

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.

A paper by Community Land Scotland (CLS).

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 a 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.

Community Land Scotland

11 November 2014

Appendix 1

Extract from Community Land Scotland evidence to Local Government and regeneration Committee – September 2014

Section 48 Part 3A - extending the community right to buy “abandoned or neglected land”

CLS strongly supports the introduction of this new power extending the community right to buy. This is viewed by CLS as a last resort power. This proposal responds to a weakness in the current LRA that, even if it were in the public interest, there is no means for a community to acquire land unless it came on to the open market. The new provision means this matter can now be considered.

The challenge of this part of the CEB is to find the right balance between granting this welcome extended right, and setting tests for the exercise of the right so high that they would not, for all practical purposes, be possible to meet. CLS believes that the significant qualifications on the new right probably makes it impossible to be exercised in practise. There are a number of ways in which the provisions in the CEB could be helpfully clarified and strengthened, and the balance in this regard improved, while still meeting all ECHR requirements. It would only be with important amendment to what is proposed that the cause of community land owning would be likely to be advanced by these provisions.

The Explanatory Notes and the Policy Memorandum make it clear that, respectively, the land in question, to be eligible, is wholly or mainly abandoned or neglected “for the purpose of the sustainable development of that land” and “in order to further the achievement of sustainable development”.

However, the provisions at Section 48 - 97C (1) do not make explicit that sustainable development connection. The provision appears to stand alone with the considerations solely about the physical condition of the land, not about the social and economic development of the place, the classic two pillars of sustainable development in addition to environmental considerations (See Lord Malcolm in the Pairc Crofters Ltd and Another v Scottish Ministers 2012 CSIH 96 at Para 112).

The everyday interpretations of “abandoned” and “neglected” do not link with the issue of the land’s lack of, or potential or need for, sustainable development, and there is therefore a risk that, even if subsection (2) of section 97C was used to bring in these issue as prescribed matters to which Ministers must have regard in determining whether land was eligible, that could be the subject of challenge on the grounds 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 set out in subsection (1).

This matter could be clarified and the CEB strengthened by making it clear – within subsection (1) or via a further subsection within section 97C itself - that the land in question, to be eligible land, could be regarded as wholly or mainly abandoned or neglected, or otherwise in need of sustained development, when having regard to the sustainable development of that land. This would be one approach to seek to make clear the concepts of abandonment or neglect of land were related to sustainable development and not solely constrained to its physical condition, use or occupation. This would be consistent with policy as set out in the Policy Memorandum, and the agreed and statutorily required Scottish Land Use Strategy which stresses the use of land for community well-being contributing to a more prosperous and successful nation. Even with this improvement, the requirement to show land was wholly or mainly abandoned or neglected still sets a very

considerable hurdle to be overcome. This clarification would need to apply equally to 48 97G (6) (b) and 97G (10) (c).

Any amendments along such lines above would, CLS believe, be compatible with ECHR A1P1 which requires that the interference in individual ownership rights must be - provided for by law; to pursue a legitimate aim; and the means of doing so must be proportionate to achieving that aim; and must achieve a fair balance between the demands of the community and the requirement of the protection of the individual's rights. All these tests would be met as the matter would be provided for in law; would pursue the policy purpose of furthering sustainable development; would be proportionate [see Pairc case and Lord Gill, paras 36 and 40]

In the case of urban areas and particular sites within such areas, it may be possible to argue that a particular site or building had been abandoned or neglected (in the normal sense of those words) by pointing to its physical condition or the absence of occupation or use, and it is probably why these provisions are in the CEB. They still remain very high, or impossible, hurdles for a community to clear.

However, when considered in the rural context and over the potentially extensive areas of land of the sort that communities have acquired by voluntary agreement in recent years, it is difficult to see how a successful case could be made that land (except in the very narrow circumstances of a building, for example) had been abandoned. The sort of defences that an owner might put up can readily be seen; the abandonment being a deliberate act of land management for conservation purposes for example, or the appearance of abandonment is simply a function of the market conditions for development not being sufficient and there being an intention to use the land, or to take some small and immediate action which would have the effect of showing the land had not been abandoned.

Similar arguments can be made about the question of whether land is wholly or mainly neglected. Had these provisions existed at the time of the initial struggles by the islanders of Eigg, for example, to secure the island into community ownership, would they have been effective in securing that outcome (the 'Eigg Test')? Even with these provisions, this may still have been an impossible case to successfully argue. This might be marginally helped by the addition of "or significantly" to "wholly or mainly" in the definition at 97C(1).

Further, however, tying this Part 3A route to community ownership of land solely to the concept of abandonment or neglect, is too limiting. Community ownership of land is not only potentially motivated by questions of abandonment or neglect, it is principally motivated by communities considering barriers to the sustainable development of their place.

