

Legal matters relating to the Community Empowerment Bill and the question of `abandoned' or `neglected' land, and other matters.

This paper comprises a summary of discussion on legal matters around Section 48 of the Community Empowerment Bill relating to the need to define more clearly provisions relating to what is `eligible land' in Section 48, 97C; and the full opinion on these issues and other matters in the Community Empowerment Bill.

The paper comprises opinion leading to drafting instructions for potential amendments to Section 48, depending on the outcome of consideration of the issues by the Scottish Government.

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Community Land Scotland
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Summary

Section 48: Definition of eligible land

Section 48 inserts Part 3A, consisting of section 97B-Z into the 2003 Act. That Part enables a community body to buy land compulsorily but only if it is eligible land “for the purposes of, or in order to further, the sustainable development of that land”¹

Section 97C defines what is meant by eligible land for this purpose. It provides that land is eligible “if, in the opinion of Ministers, it is wholly or mainly abandoned or neglected.” This is subject to certain exclusions.

In determining whether land is eligible land, section 97C(2) requires Ministers to have regard to prescribed matters but no draft regulations have yet been produced².

In the absence of any statutory definition, or of the factors to which regard is to be had, what is meant by land which is wholly or mainly abandoned or neglected would fall to be determined by reference to the ordinary meaning of those words.

However, it is thought that this creates two main difficulties. These difficulties were more particularly described in the attached Note dated 1 September 2014, supplemented by a postscript in the attached copy email dated 11 September 2014. These difficulties may be summarised as follows.

Summary of Note

Firstly, it is thought that, having regard to the ordinary meaning of those words, it will be difficult to establish that land, particularly rural land, is wholly or mainly abandoned or neglected because

- even, as a matter of fact, any minor act of management might be sufficient to show that the land has not been wholly or mainly abandoned or neglected;
- in order to establish that land has been wholly or mainly abandoned, it may not be sufficient to establish that the land is not being used, for example, that fields have not been cultivated. There may also have to be established some act or circumstances from which it may be reasonable to infer that the owner intends to abandon it in the sense of giving up or relinquish ownership of it, and not just, for

¹ Explanatory Notes para 118, Policy Memorandum para 57

² In this connection, paragraph 68 of the Policy Memorandum states -

“ the matters to be considered could include: the physical condition of the land or building; its current use (or non-use); any detrimental economic or environmental impact on the local area; and any failure by the landowner to comply with regulatory requirements. Ministers would also need to consider any environmental, planning or historic designations affecting the land or buildings, for example if there are any restrictions on its use or development relating to conservation purposes.”

example, leaving it alone as a deliberate act of management for some reason or another;

- there would appear to be similar difficulties in establishing that land has been wholly or mainly neglected because of uncertainty as to what constitutes neglect or lack of proper care or management of land

Secondly, quite apart from these difficulties, it is thought that, in the absence of some statutory assistance, what constitutes land which is wholly or mainly abandoned or neglected would be construed by reference to the physical state or condition of the land (its lack of care, dilapidation, disrepair, disuse, etc) and not by reference to factors which are taken into account when considering the potential or need for the sustainable development of that land.

This is despite the fact that the purpose of Part 3A may be said to be to further the sustainable development of land by enabling community bodies to buy such land³. It may, therefore, be argued that the courts would consider that it is implied that the need for, or the lack of, sustainable development is a factor which should be taken into account when determining whether land is abandoned or neglected.

The difficulty with this argument is that it would still appear to be possible to give effect to the purpose of Part 3A even if the concepts of abandoned or neglected land are construed simply in accordance with their ordinary meaning. There is nothing in the Bill which expressly links the concepts of abandoned and neglected land with the lack of sustainable development. In these circumstances, it may be considered doubtful whether the courts would imply such a link. They are likely to require there to be some explicit statutory provision to this effect or which implies this.

Although this factor might be prescribed under section 97C(2) as one of the matters to which Ministers are obliged to have regard, there is no guarantee that it will include the question of sustained development and, even if it did, there is a risk that this may be subject to judicial challenge on the grounds the linkage between those 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 97C(1).

