

LAND REFORM (SCOTLAND) ACT 2003: Part 3

CROFTING COMMUNITY RIGHT TO BUY: GUIDANCE



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INTRODUCTION

Part 3 of the Land Reform (Scotland) Act 2003 (the Act) creates circumstances in which a crofting community body representing a particular crofting community may be permitted to oblige a landowner to sell to it croft land associated with that crofting community. Because this process must be transparent, legally sound and comply with the European Convention on Human Rights, it is legally complex and contains a range of specific requirements that must be met. This guidance is intended to assist communities interested in acquiring land by this means, landowners who might be affected by an application to exercise the right to buy and those individuals and businesses who feel that their interest in a particular area of land may be affected by an application.

Due to the complex nature and requirements of the crofting community right to buy process crofting communities that are interested in acquiring their croft land should view the use of these provisions as a fall-back position if efforts to acquire the land by agreement fail. Acquisition by agreement is likely to result in a deal which better suits the needs of both landowner and community – but **see chapter 15**. Even a failed attempt at acquisition by agreement can reveal a great deal of information that will subsequently prove useful in preparing an application and can help avoid misunderstandings that could otherwise result in a flawed application.

This guidance cannot take the place of informed professional advice on individual applications to purchase croft land. The first consideration for any group within a crofting community wishing to create a crofting community body for the purpose of exercising the crofting community right to buy should be to obtain sound legal advice. It would also be appropriate for any landowner or other person with an interest in land who considers that a crofting community right to buy application may affect their land or interest to seek such advice. Such professional advice should include legal advice but professional advice on valuation, environmental and land management issues may also be needed.

This guidance is necessarily complex in order to cover the statutory requirements in the Act and supporting subordinate legislation. The Scottish Executive's Environment and Rural Affairs Department's Land Reform Branch is happy to assist with any queries you may have regarding the Crofting Community Right to Buy process. However, it cannot provide legal advice or, due to the impartiality required in advising Scottish Ministers on a case-by-case basis, advice which would be seen as supporting a particular group, e.g. a crofting community body, a landowner or any third party involved in a specific case. This guidance may be subject to review as we learn how the

new legislation works in practice. If you wish to check that you have the latest version available, please contact the Land Reform Branch (see page 41 for contact details).

You may also wish to read the Highlands and Islands Enterprise Community Land Unit's information leaflet "The Crofting Community Right to Buy – your questions answered", which is a useful introduction to the Right to Buy process. Copies are available from the HIE-CLU (see page 41 for contact details).



INITIAL STEPS

Preliminary consideration

1.1 The crofting community right to buy under the provisions of Part 3 of the Act is a right to apply to Scottish Ministers for authority to acquire an area of croft land from the owner of that land. This right can only be exercised by a properly constituted crofting community body and only then if an application to do so has the consent of a majority both of the crofting community and of the crofters within the crofting community. The croft land may only be purchased where the application to acquire the land is approved by Scottish Ministers. Exercising this right to buy is therefore a process requiring considerable preparation before an application is made. There are four major tasks on which work must be complete before a credible application can be prepared. These are:

- Establishing community support
- Forming a crofting community body (CCB)
- Identifying the land and interests in land to be acquired
- Identifying the resources needed

1.2 Any group considering preparation of a crofting community right to buy application should discuss its plans with the Community Land Unit of Highlands and Islands Enterprise at a very early stage. The Community Land Unit may be able to provide financial support for work leading to the creation of a CCB and preparation of an application. It will also be able to assist in identifying people who are willing and able to provide the appropriate professional advice required in order to form a CCB and prepare an application. **The Community Land Unit can be contacted at the address given in paragraph 16.2.**

Establishing community support

1.3 Preparation of a right to buy application requires considerable work and expense and this may well prove abortive if the community does not eventually support the application. **No application to purchase can succeed without the support of both the crofting community and the crofters in that crofting community.** The definition of “crofting community” is found at section 71(5) and (6) of the 2003 Act. This includes both crofters and certain other local residents. In view of the costs and need for community support, it will be essential for any group seeking to use the crofting community right to buy to establish that there is a measure of community support for purchase proposals before they start to incur expense in developing an

application. Otherwise a considerable amount of work could be rendered abortive by a failure to win support for an application when a ballot is undertaken (see chapter 6 for guidance on ballots).

Forming the crofting community body

1.4 Only a CCB may apply to Scottish Ministers to purchase croft land on behalf of a crofting community. In order to proceed with the steps required for crofting community purchase, the CCB must be in place before these are begun. That body will be responsible for preparing the right to buy application and the ballot. In most cases its creation will be a necessary prerequisite for obtaining any financial support from public sector funding sources. A group interested in exercising the crofting community right to buy therefore needs to constitute a CCB at a fairly early stage.

1.5 Section 71 of the Act specifies the structure of a CCB. Section 71(4) indicates that a body will not be a CCB unless Scottish Ministers have given written confirmation that they are satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development. The confirmation required under section 71(4) of the Act is crucial to the exercise of the right to buy. **Any group seeking to promote a right to buy application is strongly advised to discuss their plans to create a CCB with officials in the Scottish Executive Environment and Rural Affairs Department before that body is constituted. The relevant contact for doing so is given in chapter 16.2.**

1.6 Section 71(1) of the Act provides that the CCB must be constituted as a company limited by guarantee and details the requirements which must be listed in the company's memorandum and articles of association. It is possible to buy an "off-the-shelf" product for a reasonable price, completion of which will enable the CCB to meet this condition. Further information on the "off-the-shelf" product can be obtained from Companies House, 37 Castle Terrace, Edinburgh EH1 2EB or from their website at <http://www.companieshouse.gov.uk>.

1.7 Section 71(1)(c) of the Act provides that the CCB company must have at least 20 members (but see **paragraph 1.9**). There is no upper limit in the number of members the company can have. However, in practice the number of members is limited by the requirement at section 71(1)(d) of the Act that the majority of the members of the company must be members of the crofting community. Persons who are members of the crofting community are defined in section 71(5). **Guidance on identifying the members of the crofting community for the purposes of the Act is given at chapter 2.**



1.8 Membership of the company constituted as the CCB is distinct from membership of the Board of the CCB. Members of a company limited by guarantee are responsible for selecting the Board of the company in accordance with the constitution of the company. Section 71(1)(e) of the Act requires that members of the CCB who are members of the crofting community must have control of the CCB. However, these provisions do not specify how that is to be achieved. There may be a range of constitutional options for ensuring that members of the community who are members of the CCB control the activities of the Board of the CCB. Ensuring that more than half of the Board members are members of the local community may not be the only or best way to achieve that outcome.

1.9 Some crofting townships consist of less than 10 crofts and there might therefore be less than the 11 members of the community required to form a majority of the CCB membership. There is provision at section 71(2) of the Act that empowers Scottish Ministers to disapply the requirement at section 71(1)(c) of the Act where they think it in the public interest to do so. **Any group seeking to set up a CCB in the hope that Scottish Ministers might agree that the body should have less than 20 members should certainly discuss their plans with officials in the Environment and Rural Affairs Department before that body is constituted. The relevant contact for doing so is given in paragraph 16.2 of this guidance.**

1.10 The Community Land Unit will be able to assist crofting community groups to find the professional help they will need to set up a CCB designed to comply with the requirements of section 71 of the Act. The Unit may also be able to provide some financial assistance for that purpose.

