Having witnessed some of the issues emerging from the evidence sessions, the Crofting Commission wishes to provide the Committee with some observations. These are not presented as having been discussed in detail and now presented as the considered view of the Commission. They are made in the context of the Commission’s experience and how that might assist the Committee deliberations.

The Crofting Commission took office in April 2012, following the implementation of the Crofting (Reform) Scotland Act 2010. The overarching policy objectives of the bill leading to this Act stated: There is widespread concern that crofting is in decline as a consequence of persistently high levels of absenteeism, growing levels of neglect and the continuing removal and development of land from crofting tenure. Many have argued that the existing governance arrangements and regulatory framework have failed to address this decline. The objectives of the Bill are to put in place a robust regulatory and governance framework for the future of crofting that will reverse this decline and ensure that crofting continues to contribute to sustainable economic growth in some of Scotland’s most remote, rural communities.

To that extent it is against this background that the current legislation requires to be considered. The Commission itself has made a major contribution to the development of “the crofting law sump”, which has identified a considerable number of anomalies and issues with the current legislation, and is the main reason that crofting legislation is again under review. We do not wish to repeat the detail of problems that are set out within the sump, but may touch upon some of these issues in the course of this submission.

The change in title from Crofter to Crofting Commission indicated a subtle change of emphasis from responsibility for the crofter to responsibility for the crofting system as whole. The retention of the word Commission indicates that there is a particular responsibility beyond that of a purely abstract regulatory authority. The word commission has been used continually since establishment of the second Crofters Commission in 1955 following the abolition of the first Crofters Commission in 1912. Prior to that crofting legislation was administered by the Scottish Land Court, which took over from the first Crofters Commission. The Taylor Report, commissioned to examine crofting conditions in the early 1950’s, concluded that the crofting system was “worth preserving for its own intrinsic quality.” It also noted that “it is a system which, as now organised, is fighting a losing battle against the social and economic forces of the day. In many cases, though not in all, it is in a state of decline and in some, indeed, of dissolution….. The decline of the crofting system is attributable in great part to the failure of some of these auxiliary industries, notably fishing, coupled with the fact that men and women are no longer content with the modes of life which were acceptable to their ancestors.”
While circumstances in crofting areas may have changed there may be familiar echoes in the continuing evidence to Parliamentary Committees in more recent times. The recommendation of the Taylor Report was: “as we have seen from the foregoing pages we have come to the conclusion that there is need for setting up a new administrative body or Commission charged with the duty of stimulating the development of the crofting communities in all possible ways, and endowed with adequate financial and executive authority.” The report continued later: “In this situation it is clear no single measure of reform can be regarded as a panacea. The remedy in our opinion is to be sought in the creation of an ad hoc administrative organ with wide discretionary powers, flexible enough to do what is requisite in the circumstances of each case.”

What is evident is that the 1950’s enquiry into the conditions of crofting recommended a Commission that would have a duty to stimulate the development of crofting. It is not to say that development and support, particularly, through the likes of Crofting Counties Agricultural Grants Scheme did not become available to crofters, but the Crofters Commission was more noted for its regulatory responsibilities. In fact, the 2010 Act removed the development function, and required the Commission to concentrate on regulating crofting. However, the 2010 Act also imposed the general function on the Commission of promoting the interests of crofting.

The 2010 Act itself followed on from another major inquiry on crofting, resulting in a report by Professor Mark Shucksmith in 2008. The Shucksmith Report advised that the Crofters Commission resources were almost totally dedicated to effecting its regulatory function and that crofting required a new body with responsibility for the development of crofting. Shucksmith’s committee carried out a major participatory consultation within crofting communities prior to submitting its recommendations. It also commissioned independent surveys and expert appraisals; however, it did not provide any authoritative critique on crofting development over the Crofters Commission 50 years plus period of tenure.