Amendment proposed

In these circumstances, it is proposed to

³ Explanatory Notes para 118, Policy Memorandum para 57. In this connection, it is also relevant to note that in paragraphs 65 and 67 of the Policy Memorandum, the Scottish Government refers to such land as constituting a “barrier to sustained development” and state-

“that there is a general public interest in removing barriers to sustainable development of land by enabling community bodies to purchase neglected and abandoned land...”

- that it should be made clear, in some way that the need for, or the lack of, sustainable development is a factor to be taken into account in determining whether land is wholly or mainly abandoned or neglected; and
- that the definition of eligible land should be extended to refer to land which is in substantial need of sustainable development.

Paragraph 65 of the Policy Memorandum refers to abandoned or neglected land as constituting “barriers to sustainable development”. However, it is thought that it might be more accurate to describe such land as particular cases where land is in substantial need of sustainable development.

It is therefore suggested that it might be possible to build upon that concept and extend the definition of eligible land in section 97C(1) –

“Land is eligible for the purposes of this Part if in the opinion of Ministers it is wholly or mainly abandoned or neglected”

to refer also to land which otherwise is in substantial need of sustainable development. In other words, to refer to land which falls within the same category as land which is abandoned or neglected.

It is suggested that such an extension of the definition of eligible land might also have the effect of implying that the need for, or lack of, sustained development is a factor to be taken into account in determining whether land is abandoned or neglected and thus render unnecessary any express provision to this effect.

Fundamental to any such amendment, however, is the concept of the sustainable development of land. Although this expression is used in both the 2003 Act⁴ and in the proposed Part 3A⁵, there is no statutory definition of it. However, the question of what was meant by it was raised in the *Pairc* case⁶. Lord Gill avoided giving any definition of it but Lord Malcolm stated –

“[112] At its broadest, sustainable development has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Brundtland Commission, 1987). In the planning sphere the concept of sustainable development is well established and, among others, covers the following factors:

- Protection and enhancement of the natural environment and the cultural heritage.

⁴ Eg Sections 38(1)(b)(ii) and 51(3)(c)

⁵ Eg sections.97G(6)(a) and (b) and 97H(a)-(c)

⁶ *Pairc Crofters Ltd and Another v Scottish Ministers* 2012 CSIH 96

- Promotion of rural development, regeneration and recreational opportunities; and the development of mixed communities.
- The efficient use of land, buildings and infrastructure.”

As the concept seems to be reasonably well understood, it is not proposed to attempt any definition of it.

Consequential

If this amendment was made to the definition of eligible land, it would require consequential amendments to change references to abandoned or neglected land to eligible land, in section 97F(1) and heading and in 97G(10)(c).

Section 48:Criteria for consent – Section 97H(c)

One of the sections in Part 3A which section 48 proposes to insert into the 2003 Act is section 97H which sets out the matters about which Ministers have to be satisfied before they can grant consent to an application.

One of those matters is section 97H(c) which provides that Ministers have to be satisfied

“(c) 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 understood that this is intended to mirror section 97G(10)(b) which invites the owner to say –

“(b) whether the owner’s continuing to own the land would be compatible with furthering the achievement of sustainable development in relation to the land,”.

It is also understood that section 97H(c) may have been inserted in order to enable Part 3A to be compatible with A1P1⁷. There is, however, no equivalent of this requirement in Part 3 of the 2003 Act which was held to be compatible with A1P1 in the *Pairc* case.

Having regard to the purpose of Part 3A (see above), it may reasonably be expected that there should be a provision which gave the owner of the land the opportunity to convince Ministers that it is likely that the owner would achieve its sustainable development without the need to expropriate it. This would form part of the way in which the requirement of “fair balance” would be achieved as required by A1P1.