The objectives in the Policy Memorandum make clear the purpose of this part of the CEB is to remove barriers to the sustainable development of land. Wider human rights considerations also point to more positive justifications to promote change in the human condition toward achieving more adequate standards of living and the continuous improvement of living conditions, of the sort sought in the International Covenant on Economic, Social and Cultural Rights (ICESCR)(Article 2, Subsection 1). The ICESCR sets out that signatory states should, to the maximum of its available resources, seek to progressively achieve the full realization of the ICESCR by all appropriate means, including particularly the adoption of legislative measures. The Scotland Act 1998, Schedule 5, Paragraph 7 (2) makes clear that Scottish Ministers may take actions, inter alia, "observing and implementing international obligations". With ICESCR having been ratified by the UK Government, it is brought within the terms of the Scotland Act 1998 and as such, not reserved for this purpose.

Ministers are empowered and encouraged by these various provisions to take actions that would further improvement in the human condition.

In all, the Bill could therefore be significantly strengthened with the addition of further criterion to the effect that eligible land could include land, for example, *the ownership of which by a community body would be conducive to furthering sustainable development (and in pursuance of objectives of the International Covenant on Economic, Social and Cultural Rights); or, (when having due regard to International Covenant on Economic, Social and Cultural Rights) the ownership of which by a community body would be conducive to furthering sustainable development and the public interest.* These are initial ideas of potential ways to clarify and strengthen the CEB.

CLS recognise that part of the Scottish Government's reasoning in these matters is likely to be in relation to ECHR considerations and the rights of existing owners. CLS believes potential strengthening provisions, such as from the concepts above, would not threaten ECHR compliance, given their nature and given the provisions and procedures elsewhere in this part of the CEB which, in the view of CLS, addresses the principles of human rights law round due process. Further, CLS notes that the existing provisions in the LRA, and which have withstood Court challenge on ECHR Article 1 Protocol 1, do not require any notion of abandonment or neglect of land in order for it to be eligible land, so it is not clear why this would now be required. (See Lord Gill's judgement in the case of *Paic Crofters Ltd and Another v The Scottish Ministers* 2012 CSIH 96)

It is further not clear whether, even if it were possible to identify some parts of a land holding in which a case could be mounted that they were either wholly or mainly (and possibly 'or significantly') abandoned or neglected, it is only those parts which could be eligible land, or whether it could be argued that the entire land holding was abandoned or neglected by virtue of those parts being abandoned or neglected. This matter needs further clarification.

As noted above, the Bill makes clear that (97C(2)) Ministers must have regard to prescribed matters in relation to what is eligible land. This makes the Regulations here absolutely critical to the interpretation of this provision and it would be vital to see these draft regulations before a final judgement could be made on the provisions or amended provisions themselves.

Lastly, with regard to 97C, it is not clear why *bonna vacantia* land is excluded from being eligible land, particularly when related to the need to identify ownership of land which, for reasons set out above, may not always be possible and potentially therefore rendering it *bonna vacantia*.

Further still, 97H (c) requires that Ministers must not consent to an application to buy by a community body unless they are satisfied – “that, if the owner of the land were to remain as its owner, that ownership would be inconsistent with furthering the achievement of sustainable development in relation to the land.” It is difficult to see how this could ever be proved, it appears to require proof of a negative as distinct from proof of a probability and it goes much further than would be required in order to achieve a “fair balance” required by ECHR A1P1. This appears a very high and most probably an impossible hurdle to be overcome and unnecessary to meet ECHR requirements; it implies that, even if a community was able to show that the land was mainly neglected for the purpose of its sustainable development, and this was not in the public interest, if that owner could show that, none-the-less, their continuing ownership was not of itself “inconsistent” with some level of sustainable development, then the community's application must be refused.

Under the provisions, the Ministers already have to satisfy themselves that:

- The land is eligible land, ie, it is wholly or mainly (and possibly 'or significantly') neglected
- Purchase by the community body is in the public interest
- Purchase by the community body would be consistent with the achievement of sustainable development in relation to the land

Given these tests, and the fact that there is no equivalent of this requirement in Part 3 of the LRA, which was held to be compatible with ECHR A1P1 in the Pairc case, it appears unnecessary to have this further requirement. There is a strong case for deleting it entirely, which failing, it would be essential to clarify it to the effect that, *the ownership of which by the current owner would be inconsistent with (or not conducive to) the public interest when having regard its potential for contributing to the sustainable development of that land.* There is potential here too of linking this consideration to *having due regard to (or, in pursuance of the objectives of) the International Covenant on Economic, Social and Cultural Rights.*

**NOTICE UNDER SECTION 82 OF THE LAND REFORM
(SCOTLAND) ACT 2003 OF SCOTTISH MINISTERS' DECISION ON
AN APPLICATION TO PURCHASE BY A CROFTING COMMUNITY
BODY**

1. Name of crofting community body.

- The Pairc Trust Ltd

2. Description of eligible croft land, eligible additional land, eligible sporting interests or the interests of the tenant in tenanted land which are the subject of the application.

- The eligible croft land and sporting interests applied for are detailed on Map 1, Map 2, and Map 3 which accompanied the application. The eligible croft land etc in the application relates to the townships of: Seaforth Head, Sheildinish, Habost, Kershader, Garyvard, Caverstay, Cromore, Marvig, Calbost, Gravir, Lemreway, and Orinsay.

3. Decision on application and date from which it is effective **(See Notes 1 to 5)**.

- Ministers have decided to reject the application, dated 20 May 2005, for the right to buy eligible croft land etc. The date on which this decision is effective is 21 March 2011.

