

Summary of Part 5 of the Community Empowerment (Scotland) Act 2015 (“the Act”)

Note: This Summary note is a brief executive summary and guidance tailored to the application of the legislation to Boards and should be read along with the Scottish Government’s own guidance (“[SG Guidance](#)”). Links to specific sections of the SG Guidance are included throughout this document, but the guidance should be read as a whole. Boards are to have due regard to the SG Guidance in dealing with asset transfer requests (“ATRs”) under the Act.

Introduction

Part 5 of the Act introduced a right for community transfer bodies (“CTBs”) to make an ATR to relevant authorities, being all local authorities, the Scottish Ministers, Health Boards, Special Health Boards and a wide-ranging list of public bodies (“relevant authorities”), for any land or buildings they feel they could put to better use. CTBs can request ownership, lease or other rights, as they wish. The Act requires relevant authorities to assess requests transparently against a specified list of criteria, and **to agree to the request unless there are reasonable grounds for refusal**.

Community Transfer Bodies

To make an ATR, an organisation needs to be a CTB, which can either be a community controlled body or a body designated by the Scottish Ministers. A CTB which wants to make an ATR for ownership must be incorporated as a company, a SCIO (Scottish Charitable Incorporated Organisation) or a BenCom (Community Benefit Company), with a minimum of 20 members, a definition of the community to which the body relates and provision for transfer of its assets on winding up. The other requirements are set out in [section 80](#) of the Act. The Act does not require a CTB to be incorporated to make an ATR for lease or other rights.

ATR Request

An ATR must be accompanied by a copy of the CTB’s constitution or other governing documents. Relevant authorities must be satisfied that these meet the requirements of the Act. In deciding whether an organisation meets the requirements for a CTB, Boards should be aware that this may have an impact on other relevant authorities. If an organisation is accepted by one relevant authority as a CTB, it will be reasonable for them to expect that they will also be accepted by others.

Scottish Ministers’ role

Under the original community right to buy, a community body submitted its application to the Scottish Ministers for approval (the landowner being able to comment on the application to the Scottish Ministers). An ATR application is submitted direct to the relevant authority. It is for the relevant authority to decide whether the CTB meets the requirements under the Act, both in terms of their governing documents and the contents of the ATR. The Scottish Ministers’ role in the ATR process primarily relates to dealing with appeals. The Scottish Ministers may also provide comments on queries raised during the ATR process by relevant authorities and CTBs. The Scottish Ministers do not however provide advice as such, given their role in the appeals process.

Content of an ATR

The legislation requires certain information to be specified in an ATR, in terms of section [79\(4\) of the Act](#) and [Regulation 3](#) of the Asset Transfer Request (Procedure) (Scotland) Regulations 2016 (“the Regulations”). An ATR is not treated as having been made until all the required information is received by the relevant authority. Some of the key requirements are (i) a statement of the reasons for making the request; (ii) how the CTB proposes to use the land; (iii) the benefits which the CTB considers will arise if the relevant authority agrees to the ATR; (iv) outline funding of the

purchase/lease and proposed use of the land; and (v) a description of the level and nature of support from the community to which the CTB relates.

Information on areas such as the benefits of the ATR and how it is to be funded, only requires to be outline information for an ATR to be accepted as complete and valid. The relevant authority can seek further detail during the decision making process. The relevant authority may decide to refuse the request if it does not feel it has sufficient information on the proposals.

Acknowledgement and Validation Date

Once a relevant authority is satisfied that all the required information has been provided, it must send an acknowledgement to the CTB. The acknowledgment must contain the validation date, being the date on which the last of the required information was received. This is the date from which other time limits will be calculated. The relevant authority must issue a decision notice within **6 months of the validation date, unless a longer period is agreed** with the CTB.

