

COMMUNITY EMPOWERMENT (SCOTLAND) ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Asset transfer requests

320. This Part sets out how a “community transfer body” can request to buy, lease, manage, occupy or use land or buildings belonging to a “relevant authority”, how the authority is to decide whether to agree to or refuse the request, and the procedures to be followed if the request is agreed.
321. Throughout this Act (except where it amends other legislation) “land” has the meaning set out in Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010, which is that ““land” includes buildings and other structures, land covered with water, and any right or interest in or over land”.

Community transfer body

322. [Section 77](#) defines a “community transfer body”. This is either a community-controlled body, as defined in section 19, or a body designated as a community transfer body by the Scottish Ministers by order. The Scottish Ministers may designate individual bodies to be community transfer bodies or may designate a whole class of bodies, so that any body of that type will qualify as a community transfer body. Subsection (3) states that where a trust is designated, the designated body will be the trustees, since a trust is not incorporated.

Relevant authority

323. A “relevant authority” is defined by section 78. This may be a person (or organisation) listed in schedule 3, or one designated as a relevant authority, or falling within a class of persons designated as relevant authorities, by the Scottish Ministers by order. Schedule 3 includes local authorities, the Scottish Ministers, Health Boards, and certain other Scottish public bodies, which have been specified because they own significant amounts of land and buildings.
324. The remainder of section 78 gives the Scottish Ministers a power to remove or amend any entry on the list set out in schedule 3, or to make an order designating other persons or classes of person as a relevant authority. Subsection (4) provides that persons may only be designated if they fall into the following categories:
- part of the Scottish Administration, which has the meaning given in section 126(6) to (8) of the Scotland Act 1998;
 - “Scottish public authorities with mixed functions or no reserved functions under the Scotland Act 1998” – this means that UK Government departments and public bodies that deal with matters reserved to the UK Parliament cannot be included;

- companies wholly-owned by relevant authorities.

Asset transfer requests

325. [Section 79](#) sets out how an asset transfer request can be made. It must relate to land (which includes buildings) owned or leased by a relevant authority. The community transfer body may ask to have ownership of the land transferred to it, if the land is owned by the relevant authority; it may ask to lease the land from the relevant authority; or to obtain other rights in respect of the land, for example to manage or use it for a specified purpose.
326. Subsection (4) sets out the information which must be included in the request. In addition to specifying the land (or building) to which the request relates, and whether the request is for ownership, lease or other rights, the community transfer body must describe the reasons for making the request and the benefits which it considers will arise if the request is agreed to. It must also state how much the body would be prepared to pay, either to buy the land or in rent, and any other terms and conditions that would apply to the request.
327. [Section 79\(3\)](#) provides that a request for transfer of ownership of land may only be made by a community transfer body which meets the criteria set out in section 80, in addition to falling within section 77. This means it must be a company, a Scottish charitable incorporated organisation (SCIO), a community benefit society, or a body designated as a community transfer body under section 77 where the designation states that the body may make a request for transfer of ownership. Classes of bodies may also be designated as eligible to make a request for transfer of ownership.
328. If a company is to meet the criteria to request transfer of ownership, section 80(2) requires that it must have at least 20 members, and provision in its articles of association to ensure that, on winding up, any remaining property remains within either the community sector or the charitable sector.
329. In order to be registered as a SCIO, a body is required to have appropriate provision in its constitution for surplus property to be distributed for charitable purposes. Similarly, there are restrictions on how community benefit societies can use or deal with their assets, and assets can only be transferred to other community or charitable organisations. Therefore, the only additional requirement for a SCIO or a community benefit company to be able to make an asset transfer request for ownership of land is that it has at least 20 members, which is provided for in subsection (1)(b) and (c) of section 80.

Regulations

330. A community transfer body may need more information about the property before determining the purchase price, level of rent or other terms and conditions to be proposed. The Scottish Ministers may make regulations under section 81 about asset transfer requests. These may include, under subsection (3), details of how a community transfer body can request such information and how a relevant authority is to respond. Regulations under subsection (2) may also specify how asset transfer requests are to be made, additional information to be included in them, and the procedure to be followed by a relevant authority in relation to requests. They may also include requirements to publish the fact that a request is being made, and to notify specified people about them.

Decisions

331. A relevant authority must decide whether to agree to or refuse an asset transfer request in accordance with section 82. It must compare the benefits that might arise if the request is agreed to with those that might arise from any other proposal for the land, whether made through another asset transfer request, by the authority, or by any other

person (subsection (3)(e) and (6)). In doing so it must consider whether the proposals will promote or improve economic development, regeneration, public health, social wellbeing or environmental wellbeing or reduce inequalities of outcome which result from socio-economic disadvantage, and any other benefits that might arise, and the decision must be reached in a manner which encourages equal opportunities and the observance of the equal opportunity requirements. The relevant authority must also consider other matters it considers relevant, including the functions and purposes of the authority, and any obligations that may affect its ability to agree to the request. Subsection (5) requires that the authority must agree to the request unless there are reasonable grounds for refusing it.