1.11 The Act does not specify when a company set up to be a CCB should seek the confirmation required by section 71(4) of the Act (i.e. that Scottish Ministers are satisfied the main purpose of the body is consistent with furthering the achievement of sustainable development). However, given the terms of the provisions of the Act relating to the conduct of a ballot and the application process, it is strongly suggested that to minimise risk of legal challenge this should be done before a ballot is conducted.

1.12 This confirmation cannot, however, ensure the status of a CCB against a challenge from third parties. When confirmation is sought, Scottish Executive officials will endeavour to point out any issues that might lead to a challenge but no assurance can be given. When a right to buy application is received Scottish Ministers are required by section 74(1)(i) of the Act to satisfy themselves that an applicant body meets all the

requirements of section 71 of the Act. It will not be possible to give assurance that these criteria are met in advance of an application being made. In addition, the decision by Scottish Ministers to approve a CCB could be challenged and overturned through an appeal against the decision taken on the right to buy application.

Identifying the land to be acquired

1.13 Any group seeking to use the crofting community right to buy to acquire land will have a view as to the area of land that they would like the community to be able to purchase. However, before an application can be made it will be essential to establish whether the land is eligible land and who owns it. Thereafter it will also be necessary to precisely define the land and any ancillary rights (see **paragraphs 1.19** and **1.20**) which are to be the subject of the application. This needs to be done in order to meet those requirements of the Act which determine whether an application is valid.

Eligible croft land

1.14 An application must relate to eligible croft land (section 68 of the Act). **(An application may also include land which is not eligible croft land as eligible additional land – see section 70 of the Act and chapter 3).** It may not be a simple matter to determine whether land is eligible croft land. The Register of Crofts maintained by the Crofters Commission gives details of all crofts and most common grazings. However, it is not map-based and boundaries may not be adequately described. It will be the responsibility of the CCB making a right to buy application to establish that the land included in the application is eligible croft land (or eligible additional land). Failure to do so could result in the application being rejected. In some cases action in the Land Court may be required to establish whether particular areas of land are part of a croft or part of a common grazing. It will not be possible to work on the assumption that land included in an application that turns out not to be eligible croft land can be treated as eligible additional land. Eligible additional land must be specifically identified as such in an application.

1.15 Where it is proposed that there should be an application in respect of a large area of land comprising several crofts and common grazings, there is a strong likelihood that some land within that area will not be eligible croft land. Owner occupied crofts are not eligible croft land (see section 68(3) and (4) of the Act). Nor are crofts and croft house sites which have been decrofted, or areas of land that have been resumed from crofting tenure. The crofting community may be unaware that a croft has been purchased and may also be unaware of pockets of land within a larger



area that may never have been part of a croft or common grazing. The Register of Crofts may be of assistance in identifying such areas but to be certain of the status of land it will probably be necessary to conduct a full title search in the Land Register and Register of Sasines before finalising an application. Whilst these are public records that can be accessed by anyone it is advisable in property transactions to entrust such searches to professionals.

Ownership of land


1.16 Section 73(3) of the Act has the effect that all the land included in a right to buy application must be owned by the same legal person. It is therefore necessary to establish who owns the land proposed for purchase under the crofting community right to buy. In addition section 73(6) of the Act requires that a crofting community right to buy application has to be sent to any creditor holding a standard security over any part of the land. In a normal sale the seller provides this basic information when the property is marketed and the buyer's solicitor then checks it before the transaction is completed. This is not possible under the crofting community right to buy. In such circumstances the owner of the land is likely to be opposed to sale and unwilling to provide information to assist an application to exercise a right to buy. There is no scope for compelling the owner to provide information for inclusion in an application and therefore it falls on the prospective applicant to establish the facts that will be needed to prepare a competent application. This will require a full title search in the Land Register and Register of Sasines before finalising an application.

1.17 Identifying the owner of land included in an application is essential because it may be that the actual legal owner is not the individual identified locally as the landlord. This situation may be quite common where the croft land is part of a large estate. Such estates may be owned by a trust or company and the person thought of as the landlord may not in fact be the legal owner of the croft land.

1.18 Identifying the land owned by the person named as the owner of the land to be included in the application is also essential because the area of land that can be covered by an application is circumscribed by what that person owns. It is of course possible to seek to use the crofting community right to buy to purchase areas of land owned by different people, but that requires a separate application in respect of each of the separately owned properties.

1.19 Another ownership issue that needs to be addressed at an early stage is the extent of any burdens, responsibilities and rights which may be attached to the land

and the identification of sewers pipes, lines, watercourses, conduits, fences, dykes and ditches and other boundaries on the land. For example, there may be drainage or private water supplies, power lines or rights of access. Section 73(5) requires that, so far as is reasonably possible, all these things should be ascertained and identified in the right to buy application.



1.20 Attention must also be given to minerals, salmon fishings and sporting rights. These may be held by the current landowner, or in the case of minerals and salmon fishings they can be owned by or leased to a third party. Sporting rights may also occasionally be held by a third party by means of a lease or other arrangement that would be binding on anyone purchasing the land. The nature of such interests will have a bearing on what may be acquired and what it will cost. There is potential to purchase, or exclude from an acquisition, mineral and salmon fishing rights and to buy out a sporting lease. However, this can only be done insofar as these apply to eligible croft land bought or being bought or in the case of salmon fishings insofar as they are on or contiguous with the eligible croft land bought or being bought. A crofting community body will require to identify how these interests are owned and decide whether or not it wishes to acquire them. It needs to do that before it attempts to identify the resources it will need to exercise the right to buy. Decisions about acquiring these rights are discussed in more detail in **chapters 4 and 5**.

1.21 It may be best to appoint someone who has professional experience, such as a suitably experienced chartered valuation surveyor or a solicitor to assist with, advise on and, in some cases, undertake these tasks.

Identifying the resources needed

1.22 Although a CCB will not need to pay for land acquired under the crofting community right to buy until after its application is approved and the valuation completed, it is nevertheless necessary that there should be an early assessment of the likely cost of acquisition, compensation to the landowner for loss and expenses and management of the land to be acquired:

- so that the community will have adequate information available when it is balloted on whether to proceed with an application;
- to provide supporting information for the statement on proposed use, development and management that must be included in a competent application;
- to provide information that will be required by prospective funding sources in order to assess funding and financial support requirements.

1.23 This assessment of costs is a matter on which it is essential to obtain professional advice. If an application is successful a valuer appointed by Scottish Ministers will assess the consideration to be paid for the land. Employment of a chartered valuation surveyor suitably experienced in the type of property to assess the value in advance of an application should give a reasonably clear indication of potential cost. Essentially the approach is similar to that of a prospective house buyer. Wise purchasers obtain a survey before bidding for a property and that survey informs the bid. One slight difficulty in the case of the crofting community right to buy is that a valuer working for a CCB may not have the co-operation of the owner of the land in question. That may impede accurate assessment of the value of the property. In particular this may make it difficult to assess the value of minerals, sport and salmon fishings as that may depend on information which cannot be obtained from either local knowledge or simply viewing these assets.