What is significant is that the two major inquiries into crofting, undertaken over fifty years apart, have both recognised the importance of supporting the development of crofting, yet there appears to be a vacuum in how that is to be supported and delivered. In terms of the Commission position, it might be described as being left with the stick but without any carrot, and that may appropriately describe the situation within crofting itself. We are aware that views have been sought by, and presented to, the Committee on this aspect. We consider that it remains of major importance to the future of crofting. The committee has been advised there is a need for these elements to operate in unison. If one is absent the other becomes more difficult to implement and justify. The Commission also recognises the importance of aligning crofting regulation and development with other public policy objectives for the rural economy, such as population retention and wider social, cultural and environmental policies.

It is not argued by the Commission that there has not been crofting development in the past or that our predecessor did not make a contribution to that. In fact, there
have been a range of successful programmes, supported by HIDB/HIE, European and Government funding from which many crofting communities have benefited over previous years. The most recent of these the Crofting Township Development Scheme, and the Crofting Community Development Scheme were assisted by Crofter Commission administration. They may have been considered as models for the development of crofting envisaged in the Shucksmith Report. The role of an active grazings committee was often pivotal in the delivery of projects under such schemes. However, it is difficult to envisage how such initiatives could now be undertaken according to one legal view on the restrictions of a grazings committee’s role, as presented in your session of 9th November. That would suggest that clarity in legislation may be required in this context to ensure that crofting communities can undertake any potential developments with confidence.

**CROFTING DUTIES**

The 2010 Act introduced statutory residency and croft management duties for crofters and requires the Commission to investigate legitimate reports of potential breaches of these. The requirements in this part of the Act (26A etc) are prescriptive and particularly detailed. The process set out does have a legal logic but is not necessarily practical for the regulator or the crofter. It does allow for checks and balances and also provides a crofter with a right to appeal Commission decisions to the Land Court at various stages of the process. That stated, previous legislation for absentees provided the Commission with more discretion on whether to take action and in continuing with any process it started. It would not be incorrect to state that concerted periods of absentee action undertaken by the Commission between 1955 – 1960, 1998 – 2004, and 2010 – 2014, delivered more positive results in terms of crofting development and population retention than appears to be forthcoming from the enforced duties route and process. The caveat would be that, the Commission recognises the right and fairness to be able to appeal decisions which could result in an individual losing their croft to the Scottish Land Court. The Commission’s view is that it would be possible to simplify the duties sections of the current legislation whilst at the same time maintaining a satisfactory right of appeal for any party against whom duties action is taken.

**OWNER-OCCUPIER CROFTERS**

The 2010 Act did attempt to ensure that crofting duties applied to all crofters and, in doing so, a new category of owner-occupier crofter was introduced for crofts that had been purchased. As “the sump” explains in considerable detail, the legislation did not cover all possibilities and has still left some outwith the owner-occupier category. We are satisfied that this has been thoroughly detailed in “the sump”, with appropriate recommendations. It is, however, noted that there has been more recent suggestions that purchasing of a croft should remove it from crofting controls. That has the initial attraction of simplifying matters and returning crofting to its original 19th century status of being a purely tenanted system.

While recognising the arguments for such a proposal we would simply make the following observations. The proposal has the potential to gradually or, possibly, rapidly remove many crofts from a regulated system. There would in such
circumstances be no controls over successive subdivisions of crofts, resulting in very small units that have little or no agricultural (or other) potential and have limited potential to contribute to the rural economy. In particular, it would be an obvious attraction for those not complying with their statutory duties and it would increasingly make crofting regulation irrelevant. The effective demise of the crofting system would appear contrary to much of the debate that has informed and considered crofting reform and legislation since the early part of the 21st century. The already mentioned Shucksmith Report advised of the public interest in crofting as follows:

We believe that there is a national interest in Scotland having a well populated and well-manged countryside which sustains a diverse and innovative economy, attracts visitors, cares for natural habitats, biodiversity and carbon stocks, and sustains distinctive cultural practices. We have considered a wide range of evidence about crofting, as discussed in Part 2. It is our view that crofting has an important contribution to make, providing it is governed and regulated effectively in the public interest, reflecting sustainable rural development in remote and fragile areas and embracing economic, social, cultural and environmental dimension of sustainability.

