

Gamescleuch Forest and the Ettrick Marshes:

Report of the Independent Panel

Panel:

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Support:

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Contents

Abbreviations	Page 3
Terms of Reference	Page 4
Executive Summary	Page 5
Introduction and Background	Page 7
Discussion	Page 11
Conclusions and Recommendations	Page 24
Final Recommendation	Page 31
Appendix (Map)	Page 32
Acknowledgements	Page 33

Abbreviations

ATR – Asset Transfer Requests

CE – Community Empowerment

EYCDC – Ettrick and Yarrow Community Development Company

FCS – Forestry Commission Scotland

FES – Forestry Enterprise Scotland

NFLS – National Forest Land Scheme

NGO – Non Governmental Organisation

RA – Relevant Authority

SG – Scottish Government

The Act – The Community Empowerment (Scotland) Act 2015

The Panel – The Independent Panel appointed by Scottish Ministers to report, conclude, and make recommendations to Ministers on the case.

Terms of Reference

A report submitted to Kevin Stewart MSP, Minister for Local Government and Housing, in fulfillment of the Scottish Government's legal obligation to fully consider reviews made under section 87(2) of the Community Empowerment (Scotland) Act 2015.

Executive Summary

- FES's assessment at the time was that the benefits of the asset transfer request did not exceed the impacts on management of the National Forest Estate, taking into consideration the risks that the benefits will not be delivered and of increased negative impacts resulting from the proposed forest management plan.
- FES argument appears predominantly based on their doubts over EYCDC's ability to manage the site.
- EYCDC shared the FES initial decision with their members who had widespread disbelief that it could have been rejected on the grounds given. They were disappointed that FES moved to refusal rather than asking for more information.
- EYCDC feel they have not been properly listened to by FES and that FES do not fully understand their plans. They have many good ideas for the site that could potentially greatly benefit the site and also the community.
- Although communication started out positively with both parties, this appears to have broken down somewhere. It appears to the Independent Panel that procedural issues are at the heart of the communications difficulties in this case. FCS, for many years, operated the National Forest Land Scheme, which was a voluntary scheme without statutory time limits, and there was time for much discussion between the parties on an informal basis. This process must now adhere to the set asset transfer legislation timescales.
- The Panel felt that there is a question of what are Scottish Ministers requirements for the site? Do Ministers wish to put this particular area of forest into community control, or do they wish to harvest/ manage the trees for economic reasons?
- There is therefore the question of community empowerment and the needs of forestry management to consider. In the opinion of the panel, there is no reason why these two requirements should be incompatible with one another.
- On considering their recommendations to Scottish Ministers, the panel looked again at the decision made by FES on 03 November 2017 and considered this decision for themselves, taking into account the evidence and information provided by EYCDC to FES at the time, the evidence and information received from all parties since then, and other factors such as the site visit and the panel's own reflections.
- They then decided that Scottish Ministers should overturn FES's decision to refuse the application by EYCDC and instead grant the application from EYCDC to purchase 173 hectares of Gamescleuch Forest and the Ettrick Marshes from Scottish Ministers.

Summarised Process

On 26 June 2017 Ettrick and Yarrow Community Development Company (EYCDC)¹ submitted an application to purchase 173 hectares of Gamescleuch Forest and the Ettrick Marshes (Scottish Borders) from Forest Enterprise Scotland (an agency of Forestry Commission Scotland)² under Part 5 of the Community Empowerment (Scotland) Act 2015, which concerns asset transfer requests.

Forest Enterprise Scotland (FES) acting on behalf of the Scottish Ministers refused the initial request from EYCDC on 3 November 2017. FES's assessment based on the evidence presented at the time was that the benefits of the asset transfer request did not exceed the impacts on management of the National Forest Estate, taking into consideration the risks that the benefits will not be delivered and of increased negative impacts resulting from the proposed forest management plan.

EYCDC expressed disappointment that their community project could have been rejected outright on the grounds given. They felt that in some cases the comments were simply wrong and unfounded, and that others indicated to them that FES simply did not understand their proposal, possibly due to the nature of the process.