2 THE CROFTING COMMUNITY

Defining the crofting community

2.1 Membership of the crofting community is defined in section 71(5) of the Act but that definition depends on the definition of crofting township at section 71(6) of the Act and the qualifying condition at section 75(5) of the Act.

2.2 There is no requirement that all members of a crofting community should be members of the company that is constituted as the CCB. However, they must all be given an opportunity to vote in the ballot on an application. A ballot must be undertaken within the six-month period immediately preceding the date of a crofting community right to buy application. The crofting community must therefore be defined and its membership established before either a ballot can be held or a subsequent application submitted. Furthermore, failure to define the crofting community correctly could result in an application failing because the ballot is found to be invalid.

2.3 Any CCB seeking to establish who should be considered a member of a crofting community should bear in mind that a challenge to a decision on membership is most likely to arise if someone is excluded from membership. It is also important to realise that it will not be possible to restrict information as to who was given an opportunity to vote in a ballot. Given that there is obvious scope to seek to thwart a right to buy application by seeking to get the ballot result declared invalid it will be important to get definition of community membership right.

2.4 In this connection the following points are important:

- a person cannot be considered a member of the community unless that person is registered to vote in local elections in the polling district in which the township is located, or in certain cases in the polling district in which they live if that is within 16 kilometres of the township. This, for example, rules out persons under 18 years of age from membership;
- depending on where they live the landowner and his family may be members of the crofting community provided they are registered to vote in local elections;
- croft tenants of the land to be included in an application living within 16 kilometres and registered to vote where they live are members of the crofting community;



- anyone who has a grazing share or a right of pasture or grazing in the land covered by the application is a croft tenant of that land. So, if living within 16 kilometres and registered to vote where they live, such a person will be a member of the community;
- any resident of any property which lies within the crofting township or contiguous to that township or the land being acquired is likely to be a member of the crofting community. The Act does not define “resident” and it is therefore best to proceed on an inclusive basis (i.e. people living in a house in the community for a period rather than continuously should still be regarded as resident);
- persons who are not UK nationals can register to vote in local elections and therefore if they are so registered are not debarred from being considered members of the community for purposes of membership of the community body and the ballot.

The process of identifying crofting community members

2.5 Scrutiny of the voters roll for the electoral district(s) in which the land to be acquired and associated township(s) are located will be the first stage in determining who are to be considered members of the community for the purpose of membership of the community body and a right to vote in a ballot. In the event that there are persons defined by the Act as croft tenants who do not live within the township then it may be necessary to check whether these individuals are on the voters roll for any neighbouring polling district located within 16 kilometres of the land to be covered by the application. Voters rolls are held in major public libraries, local authority service points and electoral registration offices. The published version of the voters’ roll may be misleading as individuals can ask for their names to be omitted. However, it is possible to inspect the full version of the voters’ roll held at electoral registration offices. This inspection should check against the names and addresses identified by the CCB in the township and any discrepancies noted. Subsequently, individuals who are resident in the township but not noted on the voters’ roll should be asked to confirm that they are not entitled to participate in local elections and have not sought recently to be so included. In the latter case, it may be that their name would be added to the voters’ roll at some point during the process of purchase. This could occur, for example, where people moved into the township from outwith the area. A note should be kept of all instances of exclusion from the voters’ roll and of those where inclusion is not straightforward.



2.6 The algorithm on page 13 may assist in the identification of persons who are members of the crofting community.

2.7 To minimise the risk of challenge or rejection of ballot results it may make sense to employ an independent professional to establish the membership of the local community for the purposes of the Act. It might also be helpful to prepare a plan showing all properties in the township, holdings on the land and all contiguous properties together with a listing of the occupants. This will be useful both in assessing who needs to be considered as a possible community member and as a means of justifying inclusion and exclusion of individuals if there are challenges on the subject of community membership.

2.8 It would also be advisable to show the outcome of consideration of the extent of membership of the crofting community to the Scottish Executive Environment and Rural Affairs Department (SEERAD) before a ballot is conducted (**The relevant contact number for doing this is given in paragraph 16.2**). This should enable any obvious difficulties to be resolved and thus reduce the likelihood that Scottish Ministers might consider any ballot result to be invalid. This would not be a process of prior approval. The validity of every ballot has to be considered on its merits on the basis of the information provided with the ballot results. In addition the decision by Scottish Ministers on a ballot could be challenged and overturned either through judicial review or in the context of an appeal against a decision by Scottish Ministers on a subsequent right to buy application.

Giving notice of who may vote in a ballot

2.9 It is obviously necessary that those identified as members of the crofting community and thus entitled to vote are so advised. It is also essential that others in the area, who may believe that they are entitled to vote, but have not been identified as members of the crofting community are also able to make representations. There may also be challenges to the identification of individuals as members of the crofting community.

2.10 The CCB therefore need to devise means of ensuring that all with an interest – or who may believe they have an interest – are provided with information as to who is a member of the crofting community for the purposes of the Act. A letter from the CCB to all households, each tenant and the landowner is one approach to consider.

IDENTIFYING THE CROFTING COMMUNITY

CROFTERS

Obtain list of tenanted crofts and any separate tenanted shares from the Crofters Commission. Measured in a direct line, do tenants of the township crofts or shares live within 16k of the township?

No

Exclude

Yes

Are these tenants entered on the current voters roll in the polling district in which the township lies?

No

Are these tenants entered in the voters role in the polling district where they live?

No

Exclude

Yes

Yes

Include

Draw up list of eligible tenants and other residents and proceed as outlined in paragraph 2.5 of this guidance booklet.

OTHER TOWNSHIP RESIDENTS

Are they resident in houses on or contiguous to crofts sharing in the common grazings?

Yes

Are the residents of these houses entered in the voters roll of the polling district in which the township lies?

Yes

Include

No

Are these houses instead on or contiguous to the common grazings?

No

Exclude

No

2.11 The CCB will subsequently need to build into its plans sufficient time to allow any further claims or challenges to membership and be able to respond appropriately.



ELIGIBLE ADDITIONAL LAND

3.1 Where croft land is the subject of an application to purchase under the terms of part 3 of the Act, other, non-croft land may, in certain circumstances, also be included in the application. This “eligible additional land” is defined at section 70(4) of the Act. It allows the possibility of purchasing other land owned by the person who owns the croft land that is the subject of the right to buy application, provided that additional land is contiguous to that croft land.

3.2 Eligible additional land can be included in a right to buy at the request of either the CCB or the landowner. Where both parties agree to the inclusion of eligible additional land the only constraint on what additional land can be included by agreement is the requirement that it should be land which falls within the definition at section 70(4) of the Act.

