



This information note is one of a series produced by the Community Woodlands Association. It describes the statutory rights available to Scottish community groups through the Community Empowerment and Land Reform Acts, outlines the formal mechanisms for community groups to acquire woodland: the Community Right to Buy and Asset Transfer processes and signposts to scheme guidance and other CWA information notes.

## Introduction

Community woodlands are growing and thriving in Scotland, with over 200 communities across the country engaged in owning or managing woodlands. They operate under a range of tenure arrangements including ownership, lease and management agreements.

Many groups acquired their woodlands by negotiation, open market purchase, or even as a gift from a landowner. These routes to ownership avoid the need to use legislative mechanisms, which can be time-consuming and complex, however communities will still be expected to do appropriate development work, community consultation and business planning, not least for funders.

The two main formal mechanisms, defined by legislation, for community groups to acquire land are the Community Right to Buy (CR2B) and Asset Transfer (AT). Note that we are using “land” in the legal sense, which includes buildings.

These two routes have similarities, but there are some key differences:

- AT applies only to relevant Scottish Public Authorities, whereas CR2B applies to all categories of landowner (including those eligible for AT).
- AT covers buying, leasing or occupying land, whereas CR2B is only about purchase.
- CR2B is restricted to geographically defined communities whereas AT is also open to communities of interest.
- Neither AT nor the basic CR2B give a right of compulsory purchase, however, there are two additional CR2B provisions that do allow a forced sale.

## Community Right to Buy

The Community Right to Buy (Part 2 of The Land Reform (Scotland) Act 2003) is a two-stage process that allows eligible community bodies (CBs) to apply to register an interest in land (including buildings) and the opportunity to buy that land when it comes up for sale. Part 4 of the Community Empowerment (Scotland) Act 2015) introduced provisions to simplify the CR2B process and extended coverage of the Act to the whole of Scotland.

The CB may be a Company Limited by Guarantee (CLG), a Scottish Charitable Incorporated Organisation (SCIO) or a Community Benefit Society (CBS). Whichever of the three organisational forms is employed, the CB’s governing document must have provisions that:

- there be at least 10 members,
- at least three-quarters of the members are from the community, and
- the community members must have control of the CB.

CWA info note 2 describes the various organisational structures which are available to Community Woodland Groups and outlines the advantages and disadvantages of each.

Any surplus funds or assets must be applied for the benefit of the community, which must be geographically defined using postcode units or another prescribed type of area, and Scottish Ministers must have given written confirmation that the main purpose of the body is consistent with furthering the achievement of sustainable development.

The application to register an interest must accurately identify the land in question and the landowner (or demonstrate that steps have

been taken to try to identify the landowner) and explain how the community's proposals for that land will further the achievement of sustainable development.

A CB must demonstrate at least 10% support from their defined community: this is usually done by a petition cross-referenced against the Electoral Register. All evidence of community support must be from within six months of the date the application is made to Scottish Ministers.

Applications must also state whether they are "timeous" or "late". Timeous applications are those where the landowner has not taken any action to sell the land, whereas late applications are those where the land is already on the market.

Late applications can be approved by Ministers but require additional supporting information, including:

- reasons why it is in the public interest to register the interest;
- evidence of a significantly greater level of support at registration stage than the expected 10% normally required; and
- details of any relevant work or steps taken to buy the land before it went on the market.

A registered interest in land lasts for five years from the date of approval from Scottish Ministers and can be re-registered at five-year intervals.

The community can only "activate" their registration if and when the landowner decides to sell the asset. The price the CB must pay is determined by an independent valuer acting on behalf of Scottish Ministers (both parties are permitted to make representations).

The need to wait for a willing seller means that to date, use of the CR2B provisions has been limited: As of February 2019 there have been a total of 236 registrations from 123 community bodies, but the majority of these (196) are now deleted. There have been 24 cases where the right to buy was activated (11 from public bodies) and there are just 16 "live" registrations.