4. Any conditions attaching to consent if application is approved.

- Not applicable. The application has been rejected.

5. Reasons for decision.

Ministers have considered carefully all of the evidence submitted in connection with the application and have had regard to all views and responses under section 73(13) of the Act, and bearing in mind that consent of the application will result in the compulsory purchase of the eligible croft land etc under Part 3 of the Act. The application dated 20 May 2005 has been rejected for the following reasons:

Sustainable development

In terms of section 74(1)(j) Ministers are not satisfied that The Pairc Trust's exercise of the right to buy under Part 3 of the Act is compatible with furthering the achievement of sustainable development.

- The proposed activities largely include activities that are currently undertaken by the present landowner, Pairc Crofters Ltd, and the holder of the shooting lease and seek to benefit these parties. They do not provide any significant additional activities that could be developed by a community landowner for its community and its community benefit.
- The Trust's Business Plan is generalised, lacks detail, is based on a number of assumptions, and does not provide any clear benefit for the "community" as defined by the Trust; neither does it show how ownership of the common grazings would make a real difference to that "community". Ministers do not believe that funders would look upon the Trust's Business Plan favourably when considering whether to provide the Trust with financial assistance to buy out the common grazings etc for the community.
- The Trust's Business Plan includes limited income generating opportunities; the amount of income that will be generated will not provide significant benefit to the Trust's defined "community".
- While Ministers are aware of the impact of the interest of the tenant on the common grazings (and these have been pointed out by both the Trust and the landowner), they are not satisfied that having looked at the Trust's proposals, before considering the impact of the interest of the tenant on tenanted land, that they are compatible with furthering the achievement of sustainable development.

Public interest

In terms of 74(1)(n) of the Act, and having considered this in light of section 74(2) of the Act, Ministers are not satisfied that it is in the public interest that the right to buy should be exercised.

- The Trust has not provided any clear evidence of how the acquisition of the common grazings etc would provide benefits on a short, medium or long term to the "community" as defined by the Trust or to the 12 townships.
- The proposed activities largely include activities that are currently undertaken by the present landowner, Pairc Crofters Ltd, and the holder of the shooting lease and seek to benefit these parties. They do not provide any significant additional activities that could be developed by a community landowner for its community and its community benefit.
- Since the Trust submitted its application for consent for croft land etc, dated 20 May 2005, it has submitted a further application for the eligible croft land etc, dated 26 February 2010, which reflects the up-to-date proposals for essentially the same area of land. Although the

Trust has not formally withdrawn its application, Ministers consider that it has, in effect, been superseded by the application of 26 February 2010, which Ministers are considering separately.

Pairc Decision Letter 2

**NOTICE UNDER SECTION 82 OF THE LAND REFORM
(SCOTLAND) ACT 2003 OF SCOTTISH MINISTERS' DECISION ON
AN APPLICATION TO PURCHASE BY A CROFTING
COMMUNITY BODY**

1. Name of crofting community body.

- The Pairc Trust Ltd

2. Description of eligible croft land, eligible additional land, eligible sporting interests or the interests of the tenant in tenanted land which are the subject of the application.

- The interest of the tenant in tenanted land applied for is detailed on Map 1, Map 2, and Map 3 which accompanied the Trust's application. The interest of the tenant in tenanted land covers the eligible croft land etc relating to the townships of: Seaforth Head and Sheildinish, Habost, Kershader, Garyvard, Caverstay, Cromore, Marvig, Calbost, Gravir, Lemreway, and Orinsay.

3. Decision on application and date from which it is effective (**See Notes 1 to 5**).

- Ministers have decided to consent to the application dated 26 February 2010 for the exercise of the right to buy the interest of the tenant in tenanted land. The date on which this decision is effective is 21 March 2011.

4. Any conditions attaching to consent if application is approved.

- None.

5. Reasons for decision

Ministers have considered carefully all of the evidence submitted in connection with the application and have had regard to all views and responses under section 73(13) of the Act, and bearing in mind that consent to the application will result in the compulsory purchase of the interests of the tenant in tenanted land under Part 3 of the Act. Ministers consent to the application as they are satisfied that all of the criteria as set out in section 74 of the Act, are met. In particular:

Section 74(1)(m)

- Ministers are satisfied that, having regard in particular to section 75(1) of the Act, the crofting community have approved the Trust's proposal to exercise the right to buy (section 74(1)(m) of the Act). The Trust has provided sufficient evidence that it undertook a ballot on 10 December 2009 which asked the question "Are you in favour of The Pairc Trust buying the common grazings of the Pairc Estate in Lewis (shown on the plan enclosed with the ballot paper), together with the mineral and sporting rights associated with this land, and the interests of Pairc Renewables Ltd as tenants under the interposed lease granted in their favour by Pairc Crofters Ltd in relation to this land, and for that purpose applying to the Scottish Ministers for consent to buy using the provisions of Part 3 of the Land Reform Act 2003?" The ballot result showed that of the 376 persons eligible to vote, 282 voted. 195 persons voted in favour of the proposal (of which 76 persons were tenants); 87 voted against the proposal and there were no spoilt votes. The Trust complied with the requirement on a Crofting Community Body to submit the ballot result as a precursor to an application indicating that the crofting community support the proposal.