We are aware that is had already been suggested to the Committee that this research is relatively fresh and there is not the requirement to repeat such groundwork. This provided the backdrop to the 2010 Act which sought to equalise, as far as possible, the rights and responsibilities of tenants and owner occupiers of crofts. As that process has only begun, and the Sump proposes relevant solutions in this context, it would appear counter intuitive to almost immediately abandon a considered approached to making the system work for the benefit of crofting and its delivery of public benefits.

The Commission would also observe that since 1955, and arguably since the Land Settlement (Scotland) Act 1919, crofting legislation has provided protection not just for the crofter or landholder but also for the croft as an integral unit within the crofting system as a whole. The Commission’s understanding is that the 2010 Act underlined the importance of the regulation of all crofts (regardless of whether crofts are tenanted or owner-occupied) for the benefit of the crofting. The Commission would further note that, due to the particular definition of owner-occupier crofter set out in the 2010 Act, not all crofts are equally regulated. This is, as set out above, a matter raised in the Sump.

The Commission appreciates that there are divergent views within crofting which impact upon consideration of this, particularly from a regional and cultural context. The current legislation allows for the election of six members to the Crofting Commission. This allows for the representation from varying crofting perspectives. Therefore, it is important to ensure that this method allows for fair representation from within crofting. The fact that more than 50% of the crofting population is confined within two of the six areas perhaps demonstrates the inadequate consideration being given to this element.
The stated intent of the 2010 Act was also “to tackle speculation on the development value of croft land through strengthening the grounds under which the Commission may reject an application to decroft.” It is noted that additional considerations may be made by the Commission when determining an application that qualifies as a “reasonable purpose”. The considerations are not easily applied in context and the Commission has seldom, if ever, had opportunity to cite them in determinations. The additions were made in the context that the previous Crofters Commission had considered that it was obliged to approve decrofting applications where planning consent had been granted. This had arisen as the result of an appeal to the Land Court in which the Commission was advised that it should not be acting as a secondary planning authority. That misinterpretation of the Land Court decision was evidenced when this Commission inherited a case that had to be considered within the legislation that predated the 2010 amendments. The Land Court upheld the Commission decision to refuse to decroft croft land that had planning permission for 10 house sites (MacGillivray v Crofting Commission SLC/30/6) and thus proving that the Crofters Commission defence of inaction was not well founded.

Ostensibly the real anomaly relating to decrofting is that the legislation allows for a reasonable purpose application, such as a house site, and also for an application where no purpose is defined. The reasonable purpose application, although it has a greater expectation of approval, technically has a more rigorous assessment than that of one where there is no expressed reasonable purpose. Such an application only has to be assessed at the second stage where the Commission is required to have regard to the general interest of the crofting community in the district in which the croft is situated and in particular to the demand, if any, for a tenancy of the croft from persons who might reasonably be expected to obtain the tenancy if the croft were offered for letting on the open market on the date when they are considering the application. (from section 25(2))

While the may be logic in enabling applications for no expressed purpose, it also appears logical that it should be considered within all the legislative parameters. The Land Court has recently pointed out the absurdity of this anomaly, which it has described as “extremely odd” and “should be cured by legislation at the first opportunity”.

The other area that has occasioned concern for the Commission in a decrofting context is the definition of a crofting community. As can be seen from the above, the Commission is required to take account of the general interest of the crofting community. The 2007 Crofting Reform Act introduced a definition of a crofting community which does not necessarily work for some decrofting applications. The detail of this is set out in an associated paper that has been considered earlier this year by the Commission, and the Land Court has noted that the definition is narrow as it confined a community to a single crofting township. If the croft to which the application applies is not obviously part of a township, assessing the interests of a crofting community do not apply and, in certain previous cases where the Land Court itself has recognised a crofting community in a wider context this would no longer be the case. The Land Court has recently also pointed out that the definition of crofting community in crofting legislation is “strange” and “does not make sense”.

