in setting the criteria. The Committee would welcome information on how subsequent iterations of these documents would be taken account of to reflect shifts in population.

Convener, Environment, Climate Change and Land Reform Committee

Response from Cabinet Secretary for Environment, Climate Change and Land Reform

11 March 2020

Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020

Thank you for your letter of 5 March regarding the above regulations. As you will be aware, the regulations have been developed following extensive stakeholder engagement, and I was pleased to note the positive response that engagement received from those stakeholders who provided evidence at your session of 3 March.

Many elements of the right to buy are fixed in primary legislation, in the Land Reform (Scotland) Act 2016. The regulations have been developed using the powers that we have in the Act and in such a way so as to ensure a complementary fit with our other Community Rights to Buy. This means there are some areas where we have limited scope for change, but I have responded to each of the points raised in your letter which I trust

provides the Committee with the necessary information to consider the points raised by stakeholders in more detail.

Land held or used by a Minister of the Crown or by a UK Government Department

Land that is held or used by a Minister of the Crown or by a UK Government Department is excluded by regulation 5 of the draft regulations, on the basis of our legislative competence under the current devolution settlement. The compulsory acquisition of property held or used by a Minister of the Crown or UK government department is reserved by virtue of paragraph 3 of Part 1 of schedule 5 of the Scotland Act 1998. The relevance of reserved status to the right to buy land to further sustainable development is that the reservation specifically includes acquiring such land compulsorily and, where an application under Part 5 is successful, the right granted is to compulsorily acquire the land from the owner.

Due to the reservation, an Act of the Scottish Parliament cannot have the effect of providing for the compulsory acquisition of such land. Section 101 of the Scotland Act 1998 provides that where a provision could be read in such a way so as to be outside legislative competence such provision is to be read as narrowly as is required for it to be within competence. Therefore, even without the regulation in question, Part 5 could not be extended to land held or used by a Minister of the Crown or UK government department as it would have to be read narrowly so as not to include such land.

Had we left the regulations silent in relation to such land, the effect may be that to community bodies, owners and stakeholders, such land may appear eligible under Part 5 when it is not and cannot be. As such, where land falls within the reservation it is ineligible under Part 5 and an application for such land would be declined – our approach ensures that this potential for uncertainty and ineligible applications is removed from the outset.

Land which is owned or occupied by the Crown by virtue of it having vested as bona vacantia

Ownerless land which falls to the Crown as bona vacantia is ineligible by virtue of section 46(2)(d) of the 2016 Act – meaning there is no power to modify this in regulations. The provision is in keeping with the approach taken under Part 3A of the Land Reform (Scotland) Act 2003 (“the 2003 Act”) – the community right to buy abandoned, neglected and detrimental land – which was debated during stage 3 of the passage of the Community Empowerment (Scotland) Bill which created Part 3A.

The Crown’s representative in Scotland with authority to deal with ownerless land is the Queen’s and Lord Treasurer’s Remembrancer (the QLTR). In practice, the QLTR does receive approaches from community groups, from time to time. In these cases however, it is important to understand that the QLTR has a discretion, and not a duty, to claim and deal with ownerless land; and, that the QLTR is not resourced to retain land on an ongoing basis – something which would potentially be required, should the land be eligible. In every case therefore where the QLTR receives a community approach regarding ownerless land, the QLTR requires to balance the potential benefits to the public purse in dealing with the land against the Crown’s potential exposure to risk, liability, and expense, particularly where land is in poor condition.

Consistency in approach in relation to treatment of land and exclusions

Clearly, this is an issue which goes beyond the regulations in question. However, it is important to stress that while each right to buy provides a process by which a community

body might acquire land, and there will be differences between these, that is ultimately as a result of each right having a distinct purpose. Therefore, while there are similarities between them, it is also necessary for there to be differences. If there are more specific questions on this topic, or specific areas where the Committee has concerns regarding the different processes for each right, I would be happy to provide further detail.

Exclusion of land that is used to home pets

Section 46(2)(a) of the 2016 Act includes as part of the definition of excluded land: “land on which there is a building or other structure which is an individual’s home, unless the building or structure is occupied by an individual under a tenancy”. Section 46(2)(b) gives Scottish Ministers the power to make regulations excluding: “such land pertaining to land of the type mentioned in paragraph (a) as the Scottish Ministers may by regulations specify”.

