

Rights to buy: the new addition

[The right to buy land to further sustainable development, enacted in 2016, has finally been brought into force, with supporting regulations. What do practitioners need to know?]

PROPERTY

MALCOLM COMBE, SENIOR LECTURER IN LAW, UNIVERSITY OF STRATHCLYDE

On 26 April 2020, a suite of legislation relating to Scotland's newest land redistribution measure came into force. The relevant statutory material comprises three related Scottish statutory instruments and their mothership, part 5 of the Land Reform (Scotland) Act 2016. It gives a community the right to force an existing owner to transfer an area of land that is local to that community in narrow circumstances linked to the sustainable development of that land.

The 2016 Act as a whole contains a wide range of provisions that affect Scottish land and its use, such as through the establishment of the Scottish Land Commission, the introduction of a scheme for landowners to engage with a local community when making important land use decisions, and laying the groundwork for the Land Rights and Responsibilities Statement, not to mention copious changes to agricultural tenancies and providing a framework for the disclosure of information about entities that control land in Scotland (see my article at *Journal*, May 2016, 18). Part 5 of the Act is one of the last pieces of the Act's jigsaw to fall into place.

Rights to buy compared

Like the earlier rights to buy contained in parts 3 and 3A of the Land Reform (Scotland) Act 2003, part 5 of the 2016 Act allows a forced transfer of heritable property to take place, such that title will move from one private actor to another essentially private actor. Forced transfer provisions are not exactly the norm; they can skew the market, and they can engage human rights law (notably article 1 of the First Protocol to the European Convention on Human Rights, which protects the peaceful enjoyment of possessions). They can, however, exist as part of a legal scheme implemented in pursuit of the public interest, normally with suitable compensation to the outgoing owner.

The older forced transfer rights to buy only apply in narrow circumstances. One is of limited geographic application, where a crofting community wishes to buy croft land, associated common grazings and local eligible land; the other is limited by objective parameters relating to the (mis)management of certain land by the current owner, and only then where a local community has tried and failed to acquire the land by voluntary transfer, all in terms of s 97H of the 2003 Act and related regulations (see Stewart, "Community right to buy: the new scope" (*Journal*, July 2018, online content)). The crofting community right to buy was introduced in the first Land Reform Act, whereas the right to buy abandoned, neglected or detrimental land was introduced by the Community Empowerment (Scotland) Act 2015 (see Combe, "Digesting the Community Empowerment Act", *Journal*, August 2015, 40).

A forced transfer regime can be contrasted with a (comparatively weaker) right of pre-emption, aka first refusal. That is what is conferred by the now well-established community right to buy, which covers the whole of Scotland in terms of part 2 of the 2003 Act. The pre-emptive right to buy allows community bodies to register an interest in a target area of land with Registers of

Scotland, such that the existing owner of targeted land will in no way be obliged to transfer that land, but in the event the owner autonomously decides to sell, the relevant community body will get first dibs on the asset.

It is not possible to explore those existing rights to buy here. Anyone wishing more information can look to the Scottish Government's free online guidance, or deeper analysis can be found in the relevant chapters of Combe, Glass and Tindley (eds), <*Land Reform in Scotland: History, Law and Policy*> (Edinburgh University Press, 2020). What this note will focus on is noteworthy features of the new right to buy. It should nevertheless be acknowledged that the part 5 scheme shares many features with its predecessor regimes: for example, the need for a community transferee to form a suitable locally accountable juristic body that is geared towards sustainable development and with a suitable connection to the targeted land, the requirement for the buyout to achieve local approval via a ballot, and the need for Scottish ministers to be satisfied that the transfer of land is in the public interest and consistent with the goal of sustainable development in relation to the land. Some of these and other points were outlined in the 2016 Journal article referred to above, and as such the focus here will be on the scheme as implemented.

Some preliminaries

As noted above, there are three SSIs that augment part 5 of the 2016 Act. These are the Land Reform (Scotland) Act 2016 (Commencement No 10) Regulations 2020 (SSI 2020/20), the Right to Buy Land to Further Sustainable Development (Applications, Written Requests, Ballots and Compensation) (Scotland) Regulations 2020 (SSI 2020/21), and the Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 (SSI 2020/114). The first of these is a pure implementation measure. Explanations of the second and third will follow where relevant; suggestions for catchy abbreviations for them will be warmly received.