Prohibition on Disposal of Land

Once an ATR has been made, the relevant authority is not allowed to sell, lease or otherwise dispose of the land it relates to, to anyone other than the CTB, until the whole process is completed. The prohibition does not apply if, before the ATR is made, the land has already been advertised for sale or lease, or the relevant authority has entered into negotiations or begun proceedings to transfer or lease the land to another person. In these cases, an ATR can still be made, but it will not prevent negotiations or proceedings continuing with, or bid being made by, any other person. There is no specific definition of “entering into negotiations”, but the relevant authority should be able to show evidence of discussions that go further than a preliminary enquiry.

Publication of Documents and Notification and Representations

The relevant authority must make copies of the ATR and any documents or accompanying information available to be viewed online until the ATR process is completed. Any representations made about the request must also be put online. Personal information should be redacted to comply with data protection requirements. [Regulation 6](#) and [Regulation 7](#) set out arrangements for other parties to be made aware of an ATR and how they can make representations about it (e.g. any tenant or occupier of the land to which the request relates). This must be done as soon as practicable after the validation date. Notice of the ATR must also be published online and put up at the site.

Decision Making Process

Reasonable Grounds for Refusal

Where an ATR is made by a CTB the relevant authority must decide whether to agree to or refuse the request. **The relevant authority must agree to the ATR unless there are reasonable grounds for refusing it.** There is no detailed guidance on what may be reasonable grounds for refusal, as this must be determined in the circumstances of each individual case. However, they are likely to include cases where the benefits of the ATR are judged to be less than the benefits of an alternative proposal, where agreeing to the ATR would restrict the relevant authority's ability to carry out its functions, or where another obligation on the relevant authority prevents or restricts its ability to agree to the request.

Benefits

- In assessing the benefits of the request the relevant authority must consider whether agreeing to it would be likely to promote or improve economic development, regeneration, public health, social wellbeing, environmental wellbeing or reduce inequalities of outcome which result from socio-economic disadvantage.
- When comparing the benefits of other proposals to the benefits of the ATR, the non-financial benefits of the other proposals should be considered, where possible, as they are for the ATR.

- The price/rent offered for the ATR should also be considered alongside the non-financial benefits.
- There should be consideration of what outcomes could be achieved with any profit or savings that might be made, or what impact any financial loss might have, compared with the benefits offered by the community project or alternative proposals.

Ability to Deliver

- Consider whether the proposal is likely to achieve the benefits set out.
- Assess whether the CTB is able to successfully deliver the project, and make it sustainable (funding/capacity to deliver/governance/viable Business Plan).
- Consider whether the CTB has identified all the relevant costs of the project or activities.
- Have appropriate and realistic sources of funding been identified, both in the short and long term?
- Does the CTB have the appropriate skills, experience and qualifications to deliver the project/plans for engaging people who do?
- Are there suitable governance arrangements in place for the scale of the project?
- Does the CTB have succession plans in place for recruiting new Board members/Trustees in the future?

Relevant Authority's Functions

- The relevant authority must consider how any benefits relate to other matters which the authority considers relevant, including, in particular, the functions and purposes of the authority.
- There may be cases where agreeing to the request would have an unacceptable impact on the relevant authority's ability to deliver its functions (e.g. the CTB activities could physically interfere with the relevant authority carrying out its operations/require them to put alternative arrangements in place that substantially increase costs).
- There may be cases where the CTB's proposals conflict with a policy of the relevant authority.
- Affordability may be a factor if the cost of the transfer would affect the relevant authority's budget to the extent it reduced its ability to deliver its functions, even after taking into account the value of the proposed benefits.

Obligations and Restrictions

- Are there any obligations that may prevent, restrict or otherwise affect the relevant authority's ability to agree to the request, whether arising from legislation or otherwise? The Act does not over-ride or alter any such obligations.
- If an obligation imposes an absolute ban on the transfer of the rights sought by the CTB, or on the use they propose, this would be reasonable grounds for refusal. In many cases there are mechanisms available for amending or removing restrictions. The relevant authority should consider the benefits of the ATR first and consider the possibility of removing such restrictions.