## **Community Right to Buy: Abandoned, Neglected or Detrimental Land**

The Community Empowerment (Scotland) Act 2015 introduced a new Part 3A into the Land Reform (Scotland) Act 2003 which allows eligible community bodies to apply to buy land which is either:

- wholly or mainly abandoned or neglected; or
- being used or managed in a way that results in or causes harm to the environmental wellbeing of a relevant community

If an application is successful, the landowner is required to sell the land to the community body on terms set out in the Act, whether or not the landowner has decided to put the land or buildings on the market, so this is effectively a compulsory purchase.

The legislation does not define "abandoned or neglected"; the community body must justify why they consider the land qualifies. Criteria include:

- the physical condition of the land: how long it has been in that condition, whether it is a risk to public safety, has a detrimental effect on adjacent land, or causes environmental harm;
- the designation or classification of the land: whether or not it's part of a nature reserve, conservation area or special site, any listed buildings or scheduled monuments on the site, and any relevant planning policies; and
- the use or management of the land: whether used or managed for lawful public recreation or leisure activities or for preserving or conserving the natural, historic or built environment, and whether any such activity requires a permit or licence.

This last criterion is also important when considering whether land is being used or managed in a way that results in or causes harm to the environmental wellbeing of a relevant community, along with whether the use or management has caused a statutory nuisance and whether any warning notices, closure notice or closure order has been

issued or made under the Antisocial Behaviour etc. (Scotland) Act 2004.

Successful applications must demonstrate that:

- the purchase of the land is in the public interest and would further the achievement of sustainable development, whereas continued ownership by the current owner would not;
- there is community support for the proposed purchase (as shown by a ballot);
- the CB has tried to negotiate the purchase of the land;
- the CB has not been offered the land in the previous 12 months; and
- if the application is made on the basis of harm to the environmental wellbeing of the community, the CB has approached a relevant regulator (e.g. SEPA) to take action.

This part of the Act came into force on 27 June 2018, so there has been limited opportunity to date to test the definitions of “abandoned”, “neglected” and “detrimental” land.

### **Community Right to Buy: Land to Further Sustainable Development**

The Land Reform (Scotland) Act 2016 introduced a new right to buy land of further sustainable development. This is also an absolute right to buy, so a CB may force the sale of land even where the landowner is unwilling. It also allows a CB to nominate a third party purchaser to take title to the ground being acquired.

A successful application must demonstrate that the transfer of land:

- is likely to further the achievement of sustainable development in relation to the land;
- is in the public interest;
- is likely to result in significant benefit to the relevant community to which the application relates; and
- is the only practicable, or the most practicable, way of achieving that significant benefit.

and that not granting consent to the transfer of land is likely to result in harm to that community.

This part of the Act will not come into force until sometime in 2019 at the earliest, and until the detailed regulations and guidance are published it is difficult to know how usable the provisions will be.

### **Asset Transfer**

Part 5 of the Community Empowerment (Scotland) Act 2015 gives communities of geography and communities of interest the opportunity to buy, lease or occupy land and assets owned or leased by relevant authorities (RA) i.e. local authorities, Scottish public bodies or Scottish Ministers, whether or not it is up for sale. The act says that “the authority must agree to the request unless there are reasonable grounds for refusing it”.

To become eligible for any form of asset transfer a group needs to be a Community Transfer Body (CTB); a distinction is made between bodies which can request to lease or occupy and those which can request to buy.

**For lease, management and other rights**, the group must have a written constitution that includes a definition of their community, a statement of their aims and purposes, including the promotion of a benefit for that community, and provisions that

- the majority of the members of the body consists of members of that community;
- the members of the body, who consist of members of that community, have control of the body;
- membership of the body is open to any member of that community;
- any surplus funds or assets of the body are to be applied for the benefit of that community.

**For ownership**, the CTB must also be incorporated as a Company Limited by Guarantee (CLG), a Scottish Charitable Incorporated Organisation (SCIO) or a Community Benefit Society (CBS) and their governing document must include provision that they must not have fewer than 20 members. For a company, there are additional requirements specifying what happens to the company’s assets if it is wound up.

