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By email



**Comments by the Scottish property federation on the Local Government & Regeneration Committee's call for Stage 1 Evidence – the Community Empowerment Bill**

**Introduction**

1. The Scottish Property Federation (SPF) is a voice for the property industry in Scotland. We have some 150 corporate members with interests in Scottish real estate including; property funds, major institutional investors, lenders, developers, landlords of commercial and residential property, and professional property consultants and advisers.
2. We are pleased to submit comments to the Local Government and Regeneration Committee on the Community Empowerment Bill. We recognise that our views will be made public and shared with other authorities at the Committee's discretion.

**General Comments**

3. The Scottish Property Federation supports the principle of greater community engagement, empowerment and involvement in the delivery and use of local community assets and services. We believe it is important that communities are properly represented and that due processes, safeguards of property rights and checks by local authorities or Ministers applied where necessary. It is crucial in our view that major investment is supported and not frustrated. In particular, we are keen to ensure that the Bill does not interrupt or disable the many positive and important partnerships and joint ventures achieved by public authorities, or publicly supported authorities, that have been established with the aim of securing development and investment, jobs and regeneration in major urban areas of Scotland such as the east end of Glasgow.
4. On this last point we assess that the Bill has evolved over the past two years to ensure that public authorities and Ministers have a right to reject proposals for Community Right to Buy (CTRB) and Asset Transfer. This will be an important safeguard for their private sector partners engaged in joint ventures or similar arrangements. Notwithstanding this progress we feel there remain a number of publicly supported bodies who are outside this zone of protection, such as Urban Regeneration Companies (URCs) and we would like to see this rectified. Similarly, we believe uncertainty remains regarding the status of assets previously compulsorily purchased by public authorities yet subsequently unused and therefore potentially subject to CRTB or Asset Transfer applications. The Crichton

Down rules would suggest that the previous owners should remain entitled to a first opportunity to re-purchase these assets but we see no clarification of this position within the Bill or its supporting documents.

5. We believe that the government may also have underestimated the extent of complexity that may be involved with the CRTB and additional asset transfer powers being extended to urban areas. We suspect that questions of ownership and interests over land will prove to be much more complicated with much higher values involved than has hitherto been the case where CRTB has been invoked under the existing 2003 powers. We comment on this further under paragraph 12.

### **Questions**

**To what extent do you consider the Bill will empower communities, please give reasons for your answer?**

6. The Bill significantly expands the scope and extent of community empowerment in Scotland. The current restriction on Community Right to Buy to communities of 10,000 or less will be replaced by a provision extending this right to all communities across Scotland. In addition, new powers to participate in the provision of local services or to initiate asset transfer of public sector land and property to a community group is enabled. CRTB is also extended to include 'abandoned' and 'neglected' land within its parameters. In addition the Bill continues to enable Scottish Ministers to support processes for community right to buy financially, relieving some of the financial burden of the processes involved.
7. Beyond the property aspects of the Bill (CRTB and Asset Transfer) there are also significant provisions for the inclusion of community bodies within the community planning partnership process. This requirement may impose significant demands upon local authorities. It could however feasibly lead to greater community involvement in local decision-making than the enhancements to ownership and rights to property powers (CRTB and Asset Transfer) that the Bill bestows.

**What will be the benefits and disadvantages for public sector organisations as a consequence of the provisions in the Bill?**

8. Public sector landowners will be subject to the same provisions as private landowners in relation to community right to buy. There is an additional right for community bodies in relation to asset transfer although the revised Bill includes safeguards for Ministers and local authorities to reject a request for asset transfer of their assets. Other public authorities will not have this power of veto and therefore will be subject to appeal by a community body even if they initially reject a request.
9. It is possible that one benefit would be to encourage a community group to take responsibility for an asset that has lain unused for some time and has no alternative or better use or value to that which a group might propose. Disadvantages could include the potential loss of valuable sites earmarked for investment or development, or the potential loss of interest in sites by the development community as a result of perceived due diligence issues. For example, where the risk that land earmarked for development

will become subject to CRTB/Asset transfer rights deters a developer from pursuing their interest in a site.

