Additional written submission from Community Land Scotland

[Submission from Community Land Scotland in addition to the previous submission to the Local Government and Regeneration Committee which comprises:

- Supporting arguments on the need for amendments to strengthen the Community Empowerment (Scotland) Bill; and
- Submission of evidence to the Scottish Government regarding proposed revisions to Part 3 of the Land Reform (Scotland) Act 2003 via the Community Empowerment (Scotland) Bill.]

Supporting arguments on the need for amendments to strengthen the Community Empowerment (Scotland) Bill:

The question of removing barriers to sustainable development; what can constitute sustainable development and the public interest; and related ECHR considerations.

This paper builds on evidence submitted by CLS to the Local Government and Regeneration Committee in relation to the CEB, and is consequent upon close examination of Scottish Ministers decision letters in relation to the Pairc Trust application to purchase land. (relevant extracts of the CLS evidence is attached at Appendix 1)

Community Empowerment (Scotland) Bill

The CEB seeks to amend the Land Reform (Scotland) Act 2003 (LRA) by simplifying or streamlining various procedures and by extending the community right to buy land.

The policy aim of Part 3 of the LRA, which gave crofting communities a `compulsory’ right to buy, was to remove barriers to sustainable rural development. (See Policy Memorandum to 2003 Act)

The terms of the LRA require that any application to use these powers must be approved by Scottish Ministers who must be satisfied, inter alia, that the application:

- furthers the achievement sustainable development, and
- is in the public interest

The only decision by Ministers in this regard has been in relation to the Pairc Trust. That decision was challenged in the Courts and withstood that challenge. (See Pairc Crofters Ltd and Another v Scottish Ministers 2012 CSIH 96)

The new Part 4 Section 48 of the CEB, which creates an new Part 3A in the LRA, seeks to provide a similar right to that given to crofting communities, (ie, to purchase land ‘compulsorily’) to all communities in Scotland, is in pursuit of a policy aim stated as being a general public interest in removing barriers to sustainable development. (See Policy memorandum to CEB)
Within the CEB provisions, Ministers must be satisfied, inter alia, that in approving an application to purchase ‘compulsorily’ by a community, the land in question is ‘eligible land’, ie, land which is defined as:

- Wholly or mainly abandoned or neglected (CEB Section 48, 97C), and

That the application (97H), inter alia:

- furthers the achievement sustainable development
- is in the public interest

The CEB therefore introduces a new concept of ‘abandoned or neglected’ land, something that was not considered necessary in analogous provisions within the LRA for crofting land, where the relevant tests were kept to only whether the application furthered the achievement of sustainable development, and was in the public interest.

This approach suggests that ‘abandonment or neglect’ of land are considered to be the barriers to sustainable development, the removal of which are set out in the Policy Memoranda as the objectives for this part of the CEB. These barriers could be removed through the exercise of the proposed new provisions to permit ‘compulsory purchase’.

It is appreciated that, if land can be said to be abandoned or neglected by the owner, it may be easier to justify its expropriation for the purposes of enabling it to be sustainably developed by a community body. However, expropriation can be justified in other circumstances. What seems to be to be important in the first place is to ascertain what is regarded to be the general interest to be achieved by the expropriation.

Given there is a shared policy purpose to remove barriers to sustainable development to both the LRA and now the CEB, it is worth exploring whether abandonment or neglect of land are the only barriers to sustainable development, and what other barriers there may be.

**Decisions of Scottish Ministers**

Revealed within decision letters on behalf of Scottish Ministers in relation to the Pairc Trust, there is a significant account of what Ministers regarded to be both sustainable development and what was in the public interest in that case. The reasoning in the decision letters extends the concept of what would be a barrier to sustainable development significantly beyond the concept of only ‘abandoned or neglected’ land.