In general, the legislation in respect of decrofting applications is complicated, and arguably causes the Commission more difficulties than any other area. There is a need for it to be refined and a consistent requirement for the two application types referred to above.

POLICY & REGULATION

Another stated policy intent of the 2010 Act was “to give the Commission greater flexibility to develop regulatory policy so that crofting develops in the interests of crofting communities and the wider public interest.” The Act introduced section 2C(1) which requires the Commission to submit a plan setting out their policy on how they propose to exercise their functions. The first plan submitted by the Commission was aspirational and tried to fit the Commission policy direction into the Scotland Perform Framework and the many outcomes and aspirations that crofting is perceived to deliver. In reality, the Commission found that this was not always compatible with undertaking its primary role of independent regulator. In that context the Commission is required to make decision in line with the legislation and the evidence provided, it cannot manipulate its processes and decision making to ensure particular outcomes. To that extent the policy direction has to be clear at the outset and the legislation tailored to delivering accordingly.

In this context, we would invite the question as to whether crofting can be considered in the same context now as it was in 1886 or, indeed, 1955. We have seen the process of updating, resulting from the post Shucksmith Report and debate, and have highlighted some of the consequences and confusion that has resulted from this. The question remains as to what crofting is expected to deliver in a modern context and to some degree in different crofting areas, and whether the legislation provides for this. Some of these issues were touched upon in your session with Commission representation on 16th November. We believe that these are issues that are worth your further consideration.

Crofting Commission
John Toal
Head of Policy
25 November 2016
SUMMARY
This Paper provides consideration of two elements arising from the recent Scottish Land Court decision (Eunson -v- The Crofting Commission).

BACKGROUND
In the case of Eunson -v- The Crofting Commission, the Land Court upheld the Commission decision to refuse applications for decrofting directions for five crofts on mainland Shetland. While doing so, the Land Court made a number of points that merit further Commission consideration.

A previous discussion paper on the potential consequences of the Eunson case highlighted some of the practical issues for Commission decision making, particularly in the context of decrofting applications.

CURRENT POSITION
A paper at the June Policy in Development Meeting considered more specifically two of the issues emerging from the Eunson case. The two elements are the evidence the Commission requires to establish that there is a "crofting community", and where the proposed development is on land other than the croft land for which a decrofting direction is sought. The associated Annex A provides more detailed analysis of these.

The recommendations below were agreed in principle and require formal Commission approval.

RECOMMENDATION
It is recommended that the Commission seeks to establish whether a crofting community exists by examining evidence for a potential township when assessing relevant decrofting applications. This will enable the Commission to fulfil its statutory obligation to have regard to the general interests of the crofting community in the district.

It is also recommended that the Commission should recognise that an application for decrofting of croft land may be sought in connection with a reasonable purpose proposal that will take place on other land. The potential benefits or otherwise of decrofting should be considered by the Commission.

Date 7 July 2016
Author David Findlay, Solicitor and John Toal, Head of Policy
Crofting Community and Township

The recent Scottish Land Court decision on *Eunson v Crofting Commission* (March 2016) considered the implications of the definition of a crofting community provided in section 61(1) in relation to a decrofting application and section 25(2) in particular.

The section 61(1) definition reads:

“crofting community” means all the persons who (either or both) –

(a) occupy crofts within a township which consists of two or more crofts registered with the Crofting Commission

(b) hold shares in a common grazing associated with that township.

In considering this definition it is necessary not to associate the word ‘occupy’ with ‘reside’ and take the view that it has the same meaning. Occupying a croft is not the same as residing on a croft.