Before diving into the minutiae of the regime, it is worth flagging the major innovation in part 5 as compared to the other rights to buy: a transfer of land need not be to a community body directly. In terms of s 54(1), a community body can nominate a "third party purchaser" in its application to exercise the right to buy. This option will allow a community to bring a nominee that shares its ethos into its land reform plans, bringing fresh ideas and, one imagines, fresh investment to the party.

Whether there is a third party nomination or not will determine the benchmarks that a community body must meet before it can apply to ministers to buy land (more on that application process below, but for now note that applications relating to nominees and community bodies are assessed by ministers in the same way). If the community body seeks to exercise the right to buy itself, it must be a company limited by guarantee, a Scottish charitable incorporated organisation, or a community benefit society with constitutional provisions that have relevant standards of governance and local accountability. Where the community body is providing the spark but not the vehicle for the acquisition, s 54(5) does not restrict the community body in this way. Any body corporate having a written constitution can do the trick, provided it has local accountability and a statement of its aims and purposes, including the promotion of a benefit for the local community.

What land?

Another point worth clarifying is the land that can be bought. The starting point is that all land is eligible, apart from excluded land (under s 46). The two most important exclusions are croft land – already covered by a different community right to buy – and land that is an individual’s home: forced transfer of a home would be difficult to countenance in terms of article 8 of the ECHR. The home exclusion does <not> apply where the resident is a tenant; a sitting tenant will in many cases not be affected by a change in the landlord’s interest, save in terms of where rent is to be paid. Regulation 3 of one of the grandiloquently titled SSIs (SSI 2020/114) operates to deem certain types of occupation and possession as a tenancy.

A community body can also use the right to buy in relation to a tenant’s interest in land, where that is relevant, if the landlord’s interest is being (or has been) acquired under the right to buy scheme. Again, there are exclusions from the scope of this (including the tenancy of a croft and the tenancy of a dwellinghouse) (s 48). The rest of this note will proceed from the perspective of title to land rather than a tenancy being at issue.

In terms of reg 4 of SSI 2020/114, the curtilage around a home and certain land that serves that home is excluded from acquisition. This includes land used for a resident’s recreation, growing food for domestic consumption, or keeping domestic pets. An access route to the dwelling is also excluded, but only where it is owned by the same person as owns the home; this exclusion to the exclusion seems sensible, as a change of ownership of a burdened property would not affect a servitude of way. As such, it seems strange that there are not similar qualifications to the exclusions for drainage or storage of vehicles, which might equally be covered by a servitude. (The author raised this point at the relevant Holyrood Committee scrutinising the regulations, but no change was made.)

There are no exclusions relating to non-domestic land use. When the bill passed through Holyrood, there were attempts (put forward by the late Alex Fergusson MSP) to remove land used for businesses like tourism and forestry from the statutory scheme itself. These were unsuccessful. Any such land would have to be considered case by case rather than automatically, although it would seem that any community trying to make a case for a transfer of land that is being used productively would face a difficult task.

That segues to an explanation of the important point that a community or its nominee cannot simply snipe at any asset. A community must apply to buy the land, in terms of s 54 (and the Keeper must maintain a register of any applications, in terms of ss 52 and 53). As with the older rights to buy, that application is made to the Scottish ministers. It is for ministers to act on, and if appropriate consent to the application, if (and only if) everything about it falls into place. SSI 2020/21 makes provision as to the formalities required of a community application (which is to be in a prescribed form), the means by which ministers must publicise competent applications, and paperwork that is to go between a potential buyer and the owner relating to any application (including provisions about when an owner is deemed not to have responded or is taken as not agreeing to any request made).

Over to ministers

A transfer can only be approved where, separately, “sustainable development conditions” and “procedural requirements” are met: s 56(1). The procedural requirements, set out in s 56(3), are largely matters of fact or steps that track the existing community rights of acquisition, and as such will not be interrogated here. It is worth drawing specific attention to one of these though, namely that an application to buy the land can only be made if a six month period has elapsed between a

written request relating to the land being made directly to the landowner and that request either being rejected or ignored.