Section 74(1)(i)

- Ministers are satisfied in terms of section 74(1)(i) of the Act that the Trust is a crofting community body which complies with the provisions of section 71 of the Act. In particular, the Trust's Articles of Association comply with the requirements set out in section 71(1) of the Act. Ministers are content that the Articles which were received from the Trust were effective prior to the application from the time when the Trust passed its special resolution at an Extraordinary General Meeting of the Trust on 26 January 2010.

Section 74(1)(j) and (n)

- Ministers are satisfied that the Trust's exercise of the right to buy is compatible with furthering the achievement of sustainable development (section 74(1)(j) of the Act) and is in the public interest (section 74(1)(n) of the Act). This is particularly so bearing in mind the highly remote and fragile nature of the area and the importance of generating greater economic and social opportunity and infrastructure for the community. Ministers are aware of the transformational effect which community acquisition and development of land and other assets can have in fragile areas, such as the Pairc Estate, and how they can help create continued growth of rural communities, more dynamic and sustainable communities, together with communities that have increased confidence.

Sustainable development

- In relation specifically to sustainable development (section 74(1)(j) of the Act):
- Ministers are aware that the Trust's application for consent to the exercise of the right to buy the interest of the tenant in tenanted land ("the interest") is linked to the Trust's separate application for consent to the exercise of the right to buy the eligible croft land etc (which that interest also covers). The

two applications should therefore be seen in the context of a sustainable plan for the development of the land as a whole. Nevertheless, Ministers have to consider each application on its own merits as required by section 69A of the Act.

- The Trust's application demonstrates that it will diversify the economic base of the area by introducing new activities. The acquisition of the interest includes land which forms part of the proposed Pairc commercial windfarm (the consent for which is the subject of a separate statutory process) which relates to 14 of the 26 turbines located over the common grazings of the Pairc Estate, the development of an extensive commercial windfarm and any revenues associated with these turbines. The acquisition of the interest will enable the Trust to negotiate with Scottish and Southern Energy (the sub-tenants under a sub-lease of the interest and the Developer for the proposed Pairc commercial wind farm ("the Developer")) to amend the extent of the geographical area covered by the sub-lease in order to exclude all areas not included in the current Pairc commercial wind-farm proposal. The Trust would then have powers to carry out its developments on the eligible croft land generally (as proposed in its separate application for consent) without the requirement to refer any of its proposals to a landlord or tenant. This will *inter alia* allow the Trust to create employment, diversify the economic base of the area by introducing new activities (such as additional renewable energy projects of a 2 turbine community wind farm, camper-van site, a ranger service for visitors to South Lochs, the development of holiday packages for visitors, the development of a network of paths to explore the Pairc area and other community facilities). These proposed activities are set out in the Trust's Business Plan which is similar for both its applications though there is a separate Annex 4 specifically concerning the proposed use, development and management of the interest. The Trust's proposals will help to generate new surplus income in the community which would be available for reinvestment in other projects and for the benefit of the community, as defined by the Trust.
- The Trust's proposals will help to generate new surplus income in the community which would be available for reinvestment in other projects as defined by the Trust for the benefit of the community. Should planning consent be granted for the proposed Pairc commercial windfarm, and that windfarm be developed, the acquisition of the interest will provide opportunities for substantial income to the crofters, the community and the landowner (who will retain the interest of the tenant on the in-bye land on the Pairc Estate and the land at Steimreway in the south-west of the Pairc Estate) for several generations. The Trust's acquisition and management of the interest will allow it to develop a number of its key projects and will allow the Pairc community to take the first of a number of steps to acquire and to actively develop and manage the eligible croft land etc (which is the subject of a separate application). The Trust has indicated that both applications are the first stage of a plan to acquire and to actively develop and manage land in the Pairc Estate for the benefit of the community.