⁷ Article 1 of Protocol 1(AIPI) of ECHR

However, although it is not clear what section 97H(c) means, it appears to go much further than this. It seems to require Ministers to refuse consent unless they are satisfied that, if the owner remained the owner, it would not be possible to achieve the sustainable development of the land. This would require proof of a negative as distinct from proof of a probability. The standard of proof required seems to be set extremely high. It is difficult to see how this could be established and appears to go much further than what is required in order to achieve the “fair balance” required by A1P1.

It is therefore proposed that section 97H(c) should be amended to provide that Ministers must refuse consent unless they are satisfied that it is unlikely that the owner’s continuing ownership of the land [would be compatible with furthering][further] the achievement of sustainable development in relation to the land.

End of extract of summary

January 2015

Opinion of Mr Iain Jamieson

Community Empowerment (Scotland) Bill

Summary of conclusions

1. It will be difficult to establish that land, particularly rural land, is eligible land in the sense of being wholly or mainly abandoned or neglected. In particular, in order to establish that such land is abandoned, it will be necessary to establish not just that the land is abandoned as a matter of fact – which will be difficult in itself - but also that the owner intends to relinquish ownership of it. It may be easier to establish land is neglected but, in particular contexts, there can be difficult questions as to what may be reasonably regarded as neglect or the lack of the proper way to look after or to manage such land.

2. It is not likely to be implied from the provisions in Part 3A that the need for, or the lack of, sustainable development is a factor which should be taken into account when determining whether land is abandoned or neglected. This might be prescribed under section 97C(2) but it would be safer, in order to avoid the risk of challenge, to have an explicit provision to this effect in the Bill. Such a provision would be compatible with Article 1 of Protocol 1(A1P1) of ECHR

3. It would be possible to amend the definition of eligible land to refer to land which is wholly or mainly abandoned or neglected or otherwise in substantial need of sustained development or further sustained development. This would also be compatible with A1P1 and would supersede the need for any explicit provision under 2.

4. I do not see how it would be possible satisfy Ministers of the requirement in section 97H(c). It requires Ministers to refuse consent unless they are satisfied that, if the owner remained the owner, it would be “inconsistent with”, or would not be possible, to achieve the sustainable development. It is difficult to see how this could be proved. It is a very high hurdle and goes much further than what is required in order to achieve a “fair balance” for the purposes of A1P1. It is suggested that it should be amended to require Ministers to refuse consent unless they are satisfied that it is unlikely that the owner’s continuing ownership of the land [would be compatible with furthering][further] the achievement of sustainable development in relation to the land.

5. In addition, consideration should be given to-

- removing section 97C(3)(c) which exempts certain categories of Crown land from the definition of eligible land;
- clarifying that the date when it is to be determined that land is eligible land is the date of the application for consent; and
- providing whether or not a minimum period has to elapse before land is regarded as wholly or mainly abandoned or neglected and, if so, what it is and that this period can be before the date of commencement of Part 3A.

General

1.1 Section 48 of the Bill inserts Part 3A into the Land Reform (Scotland) Act 2003 (the 2003 Act). That Part enables a community body to buy land compulsorily but only if it is eligible land “for the purposes of, or in order to further, the sustainable development of that land”⁸.

1.2 This is not expressly provided for, as such, in Part 3A but it is clearly implied from the provisions that-

- the right to buy can only be exercised with the consent of Scottish Ministers⁹;
- the application for such consent must give reasons why the body considers that “its proposals are
 - (i) in the public interest and
 - (ii) compatible with furthering the achievement of sustainable development in relation to the land,[and]

.....that the land is wholly or mainly abandoned or neglected”;¹⁰ –and

- that the Ministers cannot give their consent unless they are satisfied, among other things

- (a) that the land to which the application relates is eligible land;
- (b) that the exercise of the right to buy is in the public interest and compatible with furthering the achievement of sustainable development in relation to the land and
- (c) “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.”¹¹

⁸ Explanatory Notes para 118, Policy Memorandum para 57

⁹ s. 97G(2)

¹⁰ s.97G(6)(a) and (b);

¹¹ s. 97H(a)-(c)

Eligible land

What does eligible land mean?