Whilst the CB's governing document must include a definition of the community, this does not need to be geographical, and communities of interest are eligible to use the provisions as long as they meet the other criteria. However, it is important to note that communities of interest are not eligible to apply to the Scottish Land Fund.

Unfortunately, these eligibility requirements are not aligned with those for the Community Right to Buy. However, community bodies that cannot meet AT eligibility requirements can apply for Ministerial designation: bodies which have constitutions meeting CR2B requirements have been designated by Ministers as eligible to use the AT provisions.

An asset transfer request (ATR) must be in writing, giving contact details and constitution of the CTB, specifying the land that the ATR relates to, whether it is for ownership, lease or other rights in the land and the price or rent that the CTB is prepared to pay.

It must give reasons for the request, describe how the CTB proposes to use the land, specify the benefits that will arise if the authority were to agree to the request, outline how proposals will be funded and describe the level and nature of community support.

The level of detail required should be proportionate to the scale and nature of the request; the RA may refuse a request if it does not feel it has sufficient information on the proposals but the CTB should always be given the opportunity to supply any missing information.

In assessing the benefits of an ATR, the RA must consider whether the proposals will promote or improve economic development, regeneration, health, or social or environmental wellbeing, or reduce inequalities of outcome which result from socio-economic disadvantage. It will also consider the benefits of the community body's proposals against any other proposals, including continuing the current use or sale on the open market, and how the ATR would affect the delivery of the RA's functions.

Unlike CR2B, which uses an independently assessed market value, Asset Transfer allows the CTB to say how much they want to pay. If the price offered is less than the market value, the RA must consider whether the proposed benefits justify the proposed discount.

The Scottish Government guidance describes the "Best Value" framework under which discounts should be assessed but there is no set methodology for their calculation. The discount requested should be based on the financial value of the additional public benefits that will be delivered from the specific project, rather than simply claiming a standard percentage off the market value.

The Act prescribes **timescales** (which can be extended by mutual agreement) for elements of the process:

- when the RA is satisfied that all required information has been provided, they will send an acknowledgement, including the "validation date".
- the RA has 6 months from the validation date to assess and issue a decision notice.
- If the CTB does not agree any part of the decision notice they have 20 working days to request a review or appeal.
- The CTB has 6 months from the decision notice to submit an offer.
- There is then a further 6 months for the transfer to take place.

The Act includes a **review and/or appeals process** (this varies according to the type of public body involved) to ensure fair and equitable consideration by an independent party should disputes arise. A CTB can seek a review or appeal if:

- the request is refused;
- the request is agreed, but the terms and conditions in the decision notice are significantly different from those in the request; or
- no decision notice is issued within the required period.

Part 5 came into force on 23 January 2017. A considerable number of ATRs have been made, with several approvals and transfers of assets however no overall statistics are yet available.

## **Forest Enterprise Scotland CATS**

Between 2006 and 2016 Forest Enterprise Scotland (FES) operated the National Forest Land Scheme (NFLS), which gave eligible community bodies, Registered Social Landlords and NGOs the opportunity to buy or lease national Forest Estate Land whether or not FES was seeking to dispose of it. There were 29 community acquisitions, 11 sales of land for affordable housing and several leases for renewables projects made through the scheme, which is seen as an important predecessor of the Asset Transfer provisions.

Forest Enterprise Scotland (FES) has developed a Community Asset Transfer Scheme which follows the statutory provisions of the Community Empowerment Act but adopts some of the practices of the NFLS. Key features of the scheme include:

- A dedicated team to manage the scheme, providing a single point of contact for applicants and coordination between various parts of FES.
- An independent panel of seven with a wide range of relevant experience to assess a project's impacts and benefits and make recommendations to the FES Chief Executive.
- An up-to-date website with detailed guidance and records of past and current requests.

As part of the assessment process, one of the panel will visit the group and woodland: this is an opportunity for a group to help the panel understand their proposal and for any doubts or challenges to be discussed and addressed. The panel evaluate requests against key criteria:

- Benefits;
- Viability;
- Community and wider public support;
- Impact on management of the National Forest Estate.