- The Trust's application demonstrates that on social sustainability, it has an acceptable level of community support for the project and that there is support for the project beyond the immediate membership of The Pairc Trust (see ballot return figure).
- The Trust's application shows that the acquisition of the interest will, subject to negotiations with the Developer and other existing rights holders, also enable the Trust to, *inter alia*, directly improve or create specified local services and infrastructure for the benefit of the community as a whole as well as visitors to the area (e.g. social and sustainable housing, a camper van site, a ranger service and holiday packages, paths network and information literature), as well as local amenity for visitors alike in terms of access (such as a paths network, a ranger service, information literature and information panels at suitable points).
- Whilst, as acknowledged by the Trust in its application, the timing of any community benefit arising from the Pairc commercial windfarm is "at present uncertain" as consent for that project has still to be granted, Ministers are satisfied that in the longer-term the Trust's proposals have the potential to bring significant revenues to the Trust and to the community (as also the landowner in the interest of the tenant that is not being acquired by the Trust) and to enable the Trust to bring in revenue streams from other projects for the benefit of the community.
- The Trust's application has the support from relevant public agencies (e.g. Highland and Islands Enterprise and Comhairle nan Eilean Siar). The Trust has received substantial funding in recent years from Highlands and Islands Enterprise (HIE) and has received financial assistance from the Scottish Land Fund in taking forward its plans for a phased community buyout of the Pairc Estate. More generally, HIE is currently supporting the Lochs area of Lewis for enhanced support under the Growth at the Edge / Fas aig an Oir to achieve innovative and sustainable development and that HIE and the LEADER funding programme have co-financed the services of a Local Development Officer who will be managed by the Lochs Community development Group to benefit the whole community. This allows HIE to utilise the full breadth of its powers to work with whole communities, fostering population growth, increased community capacity, economic participation and development of new sustainable revenue streams. The Trust's application also takes account of the opportunities for private sector funding to take forward its proposals arising from development of the land (for example, income from windfarm development). HIE, in its comments on the application stated that it would consider an application from the Trust towards the acquisition of the land and lease and is committed to working closely with The Pairc Trust in the longer term. The Trust has also noted that there are several funding sources which it believes will support them once the purchase price of the interest of the tenant is known, and it will be for the Trust to consider those in light of the Minister's consent to this application.
- On financial viability, the Trust has provided a Business Plan which includes a number of proposals together with appropriate costings and revenues

estimated over a 10 year period. This includes figures for the interest together with windfarm community benefit money from the proposed Pairc commercial windfarm and a separate proposed community windfarm. The Trust had earlier undertaken a feasibility study, dated September 2004, and some of the proposals included have been developed within the Business Plan (e.g. projects that will bring visitors into the area and renewables (e.g. wind turbines as a community owned scheme, small scale hydro, and wave/tidal). The Trust's Business Plan indicates that the Trust has a number of clear aspirations which it wishes to achieve and which it considers that the interest of the tenant in tenanted land will facilitate that development (e.g. social housing units, community windfarm, hydro-schemes, camper van site, the network of paths, and generation of community benefit money). The Business Plan is largely dependent on the revenues acquired by the proposed community windfarm and the Pairc commercial windfarm, both of which will be achieved through the acquisition of the interest. These revenues appear to provide the finance to allow key projects to be developed (a number of other projects will also bring in revenues for the community – such as the sale of house plots, camper van sites, ranger service, holiday packages). Ministers acknowledge that responses to the application suggest that the Trust's timescales for the development of the community windfarm are ambitious and that some of the proposals will be subject to further statutory consent processes (e.g. development of both of the commercial and the community windfarms) and so may therefore be deliverable over a longer time scale. However, Ministers are satisfied that the Business Plan overall provides sufficient evidence for sustainable development of the interest and, in any event, the acquisition of the interest is not of itself dependent on further statutory processes and will, even over the shorter term, generate revenues which can be used by the Trust for the benefit of the community.

- Ministers also acknowledge that there have been further adverse representations made concerning the viability of the Trust's proposals (the Trust submitted the same Business Plan in respect of its two applications), including that the Trust has used out of date figures and an out of date community appraisal, the figures for national insurance have been incorrectly calculated, that not all costs are attributed to projects (e.g. no staff allocated to the holiday packages, vehicle costs to the ranger service, costs attributed to the guided walks or the sale of houses), there are impractical timescales for projects (such as for renewable energy) and not all the figures are included between the Executive Summary and the Financial Projection Figures. However, Ministers remain satisfied that the Trust's Business Plan overall provides sufficient evidence of a viable plan for the sustainable development of the interest for the benefit of the community and that the acquisition of the interest will facilitate wider developments on the eligible croft land etc which the Trust is seeking to acquire through its separate application.
- The Trust's application indicates that its proposals will not have a negative impact on another business or businesses and that it will not duplicate existing provision to a detrimental level (private, community, and public). Its proposals suggest that it will not cause displacement of existing jobs and businesses.

Public interest

- In relation specifically to the public interest (section 74(1)(n)), and having considered this in light of section 74(2) of the Act:
- Ministers consider that the Trust's proposals will provide lasting benefit to a remote and highly fragile rural community where, hitherto, there have been inadequate social and economic opportunities. In particular, on the basis of the evidence submitted with the application, Ministers are satisfied that they will address issues relating to the management of the eligible croft land etc which is being acquired by the Trust by virtue of another application and the local community including:
 - It will give the Trust the opportunity to amend the lease by mutual consent to facilitate greater benefit for the Pairc community through the acquisition of community benefit from 14 of the 26 turbines of the proposed Pairc commercial windfarm and the proposed community windfarm.
 - It will allow the Trust to facilitate the development of a number of developments on the eligible croft land etc which the Trust is also seeking to acquire through a separate application. This will allow the Trust to develop projects such as social housing, hydro schemes, a community windfarm, a camper van site, a network of paths to explore the Pairc area).
 - Through these activities, the Trust will be able to address the following:
 - the long-term decline and increasing age profile of the local population.
 - the shortage of available housing and sites.
 - the creation of local services.
 - the development of a meaningful income from renewable energy projects.
 - wide-ranging proposals to boost tourism which are aimed at bring in more visitors to the area and to create employment, and environmental benefits.
- Ministers consider that the Trust's proposals will provide it with the opportunity to take control of, and develop, the interest and, by virtue of the separate application, the eligible croft land etc for the direct and lasting benefit of the whole community and will therefore provide it with **greater opportunities** overall to achieve sustainable development. It will contribute positively to the sustainable development of the interest of the tenant (and to the eligible croft land etc) and the 11 townships which form the relevant crofting community, and will deliver a sustainable community as a whole. Ministers consider that the acquisition of the interest of the tenant in tenanted land will facilitate a number of projects which each have

their own income streams which will contribute positively to the community in the short, medium and long term.