State Aid Rules (or equivalent in the period beyond the UK leaving the EU)

- A disposal at less than market value may constitute state aid (or equivalent rules) if it provides an economic advantage to a trading entity. If any assistance is found to have breached the rules, it is the organisation that received the assistance that has to pay it back.
- The CTB has not yet clarified to the Board in respect of the Leanchoil ATR, the relationship between Hanover/possible other Registered Social Landlord and Robertsons/other developers. Detail around the selection of an appropriate Registered Social Landlord is to be confirmed by the CTB and Moray Council. The Board has raised whether there will be competitive tendering in respect of any such appointments.

Community Support

Consider community support for the proposals. A scheme that attracts substantial opposition and causes division in the community may not have a net benefit.

Price, Valuation and Non-financial Benefits

- The Act does not say how much should be paid to purchase an asset or in rent, whether it should be at Market Value or at a discount.
- Transfers will not necessarily be at Market Value and a failure to offer Market Value as cash consideration may not of itself be a justification for refusing a request.
- The CTB has to state in the ATR how much they are prepared to pay, alongside the benefits the project will deliver. The Board has to decide whether to accept that price/rent. If the CTB decides to offer a price that is less than the Market Value, the Board will need to assess whether the non-financial benefits offered by the proposals justify that reduced price.
- The SG Guidance states that most relevant authorities which have operated voluntary asset transfer schemes have used a simple assessment of the benefits provided, for example on a 1 – 5 scale. This can be placed alongside similar assessment of the Best Value themes and any other relevant factors. Information on valuation and defining Best Value in the context of the proposals and any non-financial benefits can be found: [here](#) and [here](#).

Assessing ATRs

- When the price/rent offered in an ATR is less than the Market Value of the property, the relevant authority will need to consider whether the proposed benefits to be delivered justify the discount.
- The benefits of the request should be proportionate to the value of the asset and the level of discount with an appropriate level of information to support the application.
- Any decision to transfer an asset must represent good use of public resources.

Criteria for Assessing Requests

- Best Value themes, as well as consideration of the non-financial benefits referred to above, sustainability of the proposal long-term, value to the relevant authority in the existing use, value for alternative use/redevelopment, value for proposed and other community purposes, level of community benefits (i.e. extent of community served, nature of benefits to be delivered, links to relevant authority's corporate priorities and outcomes, community need/demand for services), likelihood that the benefits will be delivered over a 5 year period and impact of project failure.
- The strength of the proposals will be considered against the financial implications both for short-term budget planning and long-term strategies. This will include the consideration of the current use of the asset and any consequent implications that could arise from the transfer. A larger discount will require a stronger case to be made with an appropriate level of benefits demonstrated effectively.
- **In considering ATRs, the relevant authority should always keep in mind that the criterion is whether there are reasonable grounds for refusal.** The Board should consult with internal stakeholders to obtain views from all parts of the organisation as to proposed use and value of the ATR to the Board as a whole.
- More details on Best Value themes and assessing an ATR are set out in [Chapter 13](#) of the SG Guidance.

Use of Conditions to Protect the Discount

- Where an asset transfer is for less than the market value/rent, relevant authorities may sometimes seek to protect the discount against the risk that the benefits may not be delivered.
- Any conditions which the relevant authority proposes to impose to protect the discount should be included in the decision notice.
- The main ways of protecting the discount are (i) where a reduced price was agreed in recognition of the benefits to be delivered, the CTB may be required to repay the difference in price if the benefits are not delivered; (ii) where the price was based on a lower valuation for a particular use, conditions may be imposed to return any increase in value to the relevant authority, if the use of the property changes or the expected benefits are not delivered (i.e. Clawback Agreement, with

first ranking Standard Security, economic development burdens re main building and affordable homes land).