332. Subsection (7) requires the relevant authority to give notice to the community transfer body of its decision, and the reasons for that decision, within a specified period, as described in subsection (8). Subsection (9) gives the Scottish Ministers power to make regulations about the information to be included in this decision notice and how it is to be given.
333. **Section 83** sets out the process to be applied by a relevant authority when an asset transfer request is agreed to. The decision notice given by the relevant authority must specify the terms and conditions on which the authority is prepared to carry out the transfer. These terms and conditions may or may not reflect those included in the asset transfer request. The community transfer body must in turn submit an offer, within a period specified in the decision notice, reflecting the terms and conditions set out in the decision notice, and any other terms and conditions needed to make sure the transfer can take place, and that it takes place within a reasonable time. After this the community transfer body and the relevant authority will make arrangements to conclude a contract, as would happen with any sale or lease of property. Subsections (5) to (9) set out a timescale for this.
334. The period for concluding a contract is normally a minimum of 6 months from the date of the offer. A longer period can be agreed between the relevant authority and the community transfer body. If the relevant authority does not agree to extend the period, the community transfer body may apply to the Scottish Ministers seeking a direction under subsection (7)(b)(ii) that the period should be extended. This can be done more than once. The Scottish Ministers may make regulations under subsection (10) about these directions and how to apply for them. Under subsection (6), if the contract is not concluded within the required period, an appeal can be made to the Scottish Minister under section 90 unless the relevant authority is the Scottish Ministers.
335. When an asset transfer request is made, section 84 prevents the authority from disposing of the land in question to anyone other than the body that made the request. This applies from the day the request is made to the day on which the request is disposed of. Subsections (4) to (9) set out the ways in which a request may be disposed of. Essentially these are when a contract for transfer of the land has been concluded, when all avenues of review and appeal have been exhausted, or when the community body abandons the process, by not taking any action within the required time limit. If the relevant authority enters into a contract with another person, during this period, to sell or lease the land to them, subsection (11) makes that contract unenforceable.
336. Subsection (12) provides that the prohibition on disposal does not apply where the relevant authority has advertised the land for sale, or has entered into negotiations with another person to transfer or lease the land, before the asset transfer request was made. Subsection (13) also allows the Scottish Ministers to direct that the prohibition on disposal of the land in question to any person other than the community transfer body that made the request does not apply in a specified case.

Appeals and reviews

337. **Sections 85 to 90** set out arrangements for appeals and reviews in relation to asset transfer requests. A community transfer body can appeal or apply for a review if:

*These notes relate to the Community Empowerment (Scotland)
Act 2015 (asp 6) which received Royal Assent on 24 July 2015*

- the request has been refused;
 - the request has been agreed but the relevant authority has required terms and conditions which are significantly different to those proposed in the request; or
 - no decision has been made within the required period.
338. The arrangements depend on the relevant authority to which the asset transfer request was made, and therefore by which the original decision was made.
- Decisions made by a local authority are subject to review by the local authority, under section 86.
 - Decisions made by a relevant authority specified by the Scottish Ministers in an order under section 85(2)(c) are subject to review by a local authority.
 - Decisions made by the Scottish Ministers are subject to review by the Scottish Ministers under section 87.
 - Decisions made by any other relevant authority are subject to appeal to the Scottish Ministers under section 85.
 - Decisions made by local authorities following a review under section 86 (or provided for by section 89) are subject to appeal to the Scottish Ministers under section 88, following the procedures set out in section 85.
339. For each type of appeal or review, the Scottish Ministers may make regulations about how they are to be carried out and the time limits for making the application. These regulations may allow the authority undertaking the process to determine how certain stages are carried out.
340. In the case of an appeal to the Scottish Ministers under section 85 or section 88, the Scottish Ministers may allow the appeal or may dismiss it and may reverse or vary any part of the decision of the relevant authority, including changing any terms and conditions that were imposed. The Scottish Ministers may reverse or vary part of the decision of the relevant authority even if the appeal does not relate to that part. If the Scottish Ministers decide the relevant authority must transfer ownership, lease or confer rights in or in relation to land, or agree to certain terms and conditions, they must issue a direction requiring the relevant authority to issue a new decision notice in line with the appeal decision. That notice will replace the original decision notice.
341. In a review carried out by a local authority, section 86(8) means that the local authority must consider the same issues when reviewing a decision as it would in making an initial decision on an asset transfer request, and must agree to the request unless there are reasonable grounds for refusal. Subsection (10) displaces the general rule set out in section 56 of the Local Government (Scotland) Act 1973 (that a local authority may delegate any of its functions to any of its committees, sub-committees or officers or another local authority) to require that the review must be carried out by the authority or a committee or sub-committee of the authority, and may not be delegated to officers. Subsection (5) provides that, having carried out a review, the local authority may confirm or change its decision, including altering any terms and conditions set out in the original decision notice. It must then provide a new decision notice, providing the reasons for the decision made on review. This notice replaces the original decision notice, and must be issued within a period prescribed in regulations, or a longer period agreed between the local authority and the community transfer body.
342. A review of a decision made by the Scottish Ministers under section 87 follows much the same procedures as a local authority review. However, it allows for the Scottish Ministers to appoint persons in connection with carrying out the review. This might, for example, allow for an independent reporter or panel to scrutinise the original decision

and make a report to Ministers. There is no time limit for the Scottish Ministers to issue their decision notice following the review.