- Ministers are therefore satisfied that the benefits of the right to buy are not outweighed by any disadvantages to the wider community, the environment or the economy and are not disproportionate to the degree of any harm to private interests.
- Ministers acknowledge that, notwithstanding general support for the right to buy as evidenced by the ballot, a number of representations have been made about the Trust's organisational and management controls in how it has been managed and works with and relates to the community, and that the Trust will have to work hard to overcome these if it is to become a community landowner. While Ministers accept that there have been criticisms, the Trust has stated that it has taken steps to deal with them (including the provision of information to the community and to increasing dialogue with other community organisations in the Pairc area).
- Ministers also acknowledge that representations have been received which ask whether the Trust is acting in the interests of the community as a whole. The Trust has provided evidence that its motivation is to promote sustainable development in all parts of the community in line with local priorities. The Trust already has close links with the grazings committees of the townships and recognises the rights of the crofting tenants under the interest of the tenant in tenanted land. Ministers are satisfied that the Trust has an awareness of the needs of the different sections of the community and that it needs to represent the community as a whole.

Pairc decision letter 3 (similar in almost all respects to decision letter 2)

NOTICE UNDER SECTION 82 OF THE LAND REFORM (SCOTLAND) ACT 2003 OF SCOTTISH MINISTERS' DECISION ON AN APPLICATION TO PURCHASE BY A CROFTING COMMUNITY BODY

1. Name of crofting community body.

- The Pairc Trust Ltd

2. Description of eligible croft land, eligible additional land, eligible sporting interests or the interests of the tenant in tenanted land which are the subject of the application.

- The eligible croft and mineral rights applied for are detailed on Map 1, Map 2, and Map 3 which accompanied the application. The eligible croft land etc in the application relates to the townships of: Seaforth Head and Sheildinish, Habost, Kershader, Garyvard, Caverstay, Cromore, Marvig, Calbost, Gravir, Lemreway, and Orinsay.

3. Decision on application and date from which it is effective (**See Notes 1 to 5**).

- Ministers have decided to consent to the application, dated, 26 February 2010, for the exercise of the right to buy eligible croft land etc. The date on which this decision is effective is 21 March 2011.

4. Any conditions attaching to consent if application is approved.

- None.

5. Reasons for decision

Ministers have considered carefully all of the evidence submitted in connection with the application and have had regard to all views and responses under section 73(13) of the Act, and bearing in mind that consent to the application will result in the compulsory purchase of eligible croft land under Part 3 of the Act. Ministers consent to the application as they are satisfied that all of the criteria as set out in section 74 of the Act, are met. In particular:

Section 74(1)(m)

- Ministers are satisfied that, having regard in particular to section 75(1) of the Act, the crofting community have approved the Trust's proposal to exercise the right to buy (section 74(1)(m) of the Act). The Trust has provided sufficient evidence that it undertook a ballot on 10 December 2009 which asked the question "Are you in favour of The Pairc Trust buying the common grazings of the Pairc Estate in Lewis (shown on the plan enclosed with the ballot paper), together with the mineral and sporting rights associated with this land, and the interests of Pairc Renewables Ltd as tenants under the interposed lease granted in their favour by Pairc Crofters Ltd in relation to this land, and for that purpose applying to the Scottish Ministers for consent to buy using the provisions of Part 3 of the Land Reform Act 2003?" The ballot result showed that of the 376 persons eligible to vote, 282 voted. 195 persons voted in favour of the proposal (of which 76 persons were tenants); 87 voted against the proposal and there were no spoilt votes. The Trust complied with the requirement on a Crofting Community Body to submit the ballot result as a precursor to an application indicating that the crofting community support the proposal.

Section 74(1)(i)

- Ministers are satisfied in terms of section 74(1)(i) of the Act that the Trust is a crofting community body which complies with the provisions of section 71 of the Act. In particular, the Trust's Articles of Association comply with the requirements set out in section 71(1) of the Act. Ministers are content that the Articles which were received from the Trust were effective prior to the application from the time when the Trust passed its special resolution at an Extraordinary General Meeting of the Trust on 26 January 2010.

Section 74(1)(j) and (n)

- Ministers are satisfied that the Trust's exercise of the right to buy is compatible with furthering the achievement of sustainable development (section 74(1)(j) of the Act) and is in the public interest (section 74(1)(n) of the Act). This is particularly so bearing in mind the highly remote and fragile nature of the area and the importance of generating greater economic and social opportunity and infrastructure for the community. Ministers are aware of the transformational effect which community acquisition and development of land and other assets can have generally and especially in more remote and fragile areas, such as the Pairc Estate, and how land acquisition also creates prospects for continued growth of, increased confidence within and generally more dynamic and sustainable, communities.