A major driver of community acquisition, under both the NFLS and CATS, has been FES disposals under what is now known as the New Woodland Investment Programme. When assets are identified for sale, community bodies are given the opportunity to submit a

request to purchase before the land is offered for sale on the open market.

At the time of writing (Feb 2019) there have been 12 ATRs to FES: 9 have been agreed, 1 refused - pending the outcome of a review - and 2 are awaiting a decision. 3 transfers have been completed: it typically takes 7 – 10 months from the decision notice to complete a transfer although there may be cases where unexpected legal issues or fundraising difficulties cause delays.

## **Project Development**

Whichever route to ownership (or lease) a community group employs, there are some key questions that need to be addressed during the project development phase.

### **Objectives**

- Why & what are you hoping to achieve?
- Who will benefit and how?
- Phasing? What order?
- Is this an appropriate piece of land (type, scale)?
- Why community ownership?

Individual community groups need to be able to effectively articulate the specific objectives and public benefits of their project to FES, to funders and to their communities. The community's plans should be commensurate with the land which is to be bought or leased, where a group has multiple development projects it should show which will be delivered in the short term and which are more aspirational.

### **Capacity**

- Do you know what you're getting in to?
- What's your decision-making structure?
- Who will manage the forest / other projects?
- Do you know where to get external advice?
- Do you have partnerships or relationships with the private sector?
- Do you understand the regulatory processes and constraints?

Managing a forest is a complicated and long-term business and it's critical that potential

community woodland owners / managers understand what will be required, know what they can deliver in-house and have thought through how, and from whom, they will buy-in the specialist skills they need.

### **Community Support**

- How will you evidence community support for your proposals?
- How has the community been involved in the development of the project?
- Is there demand for the outputs of specific projects (woodfuel, housing, health, etc.)?
- How will you ensure on-going support and involvement?

It is essential that the wider community has opportunities for involvement at all stages of project development and implementation, and that any significant concerns are addressed. There are many ways to engage with the wider community and it's usually best to employ a variety of methods to ensure as many people as possible are reached.

### **Finance**

- How much will it cost? (acquisition, ongoing management, additional projects)
- Where will the money come from?
- How will you manage cashflow?
- Business development: market info? consideration of potential displacement?
- How interdependent are your various projects?
- Discounts (AT only): how will you value the public benefits you deliver?

Groups must show that they have a good understanding of the costs of their proposals and the anticipated income sources. All ATRs should have a business plan; even for small projects it is useful to set out proposals and explain how initial and ongoing project costs will be funded. For significant land purchases, plans should cover the process of acquisition and financial management, setting out budgets and funding sources for the first three to five years, with an outline of costs and income for up to 25 years for larger projects.

### **Guidance, support and resources**

#### **Community Right to Buy:**

[www.gov.scot/publications/community-right-buy-guidance-applications-made-15-april-2016/](http://www.gov.scot/publications/community-right-buy-guidance-applications-made-15-april-2016/)

#### **Community Right to Buy Abandoned, Neglected and Detrimental Land:**

[www.gov.scot/publications/land-reform-scotland-act-2003-part-3a-community-right-buy-abandoned-neglected-detrimental-land-full-guidance/](http://www.gov.scot/publications/land-reform-scotland-act-2003-part-3a-community-right-buy-abandoned-neglected-detrimental-land-full-guidance/)

**Scottish Government Asset Transfer Guidance** (for Relevant Authorities and Community Bodies): [www.gov.scot/policies/community-empowerment/asset-transfer/](http://www.gov.scot/policies/community-empowerment/asset-transfer/)

#### **Forest Enterprise Scotland Community Asset Transfer Scheme:**

[www.scotland.forestry.gov.uk/managing/get-involved/community-asset-transfer-scheme](http://www.scotland.forestry.gov.uk/managing/get-involved/community-asset-transfer-scheme)

**Community Woodlands Association** (advice and support for community woodlands):

[www.communitywoods.org](http://www.communitywoods.org)

**Making Local Woods Work** (advice, tools and resources for woodland social enterprises):

[www.makinglocalwoodwork.org](http://www.makinglocalwoodwork.org)

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