343. **Section 89** provides that decisions made by a relevant authority specified by the Scottish Ministers in an order under section 85(2)(c) are subject to review by a local authority. The local authority to which an application for review is to be made may be specified or determined by factors set out in an order under section 89(4)(b). This allows certain decisions to be reviewed by the local authority rather than the Scottish Ministers. For example where the relevant authority is a company wholly owned by one or more local authorities. The review procedures set out in section 86 will apply, subject to such modifications as the Scottish Ministers think appropriate.
344. When an appeal or review results in an asset transfer request being agreed (with or without amended terms or conditions), the process then continues under the provisions of section 83, with the community transfer body making an offer and the two parties proceeding to conclude a contract.
345. If no contract is concluded within the required period as set out in section 83, the community transfer body may appeal to the Scottish Ministers under section 90, unless the request was made to the Scottish Ministers. If the appeal is allowed, the Scottish Ministers will issue an appeal decision notice setting out the terms and conditions of an offer to be made by the community transfer body. If such an offer is made and no contract is concluded within 28 days, the Scottish Ministers may direct the relevant authority to conclude the contract, and ultimately the relevant authority may be deemed to have accepted the offer and concluded the contract, under subsection (7). As with other forms of appeal and review, the Scottish Ministers may make regulations about procedures, time limits etc., under subsections (12) to (14). Subsections (8) to (10) provide for other ways in which the asset transfer request process may come to an end.
346. **Section 91** provides that, when a request has been agreed, a community transfer body may not appeal or apply for a review in relation to the terms and conditions set out in the decision notice at the same time as making an offer. An appeal or review may not be brought if an offer has already been made and not withdrawn; if an offer is made after the appeal or application for review is made, that appeal or application for review is treated as having been withdrawn.

Land leased to a relevant authority

347. **Section 92** applies where all the criteria set out in paragraphs (a) to (d) of subsection (1) are met. It deals with the situation where an asset transfer request is made to lease or otherwise occupy land (including a building) which is leased to a relevant authority by another relevant authority, or by a company wholly owned by another relevant authority. Subsections (2) and (3) mean that any conditions in that lease which restrict the relevant authority's ability to sublet or share occupancy of the land, or restrict how the land may be used, do not prevent the relevant authority agreeing to lease the land to the community transfer body or to allow the body to occupy the land.
348. This does not apply if any other person is entitled to occupy the land (subsection (1) (d)). Subsections (4) and (5) also provide that it does not affect any restrictions on the power of the relevant authority to assign or transfer rights and liabilities under the lease, and the relevant authority continues to be subject to any obligations under the lease, even if it leases the land to the community transfer body or allows the body to occupy it. For example, the relevant authority would still be responsible to the landlord for any maintenance requirements set out in the lease between them.

Repeated requests

349. **Section 93** is intended to help relevant authorities deal with repeated, vexatious requests. It means that if a second request relating to the same land or building is made within two years of a previous request, which was refused, the relevant authority may

choose not to consider that second request. Subsections (4) and (5) provide that this only applies if the new request seeks the same type of transfer, but it does not matter whether the new request is made by the same body or a different one. For example, if one community transfer body requests to lease a particular building, and is refused, and another body requests to lease the same building within two years, the relevant authority may decline to consider that second request. On the other hand, if the second request was for transfer of ownership instead of a lease, the relevant authority would have to consider it. Declining to consider a request under these circumstances does not count as a refusal of the request and therefore is not eligible for appeal or review.

Registers of relevant authorities' land

350. [Section 94](#) requires each relevant authority to establish, maintain and make available to the public a register of land which they own or lease (to the best of the authority's knowledge and belief). There is a power for the Scottish Ministers to specify land that need not be included in the register, and relevant authorities must have regard to any guidance issued by the Scottish Ministers in relation to these duties.
351. This provision is intended to assist community bodies in identifying property that may be available for asset transfer. However, the fact that a property is not on the register will not prevent an asset transfer request being made for it. It is expected that regulations will be used to exclude types of "land", such as retaining walls and mineral rights, which are unlikely to be targets for asset transfer in themselves. Guidance will set out what information about the land is to be included, as well as issues such as how the register should be published and how often it must be updated.

Annual reports

352. [Section 95](#) requires each relevant authority to publish an annual report on the number of asset transfer requests received and their outcomes, including the outcome of any appeal or review, and any action taken by the authority to promote the use of asset transfer requests and support community bodies to make them. The report will relate to a year from 1 April to 31 March and must be published no later than 30 June following the end of the reporting year to which the report relates.