The Land Court noted that the statutory definition of a crofting community is ‘narrow’, and that it does not extend beyond a single township. The Land Court recognised the difficulties this caused, particularly in respect of previous decisions in which the Court decided that a croft was a part of the crofting community in the district of the croft, although the croft itself was not part of a specified township. The Court took the view that it could not consider that the statutory definition did not apply in this context on the basis “‘the context otherwise requires’ and that the pre-existing law therefore holds good…”. Essentially the Court has accepted that the statutory definition, with an apparently narrower description of a crofting community, has to be applied in decrofting applications as well as other regulatory applications.

Therefore a crofting community is defined in terms of township. As the Land Court stated: ‘Township’ is not defined but it is a term frequently used in the crofting context and is normally understood as meaning a crofting village or other settlement having its own distinct identity.

This appears contrary to how a crofting community was previously perceived in some Land Court determinations. For instance, in the case of *Palmer v Crofters Commision* 2006, the Land Court ruled that although there was an application to decroft a stand-alone croft that was not part of an identifiable township, there was a crofting community in the district. Borve is a single croft of some 87 hectares on Skye, and is located between the township of Edinbane on one side and the townships of Kildonan and Flashader on the other. The Court stated that the crofting community in the district was the townships of Kildonan and Edinbane and Flashader. It also stated that “it would be absurd to hold that there is no crofting community in the district …”. That would appear to be more difficult to apply now where the croft in question has to be part of a township that consequently defines the community and the district in question.

On the other hand it could also prove different in situations where the Land Court has previously ruled that there was no crofting community. For instance, in *Gammie v Crofters Commision* 1998, the Land Court ruled that there was no longer a crofting community at Kinbeachie on the north of the Black Isle, where the croft for which a decrofting direction was sought was situated. On this occasion the Court accepted the applicant’s submission that the existence of a community was determined by “the relationship between people rather
than an assessment based on land or buildings.” It further stated that “community is essentially a social concept rather than a physical one.”

The Land Court considered that visual recognition of what was a community was not necessarily the determining factor. It explained: Relevant factors for consideration include sharing of common grazings, sharing in the physical work of crofts or, perhaps, sharing in buying of materials or produce. Some form of social connection bearing upon the occupiers’ role as crofters could be expected. How the occupiers actually see themselves is of importance.”

However, the statement of facts for the case indicate that the croft at 2 Kinbeachie “was one of a group of eight crofts forming the Kinbeachie Land Settlement Estate which was created by the Department of Agriculture in about 1920.” It was later accepted in the case that croft No 2 Kinbeachie was “technically part of a township of six crofts”, although it is noted that no further evidence was provided on this. Therefore, it could now be contended that whilst there was no longer any sense of a distinctive crofting community, the crofting infrastructure did indicate the existence of a township, albeit that might not be in the format to be found in other main crofting areas of the Highlands & Islands. While the Court had ruled previously that the main elements of how a community could be defined could not be based on land or buildings, these elements could now have greater significance.

It may now be reasonable to take the view that this was a crofting township consisting of more than two crofts and, as such, the occupiers of these crofts formed a crofting community.

Essentially, it could now be concluded that it is more difficult for a single stand-alone croft that is surrounded by more traditional and readily identifiable crofting townships, of which it is not part, to be considered part of a crofting community. While on the other hand, in other areas where crofts may be less numerous, it may be possible to contend that they form part of a township and thus are part of a crofting community.

The Commission systems record many crofts as not belonging to a township of more than one croft. Essentially, where crofts are not numbered within a defined township they are recorded as an individual croft township of one croft. However, this purely administrative recording does not entail that such crofts are not part of townships or might not be considered to form part of townships. The Casework Paper, as highlighted in the Land Court report of Eunson -v- Crofting Commission case at paragraph 79, stated that only one of the five crofts in this instance is part of a township. This is because such information is simply taken from a database that has not carried out any check or analysis as to whether a single named croft is part of a township consisting of two or more crofts, and whether it has a share in an associated common grazing.