EYCDC subsequently applied for a review from Scottish Ministers, wishing to point out where in their view the assumptions made by FES were false and where there has been a failure to understand the benefits of the proposed community purchase.

As per Section 87 (1) (b) (i) and Section 87 (2) of the Community Empowerment (Scotland) Act 2015³, the Scottish Government formed an Independent Panel to review the asset transfer of Gamescleuch Forest and the Ettrick Marshes on behalf of the Scottish Ministers, and to report to them in fact and conclusion of the evidence of the case. The panel had to revisit the original decision made by FES and establish whether this was the correct decision given the evidence available to them at the time. The panel also had to consider subsequent evidence provided by EYCDC, FES, and the interested parties connected to the case. Finally, the panel had to consider the case as a whole, taking into account all evidence available to them to date, including meetings with all parties connected to the case, and a site visit.

This report will aim to capture the findings of the panel, exploring the reasons and rationale for FES's refusal of the initial request, EYCDC's response to this refusal, and the information subsequently received from both FES and EYCDC since November 2017. The report will attempt to pull all this together and offer conclusions and recommendations for consideration by the Scottish Ministers based on the facts and evidence presented.

¹ <http://www.ettrickandyarrow.org.uk/>

² <https://scotland.forestry.gov.uk/managing/who-manages>

³ <http://www.legislation.gov.uk/asp/2015/6/section/87/enacted>

Introduction and Background

Introduction

Part 5 of the Community Empowerment (Scotland) Act 2015 (Asset Transfer) introduces a right for community bodies to make requests to all Local Authorities, Scottish Ministers and a wide list of public bodies, for any land or buildings they feel they could make better use of. They can request ownership, lease, or other rights as they wish. The Act requires those public authorities to transparently assess requests against a specified list of criteria and to agree the request unless there are reasonable grounds for refusal.

The Act aims to ‘provide a framework that will empower community bodies through the ownership of land and buildings and strengthen their voices in the decisions that matter to them.’

The Act makes provision for a community group (known as a community transfer body) to seek a review by the Scottish Ministers in cases such as with EYCDC where their request is refused. In cases such as these, Scottish Ministers under Section 87 of the Act can consider such review, and either confirm the original decision, modify this decision, or change the decision.

Many communities in Scotland have already taken on ownership of assets, from public sector or private sellers. Many local authorities, and some public bodies, have operated successful asset transfer schemes, mainly in relation to property they have identified for disposal.

Gamescleuch Forest and the Ettrick Marshes

Gamescleuch Forest including the Ettrick Marshes lies in the upper Ettrick Valley about 17.5 miles from both Selkirk and Hawick. Gamescleuch Forest covers an area of 477 ha in total and has been established on the hillside of what were two adjoining hill sheep farms, Gamescleuch and Deephope.

The forest is owned by the Scottish Government and is managed by Forest Enterprise Scotland, an agency of Forestry Commission Scotland. It has a single point of access via a weight carrying bridge and a locked barrier. The part of the property known as Ettrick Marshes comprises floodplain marshes (41.5ha), mapped open ground (25.9ha) and broadleaves (11.9ha).

A map of the area can be found at [Appendix 1](#).

On 26 June 2017 EYCDC submitted an application to purchase 173 hectares of Gamescleuch Forest and the Ettrick Marshes (Scottish Borders) from Forest Enterprise Scotland (an agency of Forestry Commission Scotland) under Part 5 of the Act.

Aims of the Report

The aim of this report is to provide Scottish Ministers with all the necessary evidence to make their decision. This evidence will be gained from written representations from EYCDC and also from FES, written representations from interested parties i.e. local residents who made representation at the time of the original asset transfer request and therefore were kept in mind and asked to comment as the review progressed, face to face meetings on site with EYCDC and FES, observations gained by the independent panel from visiting the site, and the panel's own personal reflections and discussions.

The report will set this information out, and pull together these findings into the conclusions of the independent panel. The panel will further offer recommendations based on the facts and findings of the case for the Minister's consideration. The recommendations of this report are separate from but very closely related to the findings of the report in fact.

