Dear Rob

The Community Empowerment (Scotland) Bill will insert Part 3A to the Land Reform (Scotland) Act 2003, creating a right for communities to buy "eligible land" without a willing seller when certain criteria are met. Eligible land is defined in section 97C(1) of the 2003 Act (as inserted by the Bill) as land which, in the opinion of Ministers, is "wholly or mainly abandoned or neglected". Concerns have been raised both in the Committee’s Stage 1 report, and by Committee members at the Stage 1 debate, that the concept of "abandoned or neglected" land does not have a clear definition. The Committee has also highlighted that it is has concerns that the concept of "abandoned or neglected" land will be applied in such a way that limits it to the land’s physical condition.

There is no definition on the face of the Bill of the terms "abandoned" and "neglected" because it is intended that these terms are given their ordinary meaning. It is intended to use the words "abandoned" and "neglected" as descriptions of land that may be eligible land for the purposes of the exercise of the new compulsory right to buy as the words are capable of a broad meaning. This is because it is expected that the broad expressions may apply to a multiplicity of circumstances and should be understood generally.

By using broad expressions, Parliament would therefore be able to confer on Ministers a wide discretion, exercisable in a multiplicity of circumstances, to consider whether particular land described in an application is eligible for the purposes of Part 3A. Although the exercise of that discretion is subject to judicial oversight, it would not be expected that the Court could read down "abandoned" or "neglected" in a narrow way.

I would also be concerned not to try and define the expressions any further because it appears to me that any attempt to do so is more likely than not to result in a situation where the words are given a narrower meaning than the broad meaning that would otherwise apply if they are not technically defined.
The approach which Ministers would adopt in applying the test whether the land in a particular application is neglected or abandoned would be determined having regard to guidance and to a multiplicity of different matters. It is understood that some of these matters would be mandatory for Ministers to have regard to and for that reason it is intended that the minimum categories of such matters should be prescribed in subordinate legislation. There is power to do so in Section 97C(2) and I have therefore attached for your consideration a draft of Regulations under that power which indicates the sorts of matters that we would suggest that Ministers must have regard to as a minimum.

The matters set out in the draft Regulations fall into three broad categories:

- the physical condition and its effect on the surrounding area, public safety and the environment;
- the use of the land, or lack of use as the case may be, including whether the land is a nature reserve, held for conservation purposes or used for public recreation;
- any designation or classification of the land, such as land which has been classed as contaminated land, or buildings which are listed buildings or scheduled monuments.

I would like to draw your attention to the matters referred to in regulations 2(2)(b) to (d) of the draft Regulations. For each of these matters, Ministers must have regard to the effect of such condition. In particular, regulation 2(2)(d) prescribes that Ministers must have regard to “whether the physical condition of the land or any building or other structure on the land is causing or is likely to cause environmental harm”. “Environmental harm” is given the meaning that it has in section 17(2) of the Regulatory Reform (Scotland) Act 2014, which is:

(a) harm to the health of human being or other living organism;
(b) harm to the quality of the environment, including (i) harm to the quality of the environment as a whole, (ii) harm to the quality of air, water or land, and (iii) other impairment of, or interference with, ecosystems;
(c) offence to the senses of human beings;
(d) damage to property; or
(e) impairment of, or interference with, amenities or other legitimate uses of the environment.

Regulation 2(1)(b) obliges the Minister to consider whether, and to what extent, the physical condition of the land or any building or other structure on it is detrimental to the amenity of the land which is adjacent to it. It is intended that “amenity” is given its ordinary meaning, being a desirable or useful feature or facility of a building or place.

I would also like to draw your attention to the matters referred to in regulations 2(3) and 2(4). The matters in regulation 2(3) all relate to the use, or lack of use, of the land, and the matters in regulation 2(4) relates to any particular designation of the land, for example, the land forms part of a nature reserve or conservation area is a matter that must be taken into account by Ministers.
The matters listed in the draft Regulations are matters that Ministers must have regard to so far as applicable to the land described in the particular application. For example, although one of the matters listed is whether the physical condition of the land complies with the standards for good agricultural condition, this would not require to be considered by Ministers in the case of land which is situated in a city centre. Also, I should highlight that Ministers may consider other matters not set out in the draft Regulations where these are relevant. The draft Regulations are a list of the matters to which Ministers must have regard as a minimum – in some cases Ministers may have to consider other matters which they deem relevant in order to have satisfied themselves that to approve an application is in the public interest and compatible with furthering the achievement of sustainable development.

I hope that the matters set out in the draft Regulations explains our approach to the interpretation of “abandoned” or “neglected” land.