10. Our members have questioned the relationship between the Bill's provisions for CRTB and the application of the Crichton Down rules, whereby a public sector asset that may have been compulsorily purchased must be offered to the original owner if the public authority decides the land is surplus and therefore moves to sell the asset for a different purpose to that which the land was originally purchased for. Scottish Ministers have produced a Planning Circular (5-2011) which explains the obligations of public authorities in relation to the disposal of surplus land previously subject to CPO yet the Bill is silent on this issue and it would be helpful to see some clarity from the Scottish Government in relation to this aspect of the CRTB process. It seems to us that this is a matter of public law which the government cannot simply ignore.

**Do you consider communities across Scotland have the capabilities to take advantage of the provisions in the Bill? If not, what requires to be done to the Bill, or to assist communities, to ensure this happens?**

11. The example of a number of Development Trust projects across Scotland suggests that communities are certainly able to take on projects successfully. The sustainability of successful applications will inevitably be on a case-by-case basis to see if the appropriate case has been made for the asset in question. However, there is already significant government support for the development trust association (Scotland). This could be further improved and made ready as a vehicle to advise aspirant community groups before they embark upon what could be complicated arrangements for CRTB or Asset Transfer under the much more expanded scope of this Bill.
12. Each case will clearly need to be decided on its own merits and it will be important for the Scottish Ministers to be appropriately advised. We would welcome any clarification the LGR Committee might be able to secure from the Scottish Government about its intentions regarding resourcing the Community Empowerment section within the Scottish Government. Hitherto the demand for CRTB has been limited by the extent of the 2003 statute and therefore the resources required by the government have been relatively minor. This must be expected to change radically with the expansion of the CRTB and Asset Transfer powers to cover all communities in Scotland, regardless of size. Not only is the scope much wider but we believe the complications involved with delivering the due process involved with CRTB can be extensive. In discussion with one developer it was explained to us how even in the case of one building this can involve tracing owners and trustees from around the world and ensuring that due notice is provided and legal rights respected.
13. Property investment and redevelopment is a capital intensive business and the maintenance and rejuvenation of listed buildings in particular may add to this cost. Even without the community empowerment measures some local authorities have been actively encouraging the creation of community trusts to take charge of disused buildings which could play a positive community role. The motivations for this may be to try and divest the authority of financial burdens and liabilities but the ability of community groups to take advantage of this willingness to make such assets available to community groups

has not always been forthcoming. The appetite for taking on major liabilities such as old buildings for the purposes of regeneration may be less than expected.

14. This begs the question of what happens to a community group asset where the group ceases to exist or is unable to continue to function. It appears to us that the asset will fall into the ownership of Scottish Ministers, or authorities, who may find themselves burdened with unexpected liabilities and responsibilities that are not budgeted for.

**Are you content with the specific provisions in the Bill, if not what changes would you like to see, to which part of the Bill and why?**

15. The Bill has been amended since its original incarnations but a number of outstanding issues remain to be considered.

*Appeals – Community Right to Buy (Part 4)*

16. Our understanding is that a community body will be able to re-apply for asset transfer or CRTB within two years of a previous failed application. We would like to see the Bill specify that such re-applications should not occur within two years of the Minister's Notice of a decision. With CRTB enabled for up to 8 months it is in our view important to ensure there is significant gap between CRTB applications in order to avoid unfair delay and restriction upon the landowner.
17. We are also keen to see further clarification of the obligations upon land and property owners in relation to notification of intention to sell land or property. Commercial property sales will frequently be unadvertised in order to protect commercial sensitivity. Does the Bill really require, where a major property asset is set for sale by its investors, that they should notify all communities within their area and be forced to wait 8 months before being able to dispose of the asset or seek permission from Scottish Ministers if a sale is achieved (as it would be) within 8 months?
18. We do not think that it is the intention of Ministers to interfere in the normal workings of the Scottish commercial property market through the Bill but it would be helpful to see some clarification within the legislation in order to prevent any future misuse of the CRTB powers. The legislation is far too open to interpretation in this light and needs to be tightened.
19. The government could consider introducing a *maximum* valuation, say of £500,000, above which CRTB could not apply. In reality this would simply clarify market reality as few community groups would be able to participate in purchases of valuable commercial land (however see our later comments on the beneficial ownership of companies limited by guarantee). While we accept this could be done via secondary legislation it would be better to be achieved via primary legislation.