On this basis, only crofts that are enumerated within a township will be classified as being part of a township of two or more crofts. Only one of the five crofts that were part of the decrofting application was considered part of a defined township. The remainder were all recorded as not being part of a township of two or more crofts. However, two of the crofts are recorded as having shares in the same common grazing and one as being formed by apportionment from a share in that common grazing. The three crofts are all located in close proximity, and it could be considered that the only difference between these is that they have individual croft names as opposed to numbers. Therefore, it might have been possible to conclude that they were part of a township consisting of two or more crofts, and also that there was a common grazing associated with that township.

There is an obvious need to avoid such a cursory assessment as to whether a croft forms part of a croft township. By doing so it can limit the Commission’s fuller consideration of whether such a croft is part of a township. The question then is whether there are other types of crofting townships beyond that which is normally perceived as the standard crofting township. As previously stated, the Land Court has given an indication of how a township is normally perceived. That is as a crofting village or other settlement with its own distinctive identity. This provides a geographic context and suggests a proximity within a particular
area. One description of settlement is a small community, village or group of houses in a thinly populated area. On this basis there may well be other possibilities of defining a crofting township. It is not impossible to consider that a number of crofts within a defined area constitute a township and thus form a crofting community.

How the Commission would determine what is an appropriate area for defining such a crofting township then becomes relevant. An indication of whether there are other crofts within a locality can be provided from the Commission’s Croft-View system. RPID could be asked to provide a profile of crofts within the area and the level of association that might exist between crofts within that area. From information provided, the Commission would determine whether this could be considered as a crofting community within the confines of the legislation.

It is suggested that such an approach should only be employed where there is a recognised need to do so. It would not be standard for every case where a township is not immediately identifiable, but only where the Commission considers that a decrofting direction could potentially be detrimental to the interests of a crofting community. It is probable that the Commission will not require to use such an approach that frequently.

The consequences of considering such an approach for decrofting applications is that it could also have to be considered for objections to other regulatory applications under section 58A. However, in that context it would be for the objector to provide the evidence that both objector and applicant occupied crofts within a township. It would be for the Commission to accept whether such evidence is sufficient for it to recognise that it satisfies the definition of a crofting community.

An approach to exploring whether a crofting community exists may be appropriate for the areas where crofting townships are not so specifically demarcated, but it would not appear to be capable of accommodating the stand-alone croft in areas where townships are more readily defined. Therefore, while there may be plenty of crofts within crofting townships within a locality, the stand-alone croft that is not directly part of these is effectively isolated in terms of being part of a crofting community.

The other possible consideration that appears to be available for the Commission, in terms of a decrofting application for a reasonable purpose, is that of section 25(1B). This allows the Commission to take account of the effect of the proposed purpose for decrofting on the sustainability of crofting in the locality of the croft or such other area in which crofting is carried on as appears to the Commission to be relevant. While this removes consideration beyond the confines of a crofting community and how it is defined, and enables consideration of crofting in the locality, it is in the context of sustainability rather than the general interests of the crofting community. It might be considered that proving an effect on the sustainability of crofting in that locality or area has a higher threshold than that of considering the general interests of a crofting community. Nevertheless, the Act provides for such consideration.

In the recent 95 Druiminaigrid case, the Land Court discussed what it referred to as a ‘tipping point’ in a particular crofting community where even a small or modest decrofting could cause erosion of the ‘crofting land bank’. The Court related this point to “the sustainability of the crofting community”. It would be possible for the Commission to use section 25(1B) in cases where the sustainability of any meaningful crofting is at the so-called ‘tipping point’, and identify the area or areas that it is using in connection with any ‘tipping point’ argument. The Commission would however require evidence on these matters that would be specific to the individual case.

Ultimately, the Commission has to determine whether a crofting township exists and, consequently, how the interests of a crofting community can be considered. The various issues examined are summarised below.

1: The Commission might consider that only the clearly defined standard crofting townships satisfies the definition of a crofting community. On this basis, the many townships that have been entered as a single croft township would be used as the
defining point. This may ensure simplification and provide a very functional, but not necessarily accurate, means for processing applications. However, as can be seen from the *Eunson v Crofting Commission* case, this can detract from the Commission overall claim when refusing an application, particularly if it appears to accept, or has indicated by its own process, that no crofting community exists.