Kind regards

AILEEN MCLEOD
Draft Regulations laid before the Scottish Parliament under section 98(5) of the Land Reform (Scotland) Act 2003, for approval by resolution of the Scottish Parliament.

2015 No.

LAND REFORM

The Community Right to Buy (Abandoned or Neglected Land) (Eligible Land) (Scotland) Regulations 2015

Made - - - -

Coming into force - -

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 97C(2) and 98(3) of the Land Reform (Scotland) Act 2003(a) and all other powers enabling them to do so.

In accordance with section 98(5) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Community Right to Buy (Abandoned or Neglected Land) (Eligible Land) (Scotland) Regulations 2015 and come into force on [ ].

(2) In these Regulations—

“conservation area” means a conservation area for the purposes of section 61 of the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997;

“environmental harm” has the meaning given to it in section 17(2) of the Regulatory Reform (Scotland) Act 2014;

“listed building” means a listed building for the purposes of section 1 of the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997;

“nature reserve” means a nature reserve for the purposes of section 15(1) of the National Parks and Access to the Countryside Act 1949;

“scheduled monument” means a scheduled monument for the purposes of section 1 of the Ancient Monuments and Archaeological Areas Act 1979;

(a) 2003 asp 2. Section 97C was inserted by the Community Empowerment (Scotland) Act 2015 (asp ), section 48. Section 98(1) of the Act contains definitions of ‘Ministers' and ‘prescribed’ relevant to the exercise of the statutory powers under which these Regulations are made.
“special site” means a special site for the purposes of section 78C(1) of the Environmental Protection Act 1990;

“standards for good agricultural and environmental condition” means the standards for good agricultural and environmental condition as set out in [Part 2 of the Schedule to The Common Agricultural Policy (Cross-Compliance) (Scotland) Regulations 2014].

Matters to which Ministers must have regard to in determining whether land is eligible land

2.—(1) In determining whether land is eligible for the purposes of Part 3A of the Land Reform (Scotland) Act 2003(a), the Scottish Ministers must have regard, so far as applicable, to the matters mentioned in paragraphs (2), (3) and (4).

(2) The matters mentioned in this paragraph are—
(a) the physical condition of the land or any building or other structure on the land, and the length of time for which it has been in such a condition;
(b) whether, and to what extent, the physical condition of the land or any building or other structure on the land is detrimental to the amenity of land which is adjacent to it;
(c) whether, and to what extent, the physical condition of the land is a risk to public safety;
(d) whether the physical condition of the land or any building or other structure on the land is causing or is likely to cause environmental harm(b);
(e) whether the physical condition of the land complies with the standards for good agricultural and environmental condition.

(3) The matters mentioned in this paragraph are—
(a) the purpose for which the land or any building or other structure is being used or has been used, and the length of time for which it has been so used;
(b) if it appears to the Scottish Ministers that the land or any building or other structure on the land is not being used for any particular purpose, the length of time for which it has not been so used;
(c) whether, and to what extent, the land or any building or other structure on the land is being used for public recreation;
(d) whether, and to what extent, the land is being held for the purposes of permanent preservation for the benefit of historic or national interest and for the preservation of its natural aspect and features and animal and plant life;
(e) whether, and to what extent, any building or other structure on the land is being held for the purposes of the permanent preservation for the benefit of historic or national interest and for the preservation of its architectural or historical features so far as of national or historic interest.

(4) The matters mentioned in this paragraph are—
(a) whether the land, or any part of the land, is or forms part of a nature reserve or conservation area;
(b) whether the land, or any part of the land, is designated a special site(c);

(a) Part 3A was inserted by the Community Empowerment (Scotland) Act 2015 (asp  ). section 48.
(b) “Environmental harm” has the meaning given to it in section 17(2) of the Regulatory Reform (Scotland) Act 2014. “Environmental harm” therefore means: (a) harm to the health of human beings or other living organisms, (b) harm to the quality of the environment, including (i) harm to the quality of the environment as a whole, (ii) harm to the quality of air, water or land, and (iii) other impairment of, or interference with, ecosystems, (c) offence to the senses of human beings, (d) damage to property, or (e) impairment of, or interference with, amenities or other legitimate uses of the environment.
(c) A “special site” is defined as a “special site” for the purposes of section 78C(1) of the Environmental Protection Act 1990, which is an area of land that the local authority has decided should be a designated as a special site because it is contaminated land.
(c) whether any building or structure on the land is a listed building;
(d) whether any building or structure on the land is a scheduled monument.

St Andrew’s House,
Edinburgh
Date
EXPLANATORY NOTE

(This note is not part of the Regulations)