3.3 If a CCB proposes that additional land should be included in the right to buy and the owner of that land does not agree to its inclusion a process specified in section 77 of the Act comes into play. A decision on the right to buy application will be deferred until that process is completed. The process involves referral of the application to include eligible additional land to the Land Court (see **paragraph 9.2**). **This land should be no larger than 10 hectares or 5% of the size of that area of land plus the croft land sought for purchase, whichever is the greater in extent.** The Land Court will consider the application to include additional land against criteria in the legislation. It can make an order either specifying that some or all of that additional land should be included in the right to buy or that title conditions should be applied to some or all of the land. The effect of such an order would be to allow Scottish Ministers to grant the right to buy application and they would do so in relation to the additional land in accordance with the arrangements specified in that order.

3.4 However, were the Land Court to conclude that it should not make an order because there was no justification for either including any part of the additional land in the right to buy or for imposing title conditions on any part of that additional land in the right to buy, then the application as a whole would fail. It is therefore important that a CCB should consider very carefully whether it is desirable to seek to include additional land in the application. If it does include such land it should be satisfied that the criteria set out at section 77(3)(a)-(e) of the Act can be met in respect of that land.

3.5 If the landowner proposes that additional land should be included in the right to buy and the CCB does not agree to its inclusion a process under section 79 of the Act comes into play. This process is different in a number of respects from that which applies where the CCB is seeking to include eligible additional land against the wishes of the landowner. Scottish Ministers may, if they consider that it is in the public interest to do so, make further consideration of an application conditional on modification of the application to include the additional land that the landowner has identified.

3.6 In most instances Scottish Ministers are likely to seek to establish the facts relating to the additional land concerned before reaching a decision. They will do this by referring any disputed issues surrounding the additional land to the Land Court for its findings in fact. If any questions relating to the additional land are referred to the Land Court, Scottish Ministers will be bound to take account of the Land Court findings when considering the right to buy application. Scottish Ministers are not bound to refer a matter to the Land Court in every circumstance but must do if the landowner asks them to or, if having imposed a condition relating to the additional land on the application, the CCB asks them to. In this case, however, there is no effect on the application where Scottish Ministers decide against the inclusion of the eligible additional land (**see** also paragraphs 9.3 to 9.4).



4

MINERAL RIGHTS AND SALMON FISHERIES

4.1 Mineral rights (excluding oil, coal, gas, gold or silver) and salmon fisheries may form part of an application to purchase eligible croft land or may be specifically excluded from the property to be purchased. If excluded from the application to purchase the croft land a subsequent application to purchase mineral rights or salmon fisheries may be made provided that application is made within the time limits specified in the Act. Where mineral rights or salmon fisheries are under separate ownership from the croft land they can be purchased by a simultaneous or subsequent application provided the application is made within the relevant time limit. The relevant time limit starts on the date on which Scottish Ministers approved an application to purchase the relevant eligible croft land and continues through a period running from the date the CCB completed the purchase of the relevant eligible croft land. That period is 5 years in the case of minerals, and 1 year where salmon fisheries are concerned.

4.2 It is not possible to acquire mineral rights or salmon fisheries through the use of the crofting community right to buy unless the relevant eligible croft land is being or has been acquired by exercising the crofting community right to buy in accordance with the provisions of the Act. This means that the crofting community right to buy cannot be used to acquire mineral rights and salmon fisheries in isolation or in respect of land already owned by the CCB and which was acquired by means other than exercise of the crofting community right to buy.

5

SPORTING RIGHTS

5.1 Sporting rights normally go with land so in purchasing eligible croft land a CCB will normally also acquire the sporting rights. The price payable for the land will reflect that fact.

5.2 It is not possible to exclude sporting rights from the property being acquired. However, section 83 of the Act provides a mechanism whereby the CCB and the landowner can agree that in the event of a crofting community right to buy application succeeding the sport on the land will be leased back to the former owner. Where such an agreement is reached section 88(11) provides that the existence of this leaseback agreement should be taken into account in assessing the value of the land. The effect of this would be to reduce the price payable for the property by the value attributable to the leaseback arrangement. This arrangement must be agreed with the owner of the land prior to the right to buy being exercised. Failing such agreement the price payable for the land will include an element in respect of the value of the sport.

5.3 Although sporting rights cannot be separated from the land there may be some cases where an arrangement already exists that has the effect of giving a third party a heritable interest in the sporting use of the land. In such cases where the land is acquired by a CCB through the crofting community right to buy that interest could persist and give that third party effective control of the sporting use of the land. In such a situation section 70(3) of the Act empowers the CCB to apply to acquire that sporting interest under the provisions of the Act provided the application is made within the relevant time limit. The relevant time limit starts on the date on which Scottish Ministers approved an application to purchase the relevant eligible croft land and continues through a period of 5 years running from the date the CCB completed the purchase of the relevant eligible croft land.

5.4 Where, under the provisions of section 83 of the Act, sporting rights have been leased back to the former landowner section 70(3) of the Act prevents the crofting community from subsequently applying under the Act to purchase those rights.



THE CROFTING COMMUNITY BALLOT

Eligibility to vote

6.1 The ballot must be conducted as prescribed in the **Crofting Community Right To Buy (Ballot)(Scotland) Regulations 2004**.

6.2 Being clear on who is eligible to vote on whether a proposed purchase should go ahead is essential in order to avoid potential legal challenge to the result. Section 75(1) of the Act provides that eligibility is confined to members of the crofting community as defined in section 71(5) and (6) of the Act (see **section 2**).

6.3 A mistake in identification of those eligible to vote on proposed purchase could invalidate the whole process of application. It is therefore advisable that the CCB confirm with SEERAD at the address given in **paragraph 16.2** of this guidance that the voting members of the crofting community have been correctly identified.

Detail of the ballot proposition

6.4 In order to come to an informed decision on a proposed purchase, the voting members of the crofting community will require clear and sufficient information on all aspects of the proposal.

6.5 There is no statutory requirement regarding the standard of information to be provided to inform a ballot but it is suggested that the information provided ought to be as comprehensive as possible. Such an approach would seek to identify each feature having a bearing on value and use of the land in question. These will include details of extent of land sought, boundaries, inclusion of bodies of water, woods and other features affecting value. Any improvements, e.g. roads, fencing and dykes should be indicated. Rights of access by third parties, drains, sewerage, way-leaves for utilities should each be identified. Leases by third parties where known should be advised.

6.6 It is also suggested that whether or not salmon fishings, sporting interests or mineral rights are to be purchased should be made clear.

6.7 The Act provides that a majority of the members of the community who voted in the ballot and a majority of the croft tenant members of the community who voted must support an application for a crofting community right to buy. For the purpose of the ballot it is therefore vital to establish in advance who are the croft tenants. Firstly it is worth noting that someone can only vote as a croft tenant if that person is entitled to vote as a member of the community. The other important consideration is that section 75(5) of the Act defines croft tenant so as to include within the meaning

of croft tenant anyone who has a right of pasture and grazing or holds a common grazing share within the land covered by the application. This would potentially include croft owner-occupiers and people who have no croft. It does not however, apply to a subtenant who uses a croft or grazing share. In that case the voting right rests with the croft tenant from whom the croft or grazing share is sublet.