*Duty to provide information under CRTB – commercial confidentiality*

20. We are concerned to ensure that where landowners provide information to Ministers that such information as is deemed to be commercially confidential is not publicly available. This might include the relative value of a property company and its land-holdings and the related impact of these holdings on their funding facilities for example. The recent

recession demonstrated the sensitivity of changes in valuation to the survivability of a property company and we would not wish to see CRTB as a trigger for companies to be put into administration (which would in addition potentially complicate the CRTB process). There is already a power for a community body to ask for information to be not made public in relation to a register of Community Interests in Abandoned or Neglected Land (S48(97F)(3)), so this request for commercial confidentiality does not appear to be against the spirit of the Bill.

21. We are aware of concerns raised by members and other organisations about the imposition of costs on the landowner to cover the expenses of the government-appointed valuer, in the event of land being withdrawn from sale because of a CRTB notification. A withdrawal of sale may occur for reasons other than the application of a CRTB. It will be important for Scottish Ministers to exercise discretion where expenses are charged.

*Proportion of ballot required for a valid application – S36*

22. We note the 2003 Act is amended so that it is no longer required that more than half of the balloted community support the intention to CRTB. This is now replaced in S36 (a)(i) by simply a majority of an undefined proportion. However the Bill expands the scope of CRTB to more heavily populated communities than under the 2003 Act so if anything the concern that a relatively small number of people may initiate a CRTB is if anything increased. It will be important that the proportion is not set at a level that would undermine the credibility of a community body.

*Abandoned or Neglected Land (S48)*

23. We remain concerned with the potential scope of the CRTB measures and the notions of abandoned or neglected land. In the first instance these are subjective terms, so government guidance will need to be definitive and consequent decision-making robust. Of greater concern is the possibility that applications for land by community groups based on grounds of abandonment or neglect when in fact the land in question is part of a complex development process that could take many years to unfold. For complicated mixed used development schemes this length of time is not unusual and the land itself may be comprised of several smaller plots or existing buildings which may form an important part of the whole value of the site. This wider picture could be important for the landowner or the investors behind a scheme and we feel that affiliated land interests ought to be a consideration for Ministers in deciding the merits of an application for transfer to a community transfer body. Although we acknowledge that the landowner will have the ability to make representations about the assessment of value under S48 (97S) we would like to see it specified that these factors should be taken into consideration by Ministers in making their determination. Any uncertainty caused by land being subjected to applications for CRTB, or asset transfer if the asset is in public hands, will prejudice this process and will make investors more reluctant to take on such sites or to invest significant sums in the development process.
24. Neither does the legislation clarify the position of applications for land that might be the subject of a CRTB application on the grounds of abandonment or neglect when in fact the land is owned by an entity which is in administration or other insolvency process with the land. This could in itself result in inevitable delay but absolutely does not mean the land is abandoned or neglected. There are numerous examples of this in towns and

cities throughout Scotland with land possibly 'owned' by banks as the senior debt lender or other creditors. This situation does not appear to be considered in the Policy memorandum, the Bill or its Explanatory Notes and we feel it is important that there is appropriate and clear policy in relation to this issue. Indeed the relationship between a developer and their funders, onward investors and any pre-completion lease agreements are also issues which we believe it would be important for Ministers to be aware of in the context of making a decision over abandoned or neglected land.