- The usual triggers for implementation of such protections are if the project fails, the CTB is wound up, or it seeks to dispose of the property, either by sale or lease, for a use other than was expected at the time of the transfer.

Decision Notice

Timescale

- The relevant authority must issue a decision notice to the CTB, setting out its decision and the reasons for it **within 6 months from the validation date (unless a longer period is agreed between the parties)**. If no decision notice is issued within this time, the CTB has the right to request an appeal to the Scottish Ministers. The CTB should be advised of any potential delays at the earliest opportunity, and their agreement should be sought to an extension of the time period. An extension should be agreed before the prescribed (or previously extended) period expires.
- If the ATR is agreed the decision notice should specify the terms and conditions on which the relevant authority is prepared to transfer ownership, lease or confer the rights requested (i.e. heads of terms). The decision notice may be conditional on a range of factors, such as the CTB securing funding and/or planning permission.

Offer

- If the CTB wishes to proceed it must submit an offer to the relevant authority. The offer must reflect the terms and conditions in the decision notice, and may include any other reasonable terms and conditions that are necessary/helpful to secure the transfer in a reasonable time.
- The decision notice must set out this requirement and give the date by which the offer must be submitted. It is for the relevant authority to determine that date, but **it must be at least 6 months from the date of the decision notice**.
- If no offer is made by the date set out in the decision notice (and the CTB did not appeal the terms and conditions **within 20 working days of the decision notice**), the process is at an end.

Conclusion of the contract

- **The contract must normally be concluded within 6 months of the date of the CTB's offer** (unless (i) an extension is agreed with the relevant authority; (ii) the CTB applies to the Scottish Ministers to extend the period; or (iii) the CTB appeals to the Scottish Ministers to determine the terms and conditions of the contract, which the relevant authority can be required to accept). This does not mean the transfer has to take place within that time, but the date for the transfer, the price/rent and any other terms and conditions must be agreed.
- The contract may be conditional on other factors such as confirmation of funding or planning permission.
- **If no contract is concluded within 6 months of the offer and no other action is taken, the process is at an end.**

Appeals

- The CTB may appeal if: (a) the request is refused, (b) no decision notice is issued within the time allowed, (c) the CTB does not agree with terms and conditions imposed, or (d) if a request is agreed, but no contract is concluded within the required time limit.
- The CTB must send a notice of appeal in writing to the Scottish Ministers **within 20 working days of the decision notice, or if no decision has been made, within 20 working days of the deadline date for the decision (i.e. 6 months from the validation date)**.
- The relevant authority must send a response to the Scottish Ministers **within 15 working days of receiving a copy of the notice of appeal**. This must set out the matters the relevant authority

considerations should be taken into account in the appeal. The relevant authority is responsible for giving notice of the appeal to any “interested parties” to allow them to make representations.

- The Scottish Ministers may decide that further written submissions, a hearing session, or other procedures such as a site visit are required as part of the appeals process. The Scottish Ministers may allow or dismiss the appeal, and may reverse or vary any part of the original decision, even if that part was not mentioned in the appeal, including changing the terms and conditions set out in the decision notice. In all cases, the final decision lies with the Scottish Ministers.
- [Chapter 19](#) of the SG Guidance provides more detail on the appeals process, as well as the timescales involved in each part of the process, including the CTB submitting their offer and the contract being concluded.

Additional Duties and Responsibilities

Part 5 of the Act and the related SG Guidance and Regulations places certain duties on relevant authorities, in their dealings with CTBs and include the following (i) partnership working with an emphasis on supporting CTBs; (ii) establishing and maintaining a publicly available register of land owned or leased by it “to the best of its knowledge and belief; (iii) where a request has been considered and refused (including any review or appeal), Boards do not have to accept the same or another similar request for the same property if it is made within two years of the first; and (iv) at the end of each financial year, Boards must publish a report on the number of requests they have received and the number which have been agreed, refused, appealed etc.