The reasoning in support of the decisions is particularly helpful in that it sets out why an early application by the Pairc Trust was refused, on the grounds that it did not further sustainable development and was not in the public interest, and a later application then approved as meeting these requirements.
Furthering the achievement of sustainable development

In refusing the early application Ministers made clear the application did not satisfy them in relation to the question of furthering the achievement of sustainable development as it, inter alia:

- proposed to deliver activities which were largely already being delivered by the current owner
- did not provide significant additional activities
- did not provide any clear benefit to the community
- offered only limited income generating opportunities which would therefore not provide significant benefit to the community

(Pairc decision letters dated 21 March 2011 at Appendix 2)

In light of this it was considered that the application was not compatible with furthering the achievement of sustainable development.

Central to this reasoning is the potential for the furthering of sustainable development delivered through the achievement of greater outcomes, the delivery of more activity, and of securing community benefit.

The reasons set out for why a subsequent Pairc Trust application was approved and why Ministers considered it did further the achievement of sustainable development, included, inter alia:

- that there was a credible sustainable plan for the development of the land, and
- the plan would introduce new activities

Those activities would:

- have the potential to diversify the economy
- give power to negotiate and carry out developments
- create employment
- improve local services and infrastructure
- provide for social housing and the sale of house plots
- deliver improved visitor services
- generate revenues for investment for the benefit of the community
- facilitated wider developments

That ownership by the community body and the above listed potential uses and developments would, in consort with others’ actions, contribute to:

- fostering population growth
- increasing community capacity
- economic participation

In short, and in terms of the policy aim to remove barriers to sustainable development, it can be seen that the approval of the application providing for
purchase by the community body would facilitate the potential achievement of all of the above matters, and further the achievement of sustainable development.

It seems clear the reasoning for Ministers decisions, set out in such detail, was to build defences to potential legal challenge under ECHR and more widely by being explicit in what Ministers regarded would not, and what would, further sustainable development. In the Court decision on a subsequent challenge it was held that, “the expression sustainable development is in common parlance in matters relating to the use and development of land.” (our emphasis) (see Annex 3)

It would therefore seem reasonable and justifiable that the provisions of the CEB should be amended (potentially at 97C) to provide in an appropriate way to allow for considerations by Ministers, in addition to any considerations of abandonment or neglect of land, matters of use and development of land if purchased by a community body and of the sort set out in the decision letters referred to and which would permit the furthering of sustainable development.

The Public Interest

Such a provision would also be capable of meeting what was in the public interest.

The decision letters in relation to the Pairc application also set out reasoning on what was in public interest, which included:

- the area had previously inadequate social and economic development opportunities
- ownership by the community would allow the development of a number of economic developments, such as housing, etc
- ownership would address long term decline, a shortage of available housing sites
- the creation of local services
- the development of income streams
- bring in more visitors
- greater employment and environmental benefits

Taken together, the decision letter set out this provided, “greater opportunities overall to achieve sustainable development”.

The benefits in this instance were considered to outweigh any disadvantages and were not disproportionate to the degree of any harm to any private interests, a matter central to ECHR considerations.

Conclusion

The Court judgement on the Pairc case would not appear to cut across in any way what is suggested above by way of strengthening and improvement to the CEB as introduced. Indeed, the judgement might be held to strengthen the case for such improvement, and provide some comfort in thinking ahead to any question of future challenge to provisions within the CEB.
When considering the policy aim of removing barriers to sustainable development, the concept of ‘abandoned or neglected’ land is too limited as there are wider circumstances which can be a barrier to sustainable development, such as the lack of achievement of the use and development that would deliver “greater opportunities” for sustainable development.

The conditions that must be satisfied within the CEB for non-crofting land to be ‘compulsorily’ purchased by requiring that the land be ‘abandoned or neglected’ appear in themselves greater than would be necessary to meet ECHR requirements, particularly when viewed in light of the Pairc judgement.

It is not clear there is such a fundamental difference between the objective of the sustainable development of land in crofting tenure and the sustainable development of land more generally to necessitate the additional requirements of that land being abandoned or neglected for it to be eligible land for the potential exercise of the new provisions.