25. The Bill is silent also on the issue of what happens when a successful CRTB for abandoned or neglected land does not deliver the re-use of a building within a reasonable period of time. Surely Ministers do not intend that a successful community transfer body should then not be required to deliver their state-aided purchase for community benefits, or should be able to sell it on for some other use for a profit? Again we see no account taken of this issue.

*Companies Limited by Guarantee – S48*

26. The Bill expands the definition of the 2003 Act to include charities regulated by SCIO as well as companies limited by guarantee. In addition it is required that the community body should be comprised of 20 persons (or less depending on S48 (97D)) and that the body should be connected to the local area. The definition of 'connected' has been specifically watered down from the term 'substantially connected' for reasons we do not perceive and we believe this could be considered by the Committee. In addition the legislation requires that the individual members of the Board may have the liability of its members limited to such amount as the members undertake to contribute to the assets of the company in the event of it being wound up'. This suggests unequal interests will be allowed in the company and the extent of individual contributions to the community body may be an issue to be considered under subsection (4) where Ministers have to be satisfied as to the intentions of the community body.

*Option agreements and other interests relevant to the land – S32*

27. We were concerned during the consultation process at the prospect of option agreements not being respected in the process of CRTB. The consultation appeared to recognise this concern and support the view that option agreements made by investors should be respected. We welcome the government's decision to introduce S32 although we believe that other pre-agreed rights over the land that may be extent between the landowner and a third party should also be considered by Ministers.

*Asset Transfer - notifications*

28. We would wish to see some form of public notification upon a request for a public sector asset or leased asset to be transferred to a community transfer body. We would certainly wish to see a requirement for interested parties in the asset to be notified that a request for asset transfer is outstanding – not to do so could cause significant cost to interested parties in the site.

*Rights of third parties with interests in land subject of asset transfer request – S55*

29. We believe it is important for the position of third parties with interests in land that may be the subject of an asset transfer request to make representations to the authority or seek appeal to Ministers. There is significant scope under S55 for authorities to reject a

request for asset transfer but the rights of other parties are not specifically covered other than by implication and even in the event of an authority being obliged to compensate a third party for the effective loss of the asset due to asset transfer it is not certain that this would support an ability to refuse the request.

#### *Asset Transfer – leased properties*

30. We seek clarification whether assets leased – even if not used – by a public authority from a private owner are within the scope of this Part of the Bill. If so that would have significant issues for the owner who might see their asset transferred from a strong public sector covenant to a much weaker community body covenant, possibly also seeing the use of the property changed with little or no consent.

#### *Position of ALEOs and URCs*

31. We are particularly concerned with the position of local authority ALEOs (Arm's Length External Organisations) and URCs (Urban Regeneration Companies) within the context of the Community Empowerment Bill. Clyde Gateway and other URCs have worked tirelessly and with a major degree of success to regenerate areas of abandoned, neglected or simply vacant and derelict land: this is requiring a significant effort to attract private investment and indeed public sector occupation. Clearly, in the case of URCs there has been substantial public resource put towards these regeneration initiatives and we find it bizarre that they should not have the same rights as local authorities in relation to rejecting applications for CRTB and asset transfer. If anything this underlines our view that there should be a maximum value level above which CRTB and Asset Transfer applications should not be eligible.

### **Other Areas of the Bill**

#### **Part 1 National Outcomes**

32. Our only remark in this area is to ask how these statutory national outcomes will reconcile to the democratic process and the Scottish Parliament's electoral cycle in particular? It would seem odd if a party(ies) is elected to government on a particular mandate but then finds it is left with a series of national outcomes that are contrary to the electoral mandate it had just secured. It may be better to stipulate that national outcomes will be set at the onset of each parliament, as proposed by the government of the day.