Sustainable development

- In relation specifically to sustainable development (section 74(1)(j) of the Act):
- Ministers are aware that the Trust's application for consent to the exercise of the right to buy the eligible croft land etc is linked to the Trust's separate application for consent to the exercise of the right to buy the interest of the tenant in tenanted land (which also covers the eligible croft land etc). The two applications should therefore be seen in the context of a sustainable plan for the development of the land as a whole. Nevertheless, Ministers have to consider each application on its own merits as required by section 69A of the Act.
- The Trust's application demonstrates that on economic development, its proposals will create employment, will diversify the economic base of the area by introducing new activities (such as additional renewable energy projects, camper-van site, a ranger service for visitors to South Lochs, the development of holiday packages for visitors, the development of a network of paths to explore the Pairc area and other community facilities – though not all of these are associated with the common grazings). The Trust's proposals will help to generate new surplus income in the community which would be available for reinvestment in other projects as defined by the Trust for the benefit of the community, as defined by the Trust. The Trust's acquisition and management of the eligible croft land etc will allow it to develop a number of its key projects and will allow the Pairc community to take the first of a number of steps to acquire and to actively develop and manage the eligible croft land etc and the interest of the tenant in tenanted land (which is the subject of a separate application). The Trust has indicated that both applications are the first stage of a plan to acquire and to actively develop and manage land in the Pairc Estate for the benefit of the community.
- The Trust's application demonstrates that on social sustainability, it has an acceptable level of community support for the project and that there is support for the project beyond the immediate membership of the Trust (see ballot return figure).

- The application shows that the project will directly improve or create specified local services and infrastructure for the benefit of the community as a whole as well as visitors to the area (e.g. social and sustainable housing, a camper van site, a ranger service and holiday packages, paths network and information literature).
- The Trust's application demonstrates that its proposals will provide new amenity for locals and visitors alike in terms of access, (such as a paths network, a ranger service, information literature and information panels at suitable points).
- The Trust's application has the support from relevant public agencies (e.g. Highland and Islands Enterprise (HIE) and Comhairle nan Eilean Siar). The Trust has received substantial funding in recent years from Highlands and Islands Enterprise and has received financial assistance from the Scottish Land Fund in taking forward its plans for a phased community buyout of the Pairc Estate. More generally, HIE is currently supporting the Lochs area of Lewis for enhanced support under the Growth at the Edge / Fas aig an Oir to achieve innovative and sustainable development and that HIE and the LEADER funding programme have co-financed the services of a Local Development Officer who will be managed by the Lochs Community development Group to benefit the whole community. This allows HIE to utilise the full breadth of its powers to work with whole communities, fostering population growth, increased community capacity, economic participation and development of new sustainable revenue streams. The Trust's application also takes account of the opportunities for private sector funding to take forward its proposals arising from development of the land (for example, income from windfarm development). HIE, in its comments on the application, stated that it would consider an application from the Trust towards the acquisition of the land and lease and is committed to working closely with the Trust in the longer term. The Trust has also noted that there are several other possible funding sources which it believes will support them once the purchase price of the Estate is known, and it will be for the Trust to consider those in light of Ministers' consent to this application.
- On financial viability, the Trust has provided a Business Plan which includes a number of proposals together with appropriate costings and revenues estimated over a 10 year period. The Trust had earlier undertaken a feasibility study, dated September 2004, and some of the proposals included have been developed within the Business Plan (such as projects that will bring visitors into the area). The Trust's Business Plan indicates that the Trust has a number of clear aspirations for the land to be purchased and proposals for community benefit (e.g. social housing units, community windfarm, hydro-schemes, camper van site, ranger service, holiday packages, network of paths, boat trips from Kershader and the development of other community facilities at and near Ravenspoint). The Business Plan is largely dependent on the revenues acquired by the proposed community windfarm (and any revenues accrued from the interest of the tenant in tenanted land which the Trust is also seeking to acquire by virtue of a separate application).

These revenues appear to provide the finance to allow key projects to be developed and a number of these projects will bring in revenues for the community – such as the sale of house plots, camper van sites, ranger service, holiday packages. Ministers received responses during the public consultation suggesting that the Trust's timescales for the development of the community windfarm were ambitious. Moreover, some of the proposals, will be subject to further statutory consent processes (for example, development of the wind-farm) and may be deliverable over a longer time scale. However, Ministers are satisfied that the Business Plan overall provides sufficient evidence for sustainable development of the land and, in any event, there are a number of key developments for the land which are not dependent on further statutory processes and which, in the shorter term, will generate revenues which can be used by the Trust for the benefit of the community. Ministers also acknowledge that there have been adverse representations made concerning the viability of the Trust's proposals, including that the Trust has used out of date figures and an out of date community appraisal, the figures for national insurance have been incorrectly calculated, that not all costs are attributed to projects (e.g. no staff allocated to the holiday packages, vehicle costs to the ranger service, costs attributed to the guided walks or the sale of houses), there are impractical timescales for projects (such as for renewable energy) and not all the figures are included between the Executive Summary and the Financial Projection Figures. However, Ministers remain satisfied that the Trust's Business Plan as a whole provides sufficient evidence of a viable plan for sustainable development of the land for the benefit of the community.

