

Better late than never? Late applications under the Community Right to Buy



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At the beginning of February, a community body known as the North West Mull Community Woodland Company was given permission by Scottish Environment Secretary, Roseanna Cunningham, to purchase the island of Ulva off the west coast of Mull, provided they can raise the purchase price of £4.2 million. The bid was made by the community body under the late application rules that apply to a Community Right to Buy application that is made once the property concerned is being marketed for sale.

The Community Right to Buy

The Community Right to Buy was first introduced by the Land Reform (Scotland) Act 2003. It allows community bodies to register an interest in land, which gives them the first option to purchase if the owner chooses to sell the land. Originally applicable only to predominantly rural land, the right to buy was extended to all of Scotland in 2016. The acquisition of Portobello Old Parish Church by Action Porty in 2017 is the first example of a successful community bid to purchase land in an urban area.

Although there are 230 entries on the Register of Community Interests in Land established under the 2003 act, the Community Right to Buy has only been activated in 19 of these cases. In the majority of situations the legislation has been used by the community body to influence negotiations with the landlord.

Late applications

While the Scottish Government continues to introduce new legislation which further develops Community Right to Buy, it is largely a pre-emptive right and late applications, made after a property has been marketed, are rarely successful.

Under the 2003 act a community body can submit an application to register interest in land after the owner has taken steps to sell or market the property. However, the Scottish Minister's policy is that this will only be accepted in exceptional circumstances. And a late application,

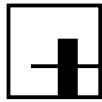
if successful, will immediately trigger the right to buy, meaning the community body must raise the funds to complete the purchase within a matter of months. The North West Mull Community Woodland Company has now launched a worldwide appeal to raise the money required for its purchase of Ulva.

Additional criteria required for late applications

The first case under the Community Right to Buy, *Holmehill Ltd v Scottish Ministers*, concerned an appeal by a community body set up by residents of Dunblane to purchase 13 acres of public open space beside Dunblane Hydro Hotel, advertised for sale by Hilton Hotels as a prospective development site. In this case, the community body's first application was rejected.

The site had already been marketed and so any application, being "late", would have to satisfy additional requirements:

- i. there were good reasons for not having submitted a timeous application;
- ii. there was significantly greater support within the community than the 10% of the electoral roll required for a timeous application; and
- iii. there were strong indicators that the right to buy was in the public interest, more so than required for a timeous application.



Scottish Ministers refused the Holmehill application on the first and third grounds, considering it to be a blocking tactic to prevent the area from being developed, and this was upheld on appeal to the Sheriff Court. It was reasonable for the ultimate outcome of granting the application to be borne in mind, so it was a necessary requirement of any application that a community body could demonstrate it had considered the implications of ownership before their right to buy materialised, and they should have a plan in mind for future use of the land.

There is a similar narrative in *Coastal Regeneration Alliance Ltd v Scottish Ministers*. An East Lothian community body applied to register a Community Right to Buy two areas at the former Cockenzie Power Station. It had plans to transform the land for use as retail, performance, heritage and green space. After a false start (in which Coastal incorrectly identified the owner of the site), by the time the applications had been resubmitted, the owner had entered into negotiations to sell the site, so Coastal's applications were "late". Neither Scottish Ministers, nor the court on appeal considered that Coastal had demonstrated that its application met the additional three requirements.

Human rights considerations

There are further Community Right to Buy regulations in the pipeline. The Community Empowerment (Scotland) Act 2015 introduces a right for community groups to compulsorily purchase abandoned, neglected or detrimental land. Scottish Ministers must be satisfied that the land is either abandoned or neglected, or that the current management and use of the land is causing harm directly or indirectly to a community's environmental wellbeing.

It is anticipated that this right to buy will come into force later this year, although its effectiveness may be limited by the overarching protection of property embodied in Article 1 of ECHR Protocol 1. Under this principle every person is entitled to "peaceful" enjoyment of his possessions and deprivation of property is only permitted if it is lawful, in the public interest and reasonably proportionate.

When determining whether deprivation of property can be classified as being reasonably proportionate, the Scottish Ministers will need to assess whether there is a fair balance between the individual's rights and the public interest. This balance will not be met if it is deemed that there is an excessive burden placed on the individual, or few procedural avenues for the individual to challenge the decision.

However ECHR Protocol will not render this new Community Right to Buy inept. As the act includes provisions allowing the owner of the land to challenge

the community group's application and appeal the outcome, successful registrations may not necessarily infringe on the owner's human rights. Scottish Ministers must refuse an application if it is not in the public interest.

The ruling in *Pairc Crofters Ltd v Scottish Ministers* is a good example. Following a successful application by Pairc Trust, a crofting community body, to exercise a compulsory right to buy croft land at the Pairc Estate in South East Lewis, the owners of the land, Pairc Crofters Limited and their tenant Pairc Renewables Limited appealed on the basis that the legislation allowing the crofting community to purchase the land was incompatible with ECHR, and did not provide sufficient safeguards for the owner's rights to satisfy the fair balance test.

The court, however, disagreed - the legislation imposed sufficient conditions with which the crofting tenant had to comply before they could register a successful application:

- the prospective purchaser had to show why the purchase was in the public interest; and
- the owner has the opportunity to rebut the application and present his case, and the opportunity to appeal and refer any question arising from the application to the Land Court.

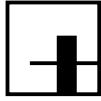
The provisions of the 2015 act for the right to buy abandoned, neglected or detrimental land replicate these conditions, so it is safe to assume that they will comply with the ECHR.

Buying community land

The original scope of the Community Right to Buy has been extended to cover the majority of Scotland and a variety of types of land, but the legal requirements for a successful application for both the pre-emptive right to purchase and the compulsory right to purchase are set at a high threshold.

The key elements of successful applications remain timeous submissions, strong evidence that the purchase is in the public interest, and support from the local community totalling more than 10% of the electoral roll for the area.

However every application is subject to the discretion of the Scottish Ministers, and incases involving compulsory purchases or late applications where a potential sale is already underway, can expect to be subjected to a more rigorous examination of the extent to which the application satisfies the essential criteria.



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