#### **Part 2 Community Planning**

33. The committee will know that one of the major changes to the Scottish Planning Policy passed earlier in the year is the requirement for development plans to have regard to the proposals of community planning partnerships. This Bill's requirements go further with a broader definition of community planning and engagement in the planned delivery of local services. Local authorities are in the best position to comment on the extent of this engagement but it will be important to ensure as with all other aspects of the Bill that community groups are appropriately representative of their communities.

34. Under S5 the Bill requires that every community planning partnership 'must' prepare a local outcomes improvement plan. This could impose considerable support costs on a

local authority and the community bodies that may make up the partnership. In many ways the requirements of this part of the Bill offer many challenges for local authorities and we will be interested to see the response of COSLA to the proposals. The stipulation of an annual report by the community planning partnership in particular is one that we fear will prove difficult to deliver consistently.

#### **Part 6: Common Good Property**

35. We think this is a good initiative and that it will help to resolve any uncertainties about parcels of land and buildings that are the subject of community speculation or private speculation. We welcome the transparency associated with the proposal.

36. S65 requires local authorities to consult with community groups that the authority knows will have an interest in a particular asset before it is considered for disposal. Again we see no problem with this approach although there may be concerns from some companies about commercial confidentiality in relation to potential purchases of common good assets. We think that the parties to such consultations should be obliged to respect such confidentiality if it is requested.

37. It would be helpful to know how this part of the Bill interacts with the CRTB process. We assume that if consulted and notified of a disposal of a common good asset that the community would be able to initiate a CTRB or an Asset transfer request.

#### **Part 7: Allotments**

38. We have no comments on Part 7.

#### **Part 8: Local Rate Reliefs**

39. During the course of engagement with the Scottish Government at the time of the Empty Property Rates legislation SPF highlighted an example of partnership working with landlords by Manchester Council, whereby the Council and local landlords contributed to rates support for businesses seeking to start up in their locality. Our members continue to highlight the burden of rates which can far outweigh rental values in many parts of Scotland and as a consequence are a major burden on start-up businesses and entrepreneurs. We support partnership arrangements and initiatives to alleviate this burden and therefore we support this part of the Bill.

#### **What are your views on the assessment of equal rights, impacts on island communities and sustainable development as set out in the policy memorandum?**

40. The Bill clearly impacts on property rights and this is recognised in the policy memorandum. The government argues that it interprets Article 1, protocol 1 of the ECHR as relating to rights that are not absolute and that the 'use of property can be controlled where it is in accordance with law, justified in the public interest and is proportionate'.

41. We have no comments on this interpretation but would add the caveat that while it may well be right - and indeed the processes of compulsory purchase orders proves that this is not a new concept - then the government would also wish to maintain the high regard



for property rights that is enjoyed in Scotland and the wider UK. Because of the differing member state interpretations of the ECHR Article 1, protocol 1 this cannot always be said to be true of all EU members' and a number of UK citizens have indeed found this to be the case to their cost. It is important therefore that robust and transparent processes are formed where CRTB or asset transfer (or CPO for that matter) is involved and that proportionate and fair compensation is enjoyed by owners whose assets are compulsorily transferred to a community transfer body.

42. We find it bizarre that no mention or statement has yet been made by the Bill team or Ministers in relation to how the Bill interacts with the Crichel Down rules. The Crichel Down rules relate to the position whereby land that has been compulsorily purchased and is later to be disposed of by the relevant public authority. The rules stipulate that where this is the case the authority must first make an offer for the land in question to the former owners. CRTB and asset transfer (which is for sale or lease) process will clearly impact on the Crichel Down rules where an asset is the subject of State-enabled compulsory acquisition, yet we have seen no mention of this in the consultation or the policy memorandum. We ask the committee to seek to clarify the relationship of Crichel Down with the Bill as soon as it can during the process of parliamentary scrutiny. To fail to do so may be to set the Bill's procedures up for challenge on grounds of wider public law principles.

43. The SPF would be pleased to answer any further enquiries from the Committee at its convenience.

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