- Ministers acknowledge that there have been concerns raised as to whether the provision of tourist facilities will attract visitors and be for the benefit of the wider community. The Trust's Feasibility Plan, dated September 2004, together with its Business Plan recognise that tourists could play an important role in its community development, and that such an opportunity could bring untapped benefits to the community. Ministers recognise that tourism and visitors play an important role in vitalising fragile communities such as Paic and have a knock-on effect on local communities in stimulating services and bringing in much-needed revenues.
- Ministers acknowledge that some of the proposals for development in the Business Plan, such as social housing, do not appear to be in accordance with the current local development plan. The planning process and the crofting community right to buy processes are entirely separate matters and are in no way related. The existence of a crofting community right to buy application will not affect Ministers' consideration of any planning matter which may subsequently come before them for determination in terms of the relevant planning legislation. It will be up to the Trust to seek all appropriate planning consents and agreements with the crofters over development on the eligible croft land etc in order to take forward some of its proposals.
- The Trust's application indicates that its proposals will not have a negative impact on another business or businesses and that it will not duplicate existing provision to a detrimental level (private, community, and public). Its

proposals suggest that it will not cause displacement of existing jobs and businesses.

Public interest

- In relation specifically to the public interest (section 74(1)(n)), and having considered this in light of section 74(2) of the Act:
 - Ministers consider that the Trust's proposals will provide lasting benefit to a remote and highly fragile rural community where, hitherto, there have been inadequate social and economic opportunities. In particular, on the basis of the evidence submitted with the application, Ministers are satisfied that the Trust will address issues that affect the local community including:
 - the long-term decline and increasing age profile of the local population,
 - the shortage of available housing and sites,
 - the creation of local services,
 - the development of a meaningful income from renewable energy projects,
 - wide-ranging proposals to boost tourism which are aimed at bring in more visitors to the area and to create employment, and environmental benefits.
 - Ministers believe that the Trust's proposals will provide it with the opportunity to take control of, and develop, the land subject to the right to buy for the direct and lasting benefit of the whole community and will therefore provide it with **greater opportunities** to achieve sustainable development. It will contribute positively to the sustainable development of the land and the 11 townships which form the relevant crofting community, and will deliver a sustainable community as a whole. Ministers believe that there are a number of projects which each have their own income streams that will contribute positively to the community in the short, medium and long terms. Ministers are satisfied that the benefits of the right to buy are not outweighed by any disadvantages to the wider community, the environment or the economy and are not disproportionate to the degree of any harm to private interests.
 - Ministers acknowledge that, notwithstanding general community support for the right to buy as evidenced by the ballot, a number of representations have been made about the Trust's organisational and management controls in how it has been managed and works with and relates to the community, and that the Trust will have to work hard to overcome these if it is to become a community landowner. While Ministers accept that there have been criticisms, the Trust has stated that it has taken steps to deal with them (including the provision of information to the community and to increasing dialogue with other community organisations in the Paicr area).
 - ministers also acknowledge that representations have been received which ask whether the Trust is acting in the interests of the community as a whole. The Trust has provided evidence that its motivation is to promote sustainable development in all parts of the community in line with local priorities. The

Trust already has close links with the grazings committees of the townships and recognises the rights of the crofting tenants under the interest of the tenant in tenanted land. Ministers are satisfied that the Trust has an awareness of the needs of the different sections of the community and that it needs to represent the community as a whole.

Appendix 3

Relevant extracts from Pairc judgement

Court of Session, *Opinion of the Lord President [Lord Gill] in the cause of Pairc Crofters Ltd and Pairc Renewables Ltd against the Scottish Ministers*, 19 December 2012.

“I conclude therefore that when Ministers decide where the overall public interest lies, the central consideration will be that of balancing the harm to the landowner against the benefit of the proposal to the wider public, most notably in relation to strengthening the crofting economy. When they make that decision, the weight to be given to the landowner’s interests is pre-eminently a matter for them. On that point, the landowner’s entitlement to compensation may be a material consideration. A1P1 requires only that any assessment of the public interest should not be manifestly unreasonable.”

Note: A1P1 relates to ECHR

Further, on the question of sustainable development and the public interest.

[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. I see no reason why the owner of land that is subject to an application to buy under Part 3 of the Act would be unable to mount an effective defence to the application on this ground.

[57] Likewise, I consider that there is nothing in the submission that the expression “public interest” lacks any legal force. The public interest is a concept that is to be found throughout the statute book. There is no need for a general definition of it. It is for the Land Court and the Ministers to assess the public interest on the facts and circumstances of the case. A general statutory definition of the public interest, if one could be devised, would be unhelpful, in my view. As it is, I consider that section 74(2) (supra) makes it sufficiently clear that in the context of an application under section 73 the assessment of the public interest involves the balancing of the objectives of the application with the interests of any sector of the public which in the opinion of the Ministers would be affected by the exercise of the right to buy.

