Written submission from Community Land Scotland

Draft Regulations on the question of `abandoned or neglected’ land provided to RACCE Committee by Scottish Government to aid considerations at Stage 2 – February 2015 - Further evidence by Community Land Scotland.

Introduction

The RACCE Committee in its Stage 1 Report raised a number of pertinent concerns about the clarity of the terms “abandoned or neglected” land, introduced by the new Part 3A of the Community Empowerment Bill to the Land Reform Act by Part 4 (Section 48) of the Community Empowerment (Scotland) Bill.

The Scottish Government has sought to meet the Committees concerns, not by amending the proposals on the face on the Bill as sought by the Committee, but through showing what draft regulations on these issues might say, and to provide reassurance to the Committee their concerns will be adequately addressed in this way. The Minister has written to the Committee giving explanations of the Scottish Government’s intentions.

Community Land Scotland can see that the Draft Regulations could be very helpful in the urban context, where physical signs of neglect may be much more obvious. Wider neglect arising from use or lack of use of land is more complex in the rural land setting.

Discussion (when thinking about the rural context in particular)

Having examined the letter from the Minister and the Draft Regulations, Community Land Scotland remains significantly concerned that the draft regulations do not provide the necessary re-assurances as they stand.

The draft Regulations do not appear to provide explicitly or even implicitly that the need for, or the lack of, sustainable development of the land is a matter to which Ministers are to have regard when determining whether land is wholly or mainly abandoned or neglected.

It may be argued that Regulation 2(3) would allow Ministers to do so but it appears that the most that Regulation does is to require Ministers to have regard to the purpose for which the land is or has been used or to consider whether it has not been used for any particular purpose. It does not require Ministers to consider, in either case, whether that use or lack of use has furthered or hindered any purpose, such as that of sustainable development.

Community Land Scotland remains of the view the matters are best resolved by making some change on the face of the Bill, as the Committee has suggested.

If, the Scottish Government is not prepared to accede to the Committees preferred approach at achieving clarity, even by potentially dropping the terms “abandoned or neglected”, it would be possible to make it explicitly clear on the face of the bill that eligible land could be land which, in addition to it being either “abandoned or neglected”, could also be land “in substantial need of sustainable development”.

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Regulations could then support these definitions, but the primary matters of eligible land being potentially land in need of sustainable development would be clear.

The proposed primary legislation at new Part 3A and the draft regulations appear to studiously avoid using the term sustainable development for reasons that are not at all clear, given the policy purpose of the Bill, and that these are terms in regular use and have a meaning capable of embracing all the Committees and many stakeholders concerns.

Lord Gill in the Judgment on the Pairc Crofters case said of the terms “sustainable development”:

[55] “…I should first deal with a preliminary objection raised by counsel for the appellants to the effect that the terms sustainable development and public interest are to [sic] vague to have legal force and are therefore, as counsel put it, “not law.”

[56] “In my view, the expression sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would be readily understood by the legislators, the Ministers and the Land Court.”

Viewed from the outside it seems that the Draft Regulations display a very clear concept of the physical aspects of land and land use, but the wider concept of sustainable development consequent on use or lack of use of land does not appear so well recognised.

It is only within the draft regulations at 2.(3)(a) and (b) that they get close to the wider idea of sustainable development, but even then it is not at all clear that as drafted they would in any way help a future Eigg to secure status as eligible land. It is also not clear that the community which sought to acquire a small piece of land to enable their sustainable development, when the owner was refusing to engage or assist, would be capable of making a case by virtue of the regulations as drafted. The scope for interpretation here is wide, and that runs both ways, to be helpful, or specifically not helpful.

The Draft Regulations cite what Ministers would be bound to consider when any land was not being used for a “specific purpose” [2. (3) (b)]. It is difficult to imagine circumstances where land could not be said to be being used for a “specific purpose”, even if that “specific purpose” was not conducive to furthering the achievement of sustainable development, as might have been said in the case of Eigg, for example. Further, 2.(3)(b) is strictly not about the non-use of the land, but the length of time for which the land has not been used.

Greater clarity by way of specific reference to the concept of sustainable development would help and may alleviate some of the concerns felt with the current draft. There could be a number of potential approaches, for example:

• in (3)(a) adding at the end, “and whether that purpose or use furthered the achievement of sustainable development”
• in (3)(b) insert after “purpose” “to further the achievement of sustainable development”

or

• add an additional requirement for Ministers to consider “such other matters as would in the opinion of Ministers further the achievement of sustainable development”

• or, Ministers could be required to have regard to “the aggregate of the social, economic and cultural conditions arising from the use or lack of use of the land.”

• or,” whether, and to what extent, [ the land or any building or structure on it, needs, or lacks, sustainable development] or [there is a need for sustainable development of the land or any building or structure on it]”

The covering letter of the Minister indicates that Ministers have to be ultimately satisfied that approving any application is in the public interest and is compatible with furthering the achievement of sustainable development. However, that is at the stage in the process when Ministers are considering the granting of consent for an application for the right to purchase, and not when considering whether the land should be eligible land and on which an application can be made at all, which is the matter at hand in this part of the Bill.

The Minister’s letter seeks to re-assure the Committee that the terms “abandoned” or “neglected” are intended to have their ordinary meaning and these words are capable of a broad meaning. It is precisely because the terms are intended to have their ordinary meaning that is the concern of Community Land Scotland, as their ordinary meaning would not appear to embrace the wider concept of sustainable development, the policy the Bill seeks to promote.

The specific avoidance of the use of the well recognised term “sustainable development”, gives the impression this is because the intention is specifically not to embrace this concept. While the Minister’s letter is in a number of respects helpful in seeking to provide some reassurance on this, the letter is not law.

A further concern of Community Land Scotland, unless there is a link provided on the face of the Bill, is that the link between the ordinary meaning of the terms “abandoned or neglected” and any regulations would be open to challenge on the basis that the linkage between the concepts was not sufficiently warranted or reasonably envisaged by the statutory provisions, or was stretching the normal interpretation of the primary tests (ie, the ordinary meaning of the words “abandoned” or “neglected”).

Additionally, it is not clear what the implication would be of land, for example, being in good agricultural and environmental condition, but wider sustainable development not being furthered. This was the situation in Eigg at the time of purchase, no one said the farm tenants were not keeping their land in GEAC, but the island as a whole was in almost terminal decline. You might read the same for Gigha.
While the good intentions of the Scottish Government in providing this draft is not in doubt, the regulations have the status of being a draft, and a lot of water could flow under this particular bridge before the regulations were finally tabled. That is why capturing the principle of wider sustainable development on the face of the Bill remains important to Community Land Scotland in establishing this is what this part of the Bill is about, and establishing that there was a link between this concept and any detail then spelt out in regulation.

ENDS

16th February 2015