Of more substantive import are the sustainable development conditions, which is unsurprising given the focus of part 5 itself. Over and above the public interest and sustainable development requirements that are well known from earlier regimes, there are then two further, beefed-up sustainable development criteria. The first such criterion is met where the transfer of land “is likely to result in significant benefit to the relevant local community” and also that it “is the only practicable, or the most practicable, way of achieving that significant benefit”. There is then a separate criterion to be met, namely that not granting consent to the transfer of land is likely to result in harm to that community.

Both those criteria are linked to s 56(12), which requires Scottish ministers to consider the likely effect of granting (or withholding) consent with reference to (a) economic development, (b) regeneration, (c) public health, (d) social wellbeing, and (e) environmental wellbeing. When making a decision about whether an application to buy land meets the sustainable development conditions, s 56(4) provides that ministers <may> take into account the extent to which, in relation to the relevant community, regard has been had to guidance issued under s 44. Such guidance relates to engaging communities in decisions about land, and any landowner who has not engaged sufficiently might be caught out by this. Then, in terms of s 56(13), ministers are also <required> to consider both equal opportunities and human rights beyond the ECHR, including the International Covenant on Economic, Social and Cultural Rights. In short, Scottish ministers will have a lot to think about.

After approval

If those requirements and conditions are met – which would normally involve a compelling application and associated effort from the community and/or a distinct lack of interest from a landowner in terms of responding to the community’s initiative – ministers may consent to the transfer. Such consent can be unconditional or subject to conditions (s 57). The statutory scheme is naturally more complex than can be set out here, but in summary it is then for the community or third party purchaser (if relevant) to “secure the expeditious exercise of its right to buy” (s 63), with valuation provided for by s 65, then a compensation scheme (and the possibility of related grants to community bodies for that) is set out in ss 67 and 68.

The compensation sections are supplemented by regs 19 and 20 of SSI 2020/21, which set out a procedure for compensation due to an owner for any losses or expenses incurred through complying with the 2016 Act’s steps in general or where the process has been aborted by the prospective transferee, and for any grants from Scottish ministers that might be applied for to cover such compensation. How a community or third party purchaser is to fund the acquisition itself is not provided for in the Act, although presumably a third party purchaser would normally only be involved owing to its ability to inject capital, and existing channels such as the Scottish Land Fund will be available to communities. An “appeal” can be made to the sheriff about a decision of Scottish ministers (s 69), and valuation appeals can be made to the Lands Tribunal (s 70).

Coming back to the secondary legislation, SSI 2020/114 has been highlighted several times. It also caters for restrictions on dealings regarding affected land when an application is pending, so as to prevent avoidance, and serves to suspend any other rights (such as pre-emptions) that might exist, all in terms of regs 7-11. Meanwhile, in addition to prescribing forms and templates for correspondence and procedures about some compensation and grants, SSI 2020/21 includes detail

around the necessary ballot for local approval of a buyout plus related proformas for publishing the ballot result and notifying Scottish ministers of that result.

Real prospects?

The new right to buy land to further sustainable development landed when much of the world was quite properly distracted by the response to the COVID-19 pandemic. It seems fair to imagine anyone reading this note at the time of its publication doing so as an intellectual exercise rather than as part of a mature land acquisition scheme or in response to an actual instruction from a client.

Be that as it may, Community Land Scotland has been particularly active in highlighting the strength of the response of its community landowner members to the public health challenges of 2020 (see www.communitylandscotland.org.uk/whats-new/community-coronavirus-responses/). It would be a brave person to predict the future in the current climate, but it is not beyond the realms of possibility that if and when some kind of normality returns, other communities will be spurred into action. Part 5 of the 2016 Act could be part of that, either as an actual means to force a transfer or encouraging a landowner to consider a community's desires rather than face the prospect of a forced transfer. Either way, you will need to know about the new right to buy, which provides yet another tool for Scotland's land reform toolbox.

--