Scottish Ministers may allow the review or dismiss it. If they allow it, they must issue a notice to the community transfer body and the relevant authority setting out details of the terms and conditions of an offer which the community transfer body may make to the relevant authority in relation to the asset transfer request, and the date by which any such offer is to be made. In effect, the Scottish Ministers will write the contract which they expect the parties to agree.

Role of the Independent Panel

If an Asset Transfer Request has been refused (as in this case), the community transfer body can appeal to the Scottish Ministers under section 87 (2) of the Act. Procedures for such reviews are set out in the Asset Transfer Request (Review Procedure) (Scotland) Regulations 2016.⁴

The Scottish Ministers must appoint a panel of three people to consider the review and report back to Ministers on their findings and recommendations. The panel is to be appointed from a pool of people with appropriate experience in relation to community asset transfer and property contracts; no more than one of them may be a civil servant. Scottish Ministers will make their decision on the outcome of the review having regard to the panel's report and its recommendations. Ministers will confirm the decision, modify this decision, or change the decision.

Gamescleuch Forest and the Ettrick Marshes review is the first review the Scottish Government has received since the new AT legislation came into force. For purposes of transparency it was decided to recruit a wholly independent panel to carry out the review, supported by officials from the Scottish Government Community Empowerment Team.

⁴ <http://www.legislation.gov.uk/ssi/2016/358/contents/made>

Careful consideration was given to seeking the necessary knowledge and experience required to carry out the review, and a gender balance was also sought.

The panel is responsible to report their findings to Scottish Ministers in fact and conclusions in respect of the asset transfer request. This will include the facts of the case and also the conclusions which the panel has drawn. The asset transfer request is likely to present some information as being factual and, if relevant to the recommendations, the report will aim to set out what view the panel has taken of the factual position. Some things are not hard facts and may be judgments which the panel has reached based on their consideration of the evidence. These may be referred to as conclusions, making it clear that the recommendation of the panel is separate from but obviously very closely related to the findings in fact. Scottish Ministers need to understand the basis on which the recommendations are made and *potentially* to disagree with the recommendations *and* to be able to do so based on reaching a different opinion based on the same facts and conclusions.

Background

The Report of the Independent Panel emerged from collating and evaluating the various papers received in connection with the review. These being:

- The original decision made by FES on 27 September 2017 and posted on their website on 3 November 2017, alongside accompanying papers (FES Benefits Assessment; FES Evaluation Panel Report; FES Evaluation Panel Scoring Sheet)⁵
- The application for review to Scottish Ministers from EYCDC received on 1 December 2017, alongside accompanying supporting papers (51 papers submitted)
- The views and testimonies of the interested parties invited to submit these as required by statutory arrangements, these being letters from local residents.

The report was also informed by:

- A site visit by the Panel to Gamescleuch Forest and the Etrick Marshes on 23 April 2018 which included separate meetings on site with EYCDC and FES, and an opportunity to tour the areas in question.
- Two local residents who contacted Scottish Government outwith the statutory process to whose views the panel gave consideration.

The Panel considered all the written evidence provided, and also that of the evidence gained during the site visit and meeting with the interested parties while there. This was corroborated with separate time allocated for the panel to discuss amongst themselves and time for reflection.

5

<https://scotland.forestry.gov.uk/managing/get-involved/community-asset-transfer-scheme/gamescleuch-forest-et-trick-marshes>

Discussion

Forest Enterprise Scotland (FES)

FES acting on behalf of Scottish Ministers refused the initial Asset Transfer request from EYCDC on 3 November 2017 stating the following reasons (summarised):

- Business plan is written at high level, with a lack of detail on implementation and outcomes, lack of clear overall vision.
- Main objective is to restore boardwalks to the Ettrick Marshes and improve access for other recreation activities in the forest. Not clear that scale of the asset transfer request is proportionate to delivery of these objectives.
- Revised felling plans will result in potentially increased visual impacts and risk of wind blow. Further evidence of consultation with the community and with Forestry Commission Scotland on the revised felling plans would be necessary.
- Request has not identified adequate resources to deliver the project including: how a forest management plan would be developed; how costs compare with benefits; and how jobs will be created in the community additional to those currently supported by management of the forest.
- The likelihood that additional resources will be required increases the risk that the project is not viable.