In line with principle behind section 46(2)(a) of the 2016 Act, the Scottish Government has taken the view that it is right that land is excluded which is used for purposes that are essential to a home. This includes uses that are necessary for maintaining the physical infrastructure of a home – for example, regulation 4(b)(i) of the regulations excludes “the storage of possessions kept by the occupants of the individual’s home that are used for the maintenance, upkeep or subsistence of the individual’s home or its occupants”. But it also includes those things necessary for the social, and indeed emotional life of a home – for example, regulation 4(b)(v) which excludes land used for recreation and leisure activities which are incidental to the use of a the individual’s home, and regulation 4(b)(vi) which excludes land used for the keeping of pets belonging to the occupants of the individual’s home.

This is consistent with the exclusions in Part 3A of the Land Reform (Scotland) Act 2003, the Right to Buy Abandoned, Neglected and Detrimental Land. If this exclusion were not in place, there would be an anomaly, because land on which there was a home (except where that home is occupied under a tenancy) would be excluded from Part 5, but land which was needed to make a home viable for individuals and families, in the full social as well as functional meaning of the word, would not be.

I realise that some stakeholders have raised concerns about potential sharp practice in relation to the exclusions. I do not think such practice would or could be common, requiring as it does both a mischievous intent and the means to carry it out, but I would like to assure the Committee that Scottish Ministers, in assessing each case on a case-by-case basis, will be live to the possibility of sharp practice. Land owners, communities, tenant’s and indeed any other interested part will have the opportunity to comment on a Part 5 application, and indeed, the Part 5 community body will have the opportunity to comment on the land owner’s comments. This gives all parties the opportunity raise any concerns about mischievous practice.

Remedies available to a former landowner

As part of any successful Part 5 application, as with all Scotland’s rights to buy, a landowner would be properly compensated for the value of their (former) land, following an independent valuation. Following successful completion of the process, the landowner would no longer have any legal interest or rights associated with that land, and as such, there is no requirement for remedies, and there is no regulation making power in the 2016 Act which would allow for the making of such a remedy.

Clearly, there are separate but related issues of ensuring that all community buy outs, both under Part 5 and the other rights to buy, are successful and achieve their full potential. This is something the Scottish Government is committed to ensuring. In the case of Part 5, the conditions that a community body must meet in order to secure a successful Part 5 application are such that there is a strong requirement for them to clearly demonstrate the sustainable development they intend to provide and how they will achieve this.

Subsequent iterations of Population Estimates for Settlements and Localities in Scotland

The use of Population Estimates for Settlements and Localities in Scotland, Mid - 2016 can be amended by regulations. We would take a view as to the appropriateness or necessity of doing so when future publications are released.

Types of occupancy or possession that are to be treated as a tenancy

While not specifically referenced in your letter, following the stakeholder evidence session of 3 March, it may be helpful to set out further detail on the matter of the types of occupancy or possession that are to be treated as a tenancy, to aid the Committee's understanding of what the regulations do.

With regard to types of tenancy, it is important to note the regulations do not include an exhaustive list of tenancies. What they do include is an exhaustive list of types of occupation or possession to be treated as a tenancy for the purposes of the right to buy. All tenancies, by virtue of being a tenancy, will be captured by section 46(2) which states that "excluded land" means – (a) land on which there is a building or other structure which is an individual's home, unless the building or structure is occupied by an individual under a tenancy". This would include, for example, "tenancies at will" which was an example discussed at your recent evidence session.

Tied accommodation was also discussed on 3 March, and I would like to clarify that where an application includes land on which there is tied accommodation this would be taken account of as part of the overall application. It would be assessed, as with all applications, on a case-by-case basis by Scottish Ministers against the sustainable development conditions in the 2016 Act, which includes a public interest test.

Specified types of area for defining a community

I know that there have been questions about communities of interest, and I would like to address this point. The Scottish Government believes it is an important feature of our various rights to buy that the definition of community is one of a local, place based community. In many areas of Scotland, communities can have a deficit of power in relation to land. The aim of right to buy legislation is to help empower these communities and equip them with the tools they need to buy land.

Nevertheless, Part 5 has important and innovative provisions that allow a third party to purchase the land, if that is what the community wants and subject to Part 5 conditions. This third party purchaser could be a community of interest, where the case can be made for their purchase of the land and where they have been nominated by the Part 5 community body. At the same time, the regulations are drafted in such a way as to ensure that communities are not restricted to the postcode or other areas within which they are based, but could for example seek to acquire adjacent land they need for sustainable development, subject to all Part 5 conditions being met.

Cabinet Secretary for Environment, Climate Change and Land Reform

Environment, Climate Change and Land Reform Committee

The Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 [Draft], 2nd Report (Session 5)

- 1 Alongside the Right to Buy Land to Further Sustainable Development (Applications, Written Requests, Ballots and Compensation) (Scotland) Regulations 2020, and Land Reform (Scotland) Act Commencement Regulations 2020 which are, respectively, negative or no procedure.