If a requirement to show land is abandoned or neglected is to remain, given the evidence above on what would constitute “greater opportunities” relevant to the achievement of sustainable development, the policy objective of the various provisions, then it would appear there is a strong justification for an amendment to the CEB, to provide Ministers with the opportunity to also consider wider matters of use and development of that land in determining what land could be eligible land.

Submission of evidence to Scottish Government regarding proposed revisions to Part 3 of the Land Reform (Scotland) Act 2003 via the Community Empowerment (Scotland) Bill.

Community Land Scotland is pleased to be able to respond to the consultation questions on the above consultation in the following terms.

Community Land Scotland (CLS) strongly advocates the need for changes to Part 3 of the Land Reform (Scotland) Act 2003 in order to make its use simpler and fairer, while maintaining appropriate rigour to test what is in the public interest and furthers sustainable development.

CLS is conscious that others have insights into the challenges of the current Part 3. In particular Highlands and Islands Enterprise, but also experienced advisors to community owners, such as Simon Fraser. CLS is aware that Simon Fraser submitted evidence to the Local Government and Regeneration Committee on Part 3 and we commend his analysis of the issues and urge it is taken most seriously. In addition, John Randall, of Pairc Trust who have unrivalled experience of the practical issues, also submitted evidence in a personal capacity, and again we commend that evidence.

CLS has gained particular insights into the Pairc case and how the final reconciliation of positions represented in the level of agreement now reached between owner and community was achieved. Though yet to be finally concluded, the advanced stage of agreement now achieved was only reached by a process of voluntary mediation between the parties. While on this occasion that was possible, partly because of the physical location of the parties and the ‘mediator’, it is not...
appropriate to leave such matters to chance and it would be helpful if this facility was available to all communities and owners in future, should the need arise. This points to a simple power being given to Ministers to be able make suitable arrangements for such mediation, if requested to do so. That power currently does not exist and would be a helpful addition to wider simplification measures around Part 3 as set out in the Appendices to this submission (this could have application to part 2 as well).

CLS will be happy to provide such further additional information or clarifications as may be requested.

Responses to consultation questions

Question 1. The Scottish Government proposes to allow SCIOs and BenComs to be crofting community bodies in addition to companies limited by guarantee. Do you agree with this proposal? Are there any other types of body which you think should be permitted to be a crofting community body?

Agree with proposal, with Ministers having a power to add such other types of body as they may see fit to give future flexibility.

Question 2. The Scottish Government proposes removing the requirement for the auditing of accounts to be included in a company limited by guarantee’s articles of association in order for it to be a crofting community body. This proposal would bring Part 3 of the Act in line with proposed amendments to Part 2 of the Act. Do you agree with this proposal?

Agree.

Question 3. The Scottish Government proposes expanding the definition of a crofting community. Do you agree with the proposal? Do you think that this is a more accurate description of a crofting community?

Generally agree. However, very few crofts will be registered on the new register for some time to come. Instead, or in combination, the Commission’s existing Register should be used.

A further potentially complicating circumstance that should be considered is where the number of crofting tenants or owner occupiers registered outweigh those actually resident within the immediate area. It is not clear whether this circumstance may arise, but it potentially could.

Question 4. The Scottish Government proposes amending the existing mapping requirements which must be included in a Crofting Community Body’s application. Do you agree with this proposal?

Agree, although it will be important to see the final and specific proposed wording of the change.

Question 5. The crofting community body’s right to buy application must be advertised by Ministers by placing a public notice in a newspaper circulating in the area where the land or interests are located, and in the Edinburgh Gazette. The Scottish Government proposes that public notice of the crofting community body’s
right to buy application continues to be given by Ministers by advertisement, but that
the form of this advertisement be set out in regulations. What is your view on this
proposal?

Agree.

Question 6. The Scottish Government proposes that the owner, tenant, person
entitled to sporting interests, (depending on the nature of land or interests that the
application relates to) and any creditor in a standard security in relation to that land
or interests are correctly identified in the application form in order for Ministers to
consent to the crofting community body’s application. What are your comments on
the proposal?