Conduct of the ballot

6.8 The ballot may be either postal or by voting in person at a polling booth set up for the purpose. Where the CCB ask the Electoral Reform Society to administer the ballot, the Society's experience and scrutiny will maintain confidence that the ballot is fair and above suspicion. Where the CCB choose another means of conducting the ballot, we strongly advise that the process be supervised by professional persons appointed for the purpose (e.g. a solicitor).

6.9 In both approaches, the voting slips will need to enable counting of the votes of the community as a whole and an additional count of croft tenant votes. There may be a number of ways to manage this double count. However, one simple approach would be to colour code or otherwise distinctively mark voting slips for croft tenants so that a croft tenant's vote can be clearly distinguishable from that of other members of the community. There is no bar to using longer timescales for completion of the ballot process than those set down in the Crofting Community Right To Buy (Ballot)(Scotland) Regulations 2003. The CCB should therefore consider whether a longer period of time is advisable.

6.10 A postal ballot would require issue of forms and stamped, return-address envelopes to each voter, together with a note on their purpose and the date by which these should be returned complete. The voter should receive these with sufficient time to consider, complete and have the voting slip received at the return address by the due date.

6.11 Where the choice is by voting in person it is likely that some people may not be able to do so on the appointed day for reasons such as holidays, business appointments or infirmity. These should be offered the possibility of a postal vote described as above.

6.12 Counting of votes must clearly be undertaken with the utmost care. One approach would be to arrange to have it done at an appointed time and place, supervised by two professional persons of standing and observed by the solicitor appointed by the CCB. The result could then be certified by both the solicitor and supervisors.



Notification of ballot results to Scottish Ministers

6.13 Notification to Scottish Ministers of the result and details of the ballot and those taking part must be on the prescribed form obtainable from SEERAD at the address given in **paragraph 16.2** of this guidance. This notification must be given within 21 days of the holding of the ballot.

7

THE APPLICATION FOR CONSENT TO BUY

7.1 An application for consent to buy croft land etc. must be made to Scottish Ministers on the prescribed form obtainable from SEERAD at the address given in **paragraph 16.2** of this guidance. Section 73 of the Act requires Scottish Ministers to consider comprehensive information on the application and the detail which must be provided by the CCB is prescribed in **the Crofting Community Body Form of Application for Consent to Buy Croft Land etc. and Notice of Minister's Decision (Scotland) Regulations 2004**. The **paragraphs 7.2 to 7.12** give guidance on the type of information required and **paragraphs 7.13 and 7.14** explain details of the application process.

Location and boundaries, rights and interests

7.2 The application must be clear on the extent of croft land and any other eligible land sought and where this is situated. This would usually require a map to **1:10000 scale or larger** showing boundaries in correct detail and giving the size of the area concerned as determined by an experienced surveyor. The area of any significant bodies of water should be indicated and their extent noted separately. Eligible croft land and any eligible additional land should be separately highlighted and their specific extents noted. Any areas excluded from the land sought for purchase should be marked – see **paragraph 7.4**.

7.3 A further map to the same scale should be provided. On this second map should be indicated certain features, fixtures and improvements. The Act specifies at section 73(5) that these will include sewers, pipes, lines, watercourses or other conduits and fences, dykes, ditches or other boundaries in or on the land. It is suggested that woodland, roads, tracks, servitudes, wayleaves, rights of way and the extent of any collective rights such as peat cutting rights should also be identified on this map. It will be particularly important to identify features which impact on neighbouring land that is not being purchased as it may be necessary to make special arrangements to ensure future management and maintenance. For example boundary fences, water supplies, field drainage and roads. The key here is to obtain the advice of a professionally qualified land agent experienced in preparing sale particulars for substantial rural properties.

7.4 A third map is also required, again to the same scale. This is to be used to highlight within the boundary proper of the land sought for purchase, any areas of land which are to be excluded from the application and the extent of all rights and interests in the land to be purchased.



7.5 The land to be excluded will comprise land which the CCB does not wish to acquire, land which could be acquired but cannot be included in the current application and land which cannot be acquired. The first of these categories is self explanatory. The second category is eligible croft land owned by a person other than the owner of the land to which the application relates. The third category will be owner occupied crofts, land owned by a third party which is not eligible croft land and land which is not eligible croft land and is not included in the application as eligible additional land.

7.6 All maps should be accompanied by an explanation of their contents, measurements of distance and a note of where these appear as part of the written content of the application.

Proposals for use, development and management of the land

7.7 The aim here should be to offer a comprehensive land, resources management and development plan covering the process of acquisition and, at least, the first 3 years following purchase by the crofting community. The objectives can, of course, lead on to further development beyond the 3-year period, in which case the eventual outcomes should be clearly explained. Sustainability should be a crucial aspect of these plans and it will be essential to demonstrate how management of the property is to be sustained in the longer term.

7.8 Budgets must be set down for the period of the plan, with sources of funding identified and spend allocated between activities. Where objectives and outcomes will not be attained within the plan period, the sources of funding for those activities in following years must be shown. Capital costs and funding must be distinguished from annual costs and revenues. Depreciation of assets and allocations for replacements should be shown.

Effects on other land

7.9 The proposals for the use and development of land or waters may have effect on other land beyond the boundaries of that sought to be purchased. For example, purchase may create questions of access to be resolved, shared roads and fences, drainage and water supplies need to be maintained. The key here is to consider broader effects and produce acceptable solutions. The proposed solutions to these problems and for long-term maintenance of shared facilities must be fully set in the plan.



Sustainable development

7.10 The Scottish Executive's approach to sustainable development is set out in "Meeting the Needs ... Priorities, Actions and Targets for Sustainable Development in Scotland" (available at www.sustainable.scotland.gov.uk). Sustainable development requires an integrated long-term approach to economic, social and environmental issues. The application must demonstrate the extent to which the main purpose of the CCB is consistent with furthering the achievement of sustainable development. The application must also demonstrate the extent to which the proposed use, development and management of the property covered by the application would consist of or support the sustainable use or development of the land, including any waters, sporting interests, salmon fishings or mineral rights which are sought for purchase under the Act.

7.11 As regards sustainable development, it is suggested that the best way to do this is to look at the economic, social and environmental consequences and ensure that taking the application in the round, and so far as possible, all of these are positive. As one of the policy aims of part 3 of the Act is to permit crofting communities greater opportunities to achieve sustainable development, the application should show how this would be an outcome of the proposed purchase. This policy is intended to deliver sustainable communities and that requires recognition of housing and employment needs and access to services. So the CCB should obtain advice and expertise to identify the environmental assets and heritage features of the land concerned and clearly indicate how these are to be employed, maintained or enhanced for the benefit of the community.

7.12 In considering sustainable development issues for an application it may be helpful to consider the content of the Scottish Executive Sustainable Development Directorate's website. This is available at www.sustainable.scotland.gov.uk. The Sustainable Development Directorate can be contacted at Area 1-H(N), Victoria Quay, Edinburgh EH6 6QQ (Tel: 0131-244 7311). Alternatively applicants can contact the appropriate local authority's sustainable development staff who can be contacted through the Sustainable Scotland Network www.sustainable-scotland.net.