2.1 Section 97C defines what is meant by eligible land for this purpose. It provides that land is eligible “if, in the opinion of Ministers, it is wholly or mainly abandoned or neglected.”¹²This is subject to certain exclusions.¹³

2.2 In determining whether land is eligible land, Ministers are required to have regard to prescribed matters but no draft regulations have yet been produced.¹⁴ All that the Policy Memorandum states in this connection is that

“ the matters to be considered could include: the physical condition of the land or building; its current use (or non-use); any detrimental economic or environmental impact on the local area; and any failure by the landowner to comply with regulatory requirements. Ministers would also need to consider any environmental, planning or historic designations affecting the land or buildings, for example if there are any restrictions on its use or development relating to conservation purposes.”¹⁵

2.3 In the absence of any statutory definition, or of the factors to which regard is to be had, what is meant by land which is wholly or mainly abandoned or neglected is to be determined by reference to the ordinary meaning of those words.

What is meant by wholly or mainly abandoned land?

3.1 I share the concerns expressed by the writer of Working Group paper (“the writer”) about the difficulties of establishing that land has been abandoned, whether wholly or mainly.

3.2 It will be difficult enough to establish that rural land, as distinct from urban land or buildings, has been abandoned as a matter of fact because any minor act of management would be sufficient to show that the land has not been abandoned. But it is not sufficient to establish that the land is not being used, for example, that fields have not been cultivated. There also has to be established some act or circumstances from which it may be reasonable to infer that the owner intends to abandon it in the sense of giving up or relinquish ownership of it, and not just, for example, leaving it alone as a deliberate act of management for some reason or another. It seems to be that this is likely to present considerable difficulties even in establishing that land is mainly abandoned.

¹² s.97C(1).

¹³ s. 97C(3)

¹⁴ s. 97C(2).

¹⁵ Policy Memorandum para 68

3.3 In this connection, I would also draw attention to the following-

- that there has to be an owner of eligible land because land which is ownerless falls to the Crown as *bona vacantia* and such land is excluded from being eligible land.¹⁶ This is so even if the land appears, simply as a matter of fact, to be abandoned or neglected and the Crown (i.e. the QLTR) may be unaware that the land has vested in the Crown as *bona vacantia*. It may be argued that the reason for this exclusion may be because, as land can never be ownerless in Scotland, the Crown cannot be said to intend to abandon the ownership of it. And, further, that this implies that the Bill intends that, when considering whether land has been abandoned, it is not sufficient merely to take into account the fact that the land appears to be abandoned; it is necessary also to take in to account whether the owner intended to abandon it. If the Bill only intended that land should be regarded as abandoned as a matter of fact, it is not clear to me why *bona vacantia* land is excluded from being eligible land. After all, section 100(2) of the 2003 Act provides that the Act binds the Crown and this means other land belonging to the Crown would appear to be potentially subject to the right to buy; and
- that it is easier to establish that moveable property is abandoned because the owner can simply relinquish possession of it. Part 1V of the Civic Government (Scotland) Act 1982 deals with lost and abandoned moveable property and it simply provides that it comes into play when a finder “takes possession of any property without the authority of the owner in circumstances which make it reasonable to infer that the property has been lost or abandoned”¹⁷

What is meant by wholly or mainly neglected land?

4.1 I also agree with the writer that it may be easier to establish the land is wholly or mainly neglected because this appears to depend more on the factual position rather than the intention of the owner. However, except in the cases where land has clearly been left derelict, the concept of land being neglected in the sense of not being properly cared or looked after may, in certain contexts, involve difficult value questions as to what constitutes neglect or the lack of proper care or management of the land.

Can the need for sustainable development be taken into account?

4.1 I have considered whether, as suggested by the writer, what is meant by land being wholly or mainly abandoned or neglected can be linked in some way with the concept of sustainable development.

¹⁶ s.97C(3)(c)

¹⁷ s. 67

4.2 In my view, the courts would construe what is meant by abandoned or neglected land in accordance with their statutory purpose. The purpose of Part 3A appears to be to further the sustainable development of land by enabling community bodies to buy abandoned and neglected property.