It is also arguable that the Commission has a responsibility to examine whether a crofting community exists to meet its obligation to have regard to the general interests of the crofting community in the district in which the croft is situated. It is not evident that this can readily be achieved in a relatively perfunctory manner that simply derives evidence from a data system that does not provide for this purpose.

2: It is preferable that the Commission should fully consider whether a crofting community may exist. Wherever it is considered necessary, the Commission could detail and analyse the crofting infrastructure within a given geographic area to determine whether it can reasonably conclude that there may be a crofting township or townships in existence. This might entail that the Commission require a more detailed profile of crofting within an area. The purpose of this would be to provide data from which the Commission could reach a view as to whether there might be a crofting township that could satisfy the statutory requirements for a crofting community.

3: It has to be recognised that there will be individual stand-alone crofts within areas where crofting townships are relatively common. It does not appear possible to coalesce such crofts within adjacent townships as part of the crofting settlement, even if they appear to be a part of crofting within that district. The only means by which consideration can be given in this scenario is in cases of purposeful use decrofting applications when considering the effect on the sustainability of crofting in a specific area. This is something that the Commission is entitled to consider and, as such, is not necessarily optional.

**Development taking place on other land**

One criticism made by the Land Court in the *Eunson* case related to the Commission’s failure to explain why it was relevant that the development would be on other (croft) land:

In our view they should have addressed the question why the fact that the development was on other land made a difference. Was it a legal reason? ... The wording of sec 25(1)(a), where it refers to the direction being applied for “in order that the croft may be used for or in connection with some reasonable purpose” (emphasis added), may be thought to point the other way. Did the Commission take either or both of these provisions into account and if so, what did they make of them? If they thought decrofting in relation to a development on other land to be unreasonable in principle, did it make any difference that the other land in this case was in the same general locality, indeed within the same parish or a neighbouring parish? These were matters which the Commission might be expected to have addressed in forming a view as to reasonable purpose. If they did address them, the appellants are entitled to know what they made of them. If they did not, the appellants are entitled to know what other factors were taken into account and by what reasoning these factors led to the Commission’s decision. The decision letter does not tell the appellants about any of these things and we are therefore satisfied that the respondents failed to give adequate reasons for their conclusion on this material issue. [63]

The suggestion from the Court is that the fact that the development takes place on land other than the croft does not of itself prevent the purpose from being a reasonable purpose. Unhelpfully, however, the Court provided no concluded view on the matter.
The natural interpretation of “in connection with” indicates that there are (at least two) possibilities as to how a reasonable purpose can take place:

1. The reasonable purpose takes place on the croft, so that the croft – or part of the croft – is used for the recognised reasonable purpose; and
2. The croft is used in a way that is ‘connected’ to a reasonable purpose. For instance, the use may be an integral part of the reasonable purpose but the greater part of the reasonable purpose takes place on neighbouring land.

In all cases, the applicant will need to demonstrate that the croft land must be decrofted in order that the reasonable purpose can be carried out. If it is essential that croft land is decrofted in order to provide a specific amount of money for a reasonable purpose project that takes place on neighbouring land, there may be grounds for the Commission to entertain the application seriously. The case usefully indicates some of the evidence that the applicant would require in this regard to make their case. The development of, for instance, a renewable energy project will involve physical as well as financial issues, and it is artificial to separate all the integral components of a development.

The Commission must consider the potential benefits as well as adverse effects of decrofting on the crofting community. One possible way to interpret “in connection with” as they appear in section 25(1)(a) would be to ask whether the development, although not physically taking place on the croft, would be of benefit to the crofting community in the district or locality. Where an applicant seeks to decroft for financing a project that brings no benefit to the crofting community (and brings no public benefit), or where the use of the croft is marginal to the proposed project, the Commission would have grounds to refuse such an application but would have to explain the basis on which it did so.