Making the application

7.13 As indicated at 7.1 above the application must include the information required by the Act and be in the format specified in **the Crofting Community Body Form of Application for Consent to Buy Croft Land etc. and Notice of Minister's Decision (Scotland) Regulations 2004**. The application should be sent to Scottish Ministers. The CCB must also send a copy of the application and any accompanying information to the owner of the land sought for purchase and, in certain circumstances specified in section 73(7) of the Act, to any person holding a standard security over all or part of that land (see **paragraph 1.16**). A failure to send the application to these parties could prejudice the success of the application.

7.14 In addition it should be noted that the timing of the application is linked to the timing of the ballot of the crofting community. 75(1) of the Act provides that a ballot must be conducted during the 6-month period immediately prior to the date of the application. This in effect means that the date of the ballot determines the last date by which a related application can be made.

8

ACTION BY SCOTTISH MINISTERS

8.1 Scottish Ministers determine whether an application for crofting community purchase should be approved. At the point when an application is made, the responsibility of Scottish Ministers is to decide whether the requirements of the Act are met and whether the process of purchase should continue. This requires detailed study and consideration of each aspect of the proposal and possible reference to the Land Court where required by the Act – see **section 9**.

Rejection of an application

8.2 It is worth noting that Scottish Ministers have power to reject an application without considering it if that application:

- does not comply with the requirements of section 73 of the Act;
- is incomplete;
- covers property which is neither eligible croft land nor eligible additional land nor an eligible sporting interest;
- otherwise indicates that it is one which Scottish Ministers would be bound to reject.

Seeking views on an application

8.3 On receipt of an application Scottish Ministers are required by section 73(8) of the Act to invite the owner of the land, the owners of any contiguous land, the Crofters Commission, and any other persons whom Scottish Ministers consider to have an interest in the application to send Scottish Ministers their view on the application within 60 days. They are also required to give public notice of the application. This will therefore constitute an opportunity, for anyone who wishes to do so, to challenge the accuracy of information supplied in the application.

8.4 Persons who could be considered to have an interest in an application would include all the croft tenants and grazing shareholders, any sporting tenant, any other tenant on the land, anyone operating a mineral concession on the land, the owners of contiguous salmon fishings, anyone entitled to servitude rights or holding a wayleave on or over the land and any creditor holding a standard security relating to the land covered by the application. In addition certain organisations may be considered to have an interest in some cases but not others. For example if all or part of the land covered by an application was covered by an

SSSI or other environmental designation Scottish Natural Heritage (SNH) might be considered to have an interest.

8.5 Scottish Ministers are also required to send copies of any views they receive to the CCB and to invite the CCB to comment within 60 days. Scottish Ministers must consider the views received and the CCB responses before reaching a decision on the application. If this process suggests that there are unresolved issues that could affect their decision section 81 of the Act provides a mechanism for resolving these issues in the Land Court. Any questions that arise as a result of views given on the application can be referred to the Land Court by Scottish Ministers, by any member of the crofting community, any person with an interest in the land or the sporting interests and anyone whom Scottish Ministers invited to send views on the application. In the event that a question is referred to the Land Court it can invite the CCB, the owner or any other person who appears to have an interest to make representations to it. If it is successfully demonstrated that the information provided in an application is incorrect or flawed, and that the application would not therefore meet the criteria for consent, Scottish Ministers would be bound to reject it.

8.6 When Scottish Ministers have completed the process of seeking views and resolving any questions arising they are required to satisfy themselves that the criteria specified in section 74(1) of the Act are met. If they conclude that they are they may consent to the application otherwise they must reject it (but see **paragraphs 3.3 and 3.4** which deal with the consequences of a failure to meet the requirement at section 74(1)(c) of the Act).

Action on a flawed application

8.7 It will be apparent that the process of seeking views and responses involves a number of people contributing evidence that Scottish Ministers will need to take into account in considering the application. Some of that evidence may reveal facts that would mean that Scottish Ministers would be bound to refuse the application. For example it may become apparent that some land is not part of the same landholding as the rest or that some land believed to be croft land is not croft land or that the owner is prevented from selling all or part of the property. In the event of that happening an appropriate response by the CCB might be to withdraw the application and resubmit a new application and perhaps thus avoid the need for another ballot. However, liability for compensation could be an important consideration in which case it might be more desirable from the perspective of the CCB to await a ministerial decision.



Reaching a decision

8.8 Most of the criteria that Scottish Ministers need to take account of in determining an application are clearly factual but section 74(1)(j), (k) and (n) of the Act involve subjective judgements. It is likely that the owner and other interested parties will offer views on these issues. Some of these views may raise factual points that can be resolved by referring the matter to the Land Court but on other points Scottish Ministers may need to reach a conclusion based on the views expressed and responses offered. Scottish Ministers will need to reach a judgement on these issues on a case by case basis with each decision dependent on the circumstances of each case. Nevertheless there are points that are generally relevant to the way Scottish Ministers will decide whether these criteria are met and these are discussed below.

Furthering the achievement of sustainable development

8.9 Section 74(1)(j) of the Act provides that Scottish Ministers must be satisfied that “the exercise of the right to buy is compatible with furthering the achievement of sustainable development”. The information given by the CCB in the application about its plans for the future development and management of the property it is seeking to acquire will be crucial to determining whether this criterion is met. This legislation is part of a programme of land reform measures intended to support, maintain and develop rural communities. So it is expected that the exercise of the crofting community right to buy should deliver long-term benefits to the community.

8.10 Development, in the widest sense, to deliver benefits to the community can be of an environmental, economic or social nature and would not be precluded because the gain from the development was purely economic or social. This is because the requirement of the legislation is not that every component of the development contemplated or planned should be compatible with the achievement of sustainable development but rather that the application as a whole should be compatible with furthering sustainable development. However, proposals for developments that might result in lasting significant environmental damage might very well fail to meet this legislative requirement. The same could be true of plans to prevent any development or simply maintain indefinitely the status quo as these may not be construed as being compatible with furthering sustainable development. Applications stand the best chance of success if they address explicitly the likely overall impacts in terms of environmental, economic and social benefits and costs, and that the optimal overall solution has been found which does not have significant downsides on economic/social/environmental grounds.

8.11 A decision by Scottish Ministers in favour of a crofting community right to buy application means that Scottish Ministers have accepted that what is proposed is compatible with furthering sustainable development. However, that does not imply that any subsequent application for planning permission will be granted. Other issues are relevant to decisions on development planning matters. These decisions will be a matter for the planning authority in the first instance. Neither should consent to a right to buy application prejudice the decision by Scottish Ministers on any planning matter which may subsequently come before them for determination.