4.3 The Scottish Government refers to such land as constituting a “barrier to sustained development” and argue-

“that there is a general public interest in removing barriers to sustainable development of land by enabling community bodies to purchase neglected and abandoned land...”¹⁸

It is, however, perhaps more accurate to describe such cases as particular cases where land is in substantial need of sustained development. It may, therefore, be argued that it is implied that the need for, or the lack of, sustainable development is a factor which should be taken into account when determining whether land is abandoned or neglected.

4.4 What constitutes sustainable development? In this connection, it is relevant to point out that sustainable development is not of course a legal concept. What may be found to be most helpful in understanding what was intended to be meant by sustainable development in this context are the 3 decision letters of Scottish Ministers involving *Pairc* dated 21 March 2011.¹⁹

In the subsequent judicial *Pairc* case²⁰, it was argued that it was so vague as to be meaningless. Lord Gill was careful to avoid attempt to define it but he accepted that it had a well understood meaning. He stated –

[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.

Lord Malcolm was more forthcoming in that case when he said -

“[112] At its broadest, sustainable development has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Brundtland Commission, 1987). In the planning sphere the concept of sustainable development is well established and, among others, covers the following factors:

- Protection and enhancement of the natural environment and the cultural heritage.

¹⁸ Policy Memorandum paras 65 and 67

¹⁹ www.scotland.gov.uk/resource/doc/.../0115329.doc; www.scotland.gov.uk/Resource/Doc/.../0115338.doc

²⁰ *Pairc Crofters Ltd and Another v Scottish Ministers 2012 CSIH 96*

- Promotion of rural development, regeneration and recreational opportunities; and the development of mixed communities.
- The efficient use of land, buildings and infrastructure.”

It will, therefore, be seen that these are environmental, social and economic factors.

4.5 The difficulty with this argument is that abandoned or neglected land would normally be construed by reference to the physical state or condition of the land and not by reference to those factors which are taken into account when considering the sustainable development of land.

4.6 Further, it would appear to be possible to give effect to the purpose of Part 3A even if the concepts of abandoned or neglected land are construed on their own simply in accordance with their ordinary meaning. There is nothing in the Bill which expressly links the concepts of abandoned and neglected land with the lack of sustainable development. In these circumstances, it may be considered doubtful whether the courts would imply such a link. They are likely to require there to be some explicit provision in the Bill to this effect or that this factor should at least have been prescribed as one of the matters to which Ministers are obliged to have regard under s. 97C(2).

4.7 In this connection, it may be noticed that the Policy Memorandum states that one of the factors which might be prescribed as one of the matters to which Ministers are obliged to have regard under s. 97C(2) is

“any detrimental economic or environmental impact on the local area”²¹

So it is possible that Ministers might be prepared to go further and prescribe that the need for, or the lack of, sustainable development is a factor which should be taken into account when determining whether land is abandoned or neglected.

4.8 However, although this factor might be prescribed under section 97C(2) as one of the matters to which Ministers are obliged to have regard, there is no guarantee that it will be so prescribed and, even if it was, there is a risk that this may be subject to judicial challenge as being *ultra vires* on the grounds the linkage between those concepts was not sufficiently warranted or reasonably envisaged by the Rather than prescribing such a factor under s. 97C(2), I therefore think that it would be safer to have an explicit provision in the Bill.

4.9 But what would this mean? Would it imply that land may be regarded as abandoned or neglected if it is not being managed in an environmentally sustainable way? I do not think that this would be regarded as the meaning of this factor. The factor would simply mean what it says and it would be one of many factors to be taken into account when determining whether land is abandoned or neglected. It would not determine that issue. Indeed,

²¹ Policy Memorandum para 68

provided Ministers take the factor into account, it is for them to determine the weight to be attached to such a factor and they could even disregard it.

Would such a factor be compatible with A1P1?

5.1 The annex to this paper contains some general observations upon the requirements which need to be met when determining whether any interference with an owner's rights under Article 1 of Protocol 1(A1P1) of ECHR can be regarded as compatible with that Article.