FES's assessment at the time was that the benefits of the asset transfer request did not exceed the impacts on management of the National Forest Estate, taking into consideration the risks that the benefits will not be delivered and of increased negative impacts resulting from the proposed forest management plan.

FES stated that they would consider a further request from EYCDC which addressed the reasons for refusal as set out in their decision letter. The community group decided to apply for a review from Scottish Ministers instead. The reasons for this course of action will be explored further in this section of the report.

Ettrick & Yarrow Community Development Company (EYCDC)

With Asset Transfer Requests made to the Scottish Ministers (as in this case), a community group can apply for a review by Ministers, as set out in section 87 of the Community Empowerment (Scotland) Act 2015. The Scottish Government has a legal obligation to fully consider reviews made under section 87(2) of the Act.

EYCDC's application for review was received on Friday 1st December 2017.

There followed a statutory process of acknowledgement and written representations. As part of Scottish Government (SG) statutory requirements, SG published full notification of the review on their internet pages⁶.

EYCDC's stated reasons for review are summarised here:

- They shared the comments and rationale for the initial decision with their members who had widespread disbelief that it could have been rejected on the grounds given.
- They wished to point out where in their view the assumptions were false and where there was a failure to understand the benefits of the proposed purchase.
- They were disappointed the FES evaluation panel and FES moved to refusal rather than asking for more information.
- They believe they have a strong proposition.
- They have taken every stated objection or question and addressed each one in turn.
- Their plan is aligned to the political objective of transferring 1 million acres into community ownership.
- Their board and membership has a depth of relevant land and forestry management experience.

Actions taken by the Independent Panel

Once in place, the review panel considered:

- all review papers already provided to Scottish Government by EYCDC
- all information provided by FES including copies of papers received by FES from EYCDC, and copies of representations they received
- all copies of the representations received by Scottish Government in response to the review.
- Representations received outwith the statutory process (two local residents coming forward)
- Their own discussions and reflections on the case

The panel was first issued with full hard copies of all papers and representations received, and digital versions were made available on request. The panel were allowed sufficient time to digest these, reflect on their content, and discuss.

⁶ <https://beta.gov.scot/publications/asset-transfer-requests-notification-of-review-decision-by-scottish-ministers/>

There followed a meeting between the panel and officials from the Scottish Government Community Empowerment Team to discuss these papers further, and for the panel to consider their next steps.

At this stage and on reflection of the evidence presented the panel felt it was necessary to visit the site and also to meet with the parties involved in order to better understand the various papers presented. A site visit was arranged and conducted on 23rd April 2018 as follows:

9.00 am	Panel met with Malcolm Cowie (Scottish Government) on site to discuss running order of day and expectations of the panel.
9.30 am	Panel met EYCDC on site for 2 hour segment. This involved a meeting with their Board in the nearby Boston Hall, Etrick, a presentation from their Policy Officer, and a land rover tour of sections of the site.
11.30 am	Private reflection time for the panel and a chance to discuss the morning visit.
12.00 pm	Lunch
1.30 pm	Met FES on site for 2 hour segment. This involved a meeting with Sallie Bailey, Forest District Manager, Dumfries and Borders Forest District (Forestry Commission), Rebecca Carr, FES Community Asset Transfer Manager, and John Ogilvie, Planning Manager, Dumfries and Borders Forest District (Forestry Commission), to discuss case, a walking tour of the boardwalk area, and a brief land rover tour of part of the site.
3.30 pm	Finish

It was then agreed by the panel to reflect on the site visit and meeting with the parties involved, and then come together to pull together their findings and reflections from the visit.

Prior to this meeting of the panel on 9 May 2018, concerns about a conflict of interest and lack of transparency were expressed by a local resident and shared with the panel for their information. Statutory guidance states that in cases such as this when evidence is received outwith the formal procedure, the panel