Support for development of the community; exploiting rights

8.12 Section 74(1)(k) of the Act provides that Ministers shall not consent to an application by a CCB to buy croft land unless they are satisfied “that where the subjects of the application are salmon fishing, mineral rights or sporting interests, the crofting community body has or is acquiring sufficient croft land to enable these subjects to be exploited so as to support the development of the crofting community”. There is a clear link between the amount of croft land to be acquired and the ability to develop a financially viable and worthwhile operation to exploit fishing rights, sport or minerals. This is because these things can only be exploited on, or in the case of salmon fishings from, the croft land. However, the amount of croft land that is sufficient in any particular case will depend on what is delivered by way of revenue or other benefits.

8.13 Scottish Ministers will wish to see that there are plans for exploitation of the fishing rights, sport or minerals (but these plans will need to be compatible with furthering sustainable development – see **paragraphs 7.10 and 8.9** above). It will also be necessary to demonstrate that such plans are realistic, are expected to be profitable or failing that will provide a real and lasting benefit to the community and that the profit or benefit will make a significant contribution to the development of the crofting community. In the event that the case for acquisition is founded on the belief that it will deliver a benefit to the community, it may also be necessary to show that this is a new benefit or will secure an existing benefit for the community. In the event that Scottish Ministers are convinced that purchase of the fishing rights, sport or minerals will make a significant contribution then they are likely to conclude that the amount of croft land acquired or being acquired is sufficient for the purposes of section 74(1)(k) of the Act.

8.14 If a community seeks to acquire fishing rights, sport or minerals as a separate purchase from their acquisition of the associated land and there are no indications that the CCB intends in due course to utilise these rights, the plans for utilisation are unrealistic or the plans convey no significant benefits to the crofting community Scottish Ministers may feel bound to reject such an application. So, for example, if a CCB were to apply for a right to buy mineral rights so as to prevent any planned exploitation of these minerals Scottish Ministers could well reject such an application.

Public interest

8.15 Section 74(1)(n) of the Act provides that a crofting community right to buy may be approved only if it is in the public interest. The public interest is not defined. Scottish Ministers must determine whether any particular proposal is in the public interest on a case by case basis. It is not a simple matter to determine what might be in the public interest. At the very minimum it will be necessary to demonstrate that the proposed acquisition would bring real benefits to the whole of the local community and not just to some or all of the individual members of the CCB. It would also be necessary to satisfy Scottish Ministers that such benefits were not outweighed by disbenefits to the wider community, environment or economy or were not disproportionate to the degree of harm that would be suffered by private interests as a result of the exercise of the right to buy. So, for example, an attempt to acquire salmon fishings managed by a local angling club might be liable to fail the public interest test if the outcome of the exercise of that right to buy were to restrict access to or increase the cost of that fishing. Conversely an application which would lead to substantial public benefits by widening access and improving management of the resource would be likely to be successful.

8.16 A right to buy may also be refused where there is evidence to suggest that the right to buy may be inconsistent with the public interest, for example were it used to thwart the outcome of the statutory planning process. Indeed Scottish Ministers will consider the development plan for the area when deciding on the public interest. The planning system does not exist to protect the interests of one person, group or business from the activities of another but guides the future development and use of land in the long-term public interest. It may result in decisions that some communities may dislike. However, it would not be in the public interest to allow the crofting community right to buy to be used to derail that process.



8.17 Section 74(2) of the Act provides that the public interest includes the interest of any sector (however small) of the public which, in the opinion of Scottish Ministers, would be affected by the exercise of the right to buy. Scottish Ministers do not, as some have suggested, see this as a measure to place the interests of the crofting community body seeking to exercise the right to buy above the wider public interest. Rather it is intended to protect the interests of distinct existing communities and groups other than the community the CCB represents. For example a crofting community body may be set up to represent a grouping of crofting townships and collectively these townships may vote in a ballot in favour of exercising a right to buy. However, it could be that in one of these townships – or indeed a neighbouring township – most if not all of the residents might be opposed to the right to buy. If this is made known to Scottish Ministers they would be bound to consider how the interests of that township would be affected before reaching a decision. Another possibility might be that all the active crofters who form a grazings committee or even the landowners family and friends might indicate that the exercise of right to buy affected their interests. Of course, if Scottish Ministers consider the interests of a particular sector of the public in accordance with the provisions of section 74(2) of the Act and conclude that these interests are adversely affected that does not mean that they are bound to reject the application.

Valuation

8.18 Where Scottish Ministers are satisfied that the application should succeed, they will appoint and pay a suitable person to provide an independent and expert valuation of the land. This valuation will be at market value.

8.19 Within 6 weeks of appointment, the valuer must report the valuation of the land to Scottish Ministers, the landowner and the crofting community body.

9

THE ROLE OF THE SCOTTISH LAND COURT

9.1 The Act gives the Land Court the role of determining references by Scottish Ministers and other interested parties, together with that of considering certain appeals.

Reference by Scottish Ministers

9.2 Section 77 of the Act provides that where the owner of eligible additional land has not requested or agreed to include such land in an application to purchase, Scottish Ministers shall refer to the Land Court the question whether or not that land is to be included in the application.

9.3 Section 79 of the Act provides for Ministerial discretion whether to refer to the Land Court a question of including additional eligible land in the application to purchase where this has not been requested by the owner.

9.4 Section 79 of the Act also provides for an owner or the crofting community body making the application to require Scottish Ministers to refer to the landlord the question whether additional eligible land is to be included in that application.

9.5 Section 81 of the Act allows Scottish Ministers, prior to coming to a decision on an application, to refer any question on that application to the Land Court for determination.

9.6 Section 83 of the Act provides that Scottish Ministers shall refer to the Land Court the question of terms and conditions of a leaseback of sporting rights to the owner of the land.



Other References to the Land Court

9.7 Section 81 of the Act provides that, before Scottish Ministers make a decision on an application, these other parties in addition to Scottish Ministers may refer a question on the application to the Land Court:

- any member of the crofting community as defined by the Act;
- the owner of the land;
- any other person with a legally enforceable interest in the land or sporting rights; and/or
- any person invited by Scottish Ministers to give them their views on the application.

9.8 Where the parties concerned cannot agree about compensation the matter may be referred by either to the Land Court for decision – see **paragraph 13.2**.

Appeals to the Land Court

9.9 Where an owner, or the crofting community body is unhappy with the valuation put on the land or sporting interests of the application to purchase, they are entitled under section 92 of the Act to appeal to the Land Court against that valuation.

10

APPEAL AGAINST SCOTTISH MINISTERS' DECISION ON AN APPLICATION

10.1 The Sheriff Court of the area to which the application refers has jurisdiction in this form of appeal.

10.2 Section 91 of the Act provides that appeal against a Scottish Ministers' decision to allow or refuse an application is open to:

- any member of the crofting community as defined by the Act;
- the owner of the land;
- any other person with a legally enforceable interest in the land or sporting rights; and/or
- any person invited by Scottish Ministers to give them their views on the application.

10.3 The Sheriff may make an order to uphold, reverse or add conditions to the decision by Scottish Ministers. The conditions must be consistent with any decisions or finding by the Land Court on matters under sections 77 or 81 of the Act (see **paragraphs 9.2 and 9.7**). This order by the Sheriff is final.