5.2 The Scottish Government clearly consider that Part 3A would be compatible with A1P1 because they are following the general approach of Part 3 of the 2003 Act which has been held to be compatible by the Inner House in the *Pairc* case.²² Some of the reasoning of the Inner House in that case is summarised in the annex to this paper.

5.3 I appreciate that, if land can be said to be abandoned or neglected by the owner, it will be easier to justify its expropriation for the purposes of enabling it to be sustainably developed by a community body – particularly if abandoned land means that the owner intends to give up ownership of it.

5.4 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.

5.5 It seems to me that the common thread which ties Part 3 and the proposed Part 3A of the 2003 is that both are intended to remove barriers to the sustainable development of land to enable community bodies to buy certain eligible land for the purpose of furthering its sustainable development. What constitutes eligible land is different in both cases – in the case of Part 3, it is certain crofting land and in the case of Part 3A, it is land which is wholly or mainly abandoned or neglected. For example –

- the Policy Memorandum to the 2003 Act states -

“16. The policy aim [of Part 3] is to remove barriers to sustainable rural development by empowering crofting communities.....to buy all the land which the crofters use including..”; and

- the Policy Memorandum to the CEB states –

²² *Pairc Crofters Ltd and Another v Scottish Ministers 2012 CSIH 96*

“67. The Scottish Government considers that there is a general public interest in removing barriers to sustainable development of land by enabling community bodies to purchase neglected and abandoned land”

5.6 Certainly the fact that eligible land is crofting land or land which is abandoned or neglected is important but the more important things, it seems to me, is that both are examples of barriers to sustainable development which it is the object of the legislation to remove and which it is the general interest which justifies its expropriation. And these may not be the only examples of such barriers. It seems to me that it is possible to suggest other examples of such barriers where expropriation can be justified.

5.7 I do not therefore understand why, if it is considered that

“that there is a general public interest in removing barriers to sustainable development of land by enabling community bodies to purchase neglected and abandoned land”,

it should be thought that it would be incompatible with AIPi if it was provided, whether expressly or impliedly, that the need for, or the lack of, sustainable development is a factor which should be taken into account when determining whether land is abandoned or neglected. In particular, I do not understand why it should be thought that the courts would not follow the reasoning in the Pairc case if Ministers were required to take this factor into account.

5.8 However, it would be unnecessary to have an explicit provision that the courts should take this factor into account if the definition of eligible land is amended as suggested in the following section.

Can the definition of eligible land be amended to refer to land in need of sustainable development?

6.1 Various ways have been suggested to extend the definition of eligible land to refer to land in need of sustainable development. The one which I propose to consider in detail because I think it may accord most closely with what is already in Part 3A is to amend that definition to refer to land which is wholly or mainly abandoned or neglected or otherwise in [substantial] need of sustained development or further sustained development.

6.2 This proposal has the advantage of simply developing what might be said to be the concept underlying the reference to land which is abandoned or neglected. The Scottish Government refers to such land as constituting “barriers to sustainable development”²³ but

²³ Policy Memorandum para 65 and 67

I have suggested that they may more accurately be described as particular cases where land is in substantial need of sustained development.²⁴ The proposed amendment would simply extend that concept to refer to other cases within the same category.

6.3 Such an amendment would also have the effect of making it clear that the need for, or lack of, sustained development is a factor to be taken into account in determining whether land is abandoned or neglected and thus render unnecessary any express provision to this effect as discussed in the previous section.

Would such an amendment be compatible with A1P1?