It does not seem an unreasonable proposition for a community to use all its
best endeavours to accurately identify owner, person, etc.... However, the
question arises of what would happen if the owner, person, etc ... could not,
even after all reasonable steps had been taken by the community, be
identified. This could arise by virtue of some of the complex and potentially
overseas arrangements that can be put in place to hide ownership and
beneficial interest, or simply by the passage of time, complex and dispersed
ownership arrangements that can follow from one time changes in ownership.
The same comment can be made about the Section 3A, which this proposal is
designed to align with, and which Parliament has yet to consider. It is not
clear why this change is necessary either for Part 3A or for this proposed
section. This proposal would only be acceptable if accompanied by a
provision to allow Ministers to, notwithstanding this provision, grant consent
when they are satisfied that the community has taken all reasonable steps to
identify the owner, person, etc ..., but have been unable to do so.

Question 7. The Scottish Government proposes Ministers having a specific
power to make regulations setting out the information that the crofting community body is
required to provide to Ministers about the ballot, or any consultation that the crofting
community body may have held with the community about their application. The
crofting community body already are responsible for paying for the cost of the ballot.
The Scottish Government proposes to expressly state in the Act that the crofting
community body is liable for meeting the expense of conducting the ballot. What are
your comments on the proposals?

The proposals in the Community Empowerment (Scotland) Bill regarding Part
2 of the Land Reform (Scotland) Act 2003 makes provision for the Scottish
Government to in future take responsibility for the balloting arrangements and
pay for such. As a matter of principle, this proposal was not seen as one of
simply making it easier for the community body, it was also seen as a proposal
which could ensure the proper conduct of any such ballot and which therefore
provided re-assurance to the parties concerned and for the wider public
interest. These latter reasons would apply equally and might even be seen to
be more important to the conduct of ballots in the crofting community and in
circumstances where there was not a willing seller. There is therefore a case
for the same provisions as it is proposed will apply to Part 2 (through
revisions in CEB) to apply to this part. If the concern was simply one that in
such circumstances Government would be funding a ballot on what was a
`compulsory' sale, this could be readily justified as being appropriate to ensure proper conduct and public confidence in the conduct of such a ballot.

Question 8. The Scottish Government proposes that, when an application is extinguished under section 76, Ministers should be required to notify each person invited to give views on the application. This proposal aligns Part 3 with the proposed Part 3A of the Act. What is your view on this proposal?

Agreed.

Question 9. The Scottish Government proposes clarifying the certain persons listed in section 81(1) of the Act who may refer a question to the Land Court at any time before Ministers reach a decision on an application made under Part 3. What is your view on this proposal?

This does not seem unreasonable.

Question 10. The Scottish Government proposes increasing the timescale in which the valuer must notify the value of the land from 6 weeks to 8 weeks. Do you agree with this proposal?

Agreed.

Question 11. The Scottish Government proposes requiring the valuer to seek counter-representations when representations regarding the valuation of the land are received from the land owner, tenant, person entitled to sporting interests, as the case may be, or the crofting community body. Do you agree with this proposal?

Agreed.

Question 12. Section 89 of the Act allows compensation to be paid in respect of a loss or expense incurred in connection with a crofting community right to buy application. Ministers are already required to set out the procedure for claiming compensation by way of order. The Scottish Government proposes amending this order so that Ministers may, via an order, specify the amounts payable in respect of compensation and who is liable to pay these amounts. What are your views on the proposal?

This does not seem unreasonable.

Question 13. The Land Court is required to give its decision in writing within 4 weeks of the date of the hearing. The Scottish Government proposes removing the 4 week time limit, and remove the provision requiring the reasons to be provided in writing. What is your view of this proposal?

It is not clear why this is necessary or helpful to the parties involved. Having reasons in writing seem appropriate, as does having a reasonably short timescale for these matters being concluded.