AFTER SCOTTISH MINISTERS DECIDE

Effects on other rights

11.1 Where Scottish Ministers approve the application to purchase, this has immediate effect on existing rights in the land. Section 84 of the Act provides that any rights of pre-emption, redemption, reversion or others derived from options to purchase are suspended from the date of Scottish Ministers' approval of the application. The crofter's right to approach the Land Court for approval of purchase of his own croft is also suspended.

11.2 However, this suspension is temporary. Such rights are revived when the transfer of the land to the CCB is complete, or where the CCB withdraws from the process.

11.3 From the date on which Scottish Ministers give their consent to the application, the landowner or person entitled to the sporting interests is prohibited by section 95 of the Act from disposing of the land or interests concerned to any person other than the CCB.

12

TRANSFER OF CROFT LAND TO THE CROFTING COMMUNITY BODY

Confirmation by Crofting Community Body

12.1 On approving an application, Scottish Ministers will appoint a valuer to assess the market price of the croft land to be purchased by the CCB. Within 6 weeks of that appointment, the valuer must advise the price to be paid. The CCB then must confirm within 21 days from the date of being advised of that price that they intend to proceed with purchase. This confirmation must be given to Scottish Ministers, the landowner and any other person entitled to the interests included in the application to buy.

Completion of purchase

12.2 The CCB is fully responsible for preparing and effecting transfer, including all documentation and inclusion of conditions set by Scottish Ministers as well as payment to the landowner. This clearly calls for a solicitor to act for the CCB and steer completion through the requirements of section 86 of the Act.

Completion of transfer

12.4 Section 87 of the Act sets out the details of how the transfer of the land is to be completed. As with any other sale of land or sporting interest, the tasks identified in that section require separate solicitors to act for the purchaser and seller. Payment must be made within 6 months from the date on which Scottish Ministers agreed to the application, unless both the owner of the land or person entitled to the sporting interests agree to an extension of that period.



COMPENSATION

Rights to compensation

13.1 Where someone, perhaps owning the land or entitled to the sporting interests has incurred loss or expense through the process of crofting community purchase, they are entitled to reclaim that loss or expense from the CCB under section 89 of the Act. This right includes the costs or losses resulting from compliance with the Act following an application to purchase by the CCB, costs or losses resulting from a CCB withdrawal from the process and costs or losses resulting from failure by the CCB to complete the purchase. There is no right to compensation from the CCB where Scottish Ministers have refused an application to purchase croft land. In that case it is Scottish Ministers who will be liable to pay compensation and to whom claims should be directed. The process for making a claim is set out in the the **Crofting Community Right To Buy Compensation (Scotland) Order 2004**.

13.2 Where the parties cannot agree on the compensation which should be paid, either of them may refer the question for decision by the Land Court.

Grant towards compensation

13.3 Section 90 of the Act empowers Scottish Ministers, in given circumstances, to make grant towards the CCB's liability for compensation.

13.4 To successfully apply for such a grant, the CCB would require to demonstrate:

- that, after payment of outstanding costs incurred by the purchase of croft land, it has insufficient funds to pay the compensation required;
- that it has already taken all reasonable steps to try and raise the compensation amount required.

13.5 Scottish Ministers' decision on an application for grant towards compensation costs is final. The process for application for grant towards compensation costs is set out in the **Crofting Community Right To Buy (Grant Towards Compensation Liability) (Scotland) Regulations 2004**.

14

AFTER PURCHASE

What happens next?

14.1 The whole purpose of this part of the legislation is to enable crofting communities to secure their future through the purchase and subsequent sustainable development of land. Although the CCB has succeeded in purchasing the croft land, this is not the end of the Act's role in advancing the interests of the crofting community.

14.2 The Act seeks to ensure that the purchased land will remain a resource whose benefits accrue to the crofting community as a whole.

The Crofting Community Body

14.3 As required by section 71 of the Act, the CCB must be a company limited by guarantee whose surplus funds are applied for the benefit of the crofting community and that, were the CCB to be wound up, a successor body would require the approval of Scottish Ministers.

14.4 Section 72 of the Act requires that any CCB may not amend its memorandum or articles of association without the consent of Scottish Ministers. Where Scottish Ministers believe that a body, having succeeded in an application to purchase would no longer qualify as a crofting community body, they may then compulsorily acquire the land purchased by that body.

14.5 The implications of these sections are clear. Following purchase, a CCB or any succeeding body must continue to observe the requirements of section 71 of the Act, e.g. any surplus funds which the CCB or successor may enjoy may only be applied to subjects which benefit the whole of the crofting community and there is therefore no scope for treating any surplus as a dividend to be shared out amongst individuals.



If winding-up becomes necessary

14.6 The Act has also had to deal with the question of what happens where the CCB is wound-up. The land and any associated sporting interests remain assets and as such would need to go towards satisfying any liabilities the CCB may leave behind. Section 71 of the Act provides that where land or sporting interests were not absorbed by liabilities, these must be transferred to a crofting community body, or a community body which received Scottish Ministers' approval. Where there are no such bodies, the land and interests then pass to Scottish Ministers, or may be directed by Scottish Ministers to a suitable charity.

15

OTHER INFORMATION

Capital Gains Tax rollover relief

15.1 In considering the purchase of property under the provisions of the Act, the CCB may wish to approach the landowner and enquire whether a voluntary sale would be possible. The CCB would need at this point to be clear that the crofting community supported the proposed purchase, and this therefore suggests that any approach be made following the ballot required by section 75 of the Act.

15.2 A further reason for this timing is that the landowner would face a Capital Gains Tax liability on the sale of his property, **unless** the sale was to an authority exercising or having compulsory powers, in which case the disposal might qualify for roll-over relief under section 247 of the Capital Gains Act 1992 (subject to other conditions in that section being satisfied).

15.3 Guidance on the availability of roll-over relief for disposals made under powers of compulsory purchase is set out in the Inland Revenue's *Capital Gains Tax Manual* at paragraphs CG61900 to CG61945, and in *Tax Bulletin 41* (published in June 1999). Copies of both the guidance in the *Capital Gains Tax Manual* and the *Tax Bulletin* are available from any local tax office, or can be obtained from the Inland Revenue's website at www.inlandrevenue.gov.uk.

15.4 Revenue Statement of Practice SP13/9 (which is referred to in CG61940 and the Tax Bulletin article) will be amended in due course to confirm the extension of SP13/93 to include the provisions in the Land Reform (Scotland) Act 2003 relating to acquisitions by CCBs. It is intended to publish a further *Tax Bulletin* article at that point.



CONCLUSION

16.1 This guidance demonstrates that crofting community purchase of land as permitted by part 3 of the Land Reform (Scotland) Act 2003 requires both commitment and patience. The assistance of a solicitor is recommended at an early stage in proceedings.

16.2 As indicated in this guidance, the Scottish Executive Rural Affairs Department and the Community Land Unit of Highlands and Islands Enterprise will be able to offer advice at certain crucial points of the process. These contacts can be found at:

Scottish Executive Environment and Rural Affairs Department
LURP Divison
Area 1D
Pentland House
47 Robb's Loan
Edinburgh
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