7.1 Any interference which deprives an owner of his property must be justified under the second sentence of the first paragraph of A1P1 (“the deprivation rule”). As indicated in the Annex, this means in particular that the interference must be provided for by law; that the legislation would have to pursue a legitimate aim; and that the means by which it did so must be reasonably proportionate to achieving that aim and

“must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights”.²⁵

7.2 I see no reason why these requirements would not be met if eligible land was amended as suggested above because

- it would be provided by law;
- the purpose of the legislation would be similar to the purpose of the existing provisions in Part 3A, namely furthering the sustainable development of land by enabling a community body to buy land which is in substantial need of such development. This is likely to be regarded as pursuing a legitimate aim in the general interest, particularly if the need required was stated to be substantial. It would be regarded as falling within what the courts regard as the legislature’s margin of appreciation because it does not seem to be “manifestly without reasonable foundation;” and
- in assessing whether the means are proportionate to achieving that aim and maintain a fair balance, I see no reason why the reasoning of Lord Gill in *Pairc* would not be followed. In that case Lord Gill pointed out that Part 3 of the 2003 Act -

²⁴ See paragraph 4.3 above

²⁵ *Salvesen v The Lord Advocate*[2013]UKSC 22, Lord Hope at para 34

“[36]... is not based on a policy decision that, on the fulfilment of certain specified criteria, the landowner's interest will be expropriated; or that such an expropriation will *per se* be a justified interference with property rights in the public interest ...On the contrary, the 2003 Act requires that the applicant must in every case satisfy the Ministers that the proposed purchase is in the public interest.

[40]... when the 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”

I see no reason why this should not apply to the proposed Part 3A even if the definition of eligible land is amended as proposed above.

Is section 97H (c) necessary?

8.1 Section 97H provides that Ministers cannot give their consent to an application to buy land 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”

8.2 There is no explanation for this requirement in the Policy Memorandum or in the Explanatory Notes.

8.3 It appears to mirror section 97G(10)(b) which invites the owner to say –

“(b) whether the owner’s continuing to own the land would be compatible with furthering the achievement of sustainable development in relation to the land,”.

8.4 These provisions may have been inserted in order to assist in making Part 3A compatible with A1P1. But there is no equivalent of them in Part 3 of the 2003 Act which was held to be compatible with A1P1 in the *Pairc* case and it may therefore be questioned why they are required in this case.

8.4 Having regard to the purpose of Part 3A,²⁶ I think that it might reasonably be expected that there should be a provision which gave the owner of land, which is considered to be wholly or mainly abandoned or neglected, the opportunity to convince Ministers that it is likely that the owner would achieve its sustainable development without the need to expropriate it. This would be particularly so if the definition of eligible land is

²⁶ Para 1.1 states “[Part 3A] enables a community body to buy land compulsorily but only if it is eligible land “for the purposes of, or in order to further, the sustainable development of that land”

amended as suggested above. This would form part of the way in which the requirement of “fair balance” would be achieved as required by A1P1.

8.5 Although it is not clear that this is what section 97H(c) means, it seems, however, to go much further than this. It seems to require Ministers to refuse consent unless they are satisfied that, if the owner remained the owner, it would not be possible to achieve the sustainable development of the land. This would require proof of a negative as distinct from proof of a probability. The standard of proof required seems to be set extremely high. It is difficult to see how this could be established and appears to go much further than what is required in order to achieve the “fair balance” required by A1P1.

8.6 It is therefore suggested that consideration should be given to amending section 97H(c) to provide that Ministers must refuse consent unless they are satisfied that it is unlikely that the owner’s continuing ownership of the land [would be compatible with furthering][further] the achievement of sustainable development in relation to the land.

Miscellaneous other matters

9.1 It is suggested that consideration should be given to the following miscellaneous matters-

- removing section 97C(3)(c) which excepts *bona vacantia* land from the definition of eligible land. This is for the reasons mentioned in paragraph 3.3;
- clarifying that the date when it is to be determined that land is eligible land is the date of the application for consent. As far as I can see, there is no provision to this effect in the Bill, although it may be argued that it implied. In the absence of some provision, there could be arguments about this. In other contexts, this has proved problematic²⁷; and
- providing whether or not a minimum period has to elapse before land is to be regarded as wholly or mainly abandoned or neglected and, if so, what is it and whether that period can be, or commence, before the date of commencement of Part 3A . As far as I can see, there are no provisions dealing with these matters in the Bill and in the absence of some provision, there could be arguments about them.

²⁷ Oxfordshire CC v Oxfordshire City Council HL [2006] UKHL 25, where one of the questions to be determined by the House of Lords was the date on which it fell to be determined whether land had become a village green – was it on the date of application for registration as a village green or the later date of registration or some earlier date.

Iain Jamieson

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Annex: General considerations regarding A1P1

1 Article 1 of Protocol 1(A1P1) of ECHR provides that every person is entitled to the peaceful enjoyment of his possessions. The principles according to which any interference with an owner's property can be held to be compatible with that right are well established. The interference must be provided for by law; that the legislation would have to pursue a legitimate aim; and that the means by which it did so must be reasonably proportionate to achieving that aim.

2 In assessing whether there is a legitimate aim and whether the means are proportionate to achieving that aim, the court will respect the legislature's judgement on what is in the public interest unless the aim and proportionality are, respectively, "manifestly without reasonable foundation".²⁸

3 But there must be a fair balance if the requirement of proportionality is to be satisfied. In *Salvesen v The Lord Advocate*,²⁹ Lord Hope summarised the established principles as follows:

"... An interference must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: *Sporrong v Sweden*³⁰. There must be a reasonable relationship of proportionality between the means employed and the aim pursued: *James v United Kingdom*³¹ ..."

In that case, the Supreme Court held that a provision in an Act of the Scottish Parliament, section 72(10) of the Agricultural Holdings (Scotland) Act 2003, was incompatible with A1P1 because it imposed an unreasonable and discriminatory burden upon certain landlords and thereby failed to strike a fair balance between their interests on the one hand and the aim of the legislation on the other.

4 The Scottish Government clearly consider that it would not be incompatible with an owner's rights under A1P1 to deprive an owner of land in circumstances where the owner has allowed that land to become abandoned or neglected and where a community body buys that land for the purpose of furthering its sustainable development. They argue

"that there is a general public interest in removing barriers to sustainable development of land by enabling community bodies to purchase neglected and

²⁸ *James v United Kingdom* (1986) 8 EHRR 123 at [46]; *AXA* at [31]; *JA Pye (Oxford) Ltd v United Kingdom* [2008] 1EGLR 111 at [75] and *R. (on the application of Newhaven Port and Properties Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWCA 673, at [50].

²⁹ [2013]UKSC 22, at para 34

³⁰ (1983) 5 EHRR 35, para 69

³¹ (1986) 8 EHRR 123, para 50

abandoned land. Before approving an application Ministers will have to be satisfied, amongst other things, that it is in the public interest for the right to buy to be exercised in that case, that the right to buy is compatible with furthering the achievement of sustainable development in relation to the land and that the continued ownership of the land by the owner is inconsistent with furthering the achievement of sustainable development in relation to the land.”³²

5 In Part 3A, the Scottish Government are clearly following the approach in Part 3 of the 2003 Act which the Inner House held in the *Pairc* case³³ was compatible with A1P1. In that case, Lord Gill said -

“[36]... the 2003 Act is not based on a policy decision that, on the fulfilment of certain specified criteria, the landowner's interest will be expropriated; or that such an expropriation will *per se* be a justified interference with property rights in the public interest ...On the contrary, the 2003 Act requires that the applicant must in every case satisfy the Ministers that the proposed purchase is in the public interest.

[37] In making a judgment as to the public interest, the Ministers must act compatibly with A1P1

In that case, Lord Gill was able to conclude

[40]... that when the 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 the strengthening of the crofting economy.

6 However, it is noticeable that the requirement for land to be abandoned or neglected is absent from Part 3 of the 2003 Act as is the requirement that, if the owner continued to own the land, that would be inconsistent with furthering the achievement of its sustainable development. All that Part 3 of the 2003 Act requires is that the land should be eligible croft land which in effect means certain land subject to crofting tenure.

³² Policy Memorandum, paras 65 and 67

³³ *Pairc Crofters Ltd and Another v Scottish Ministers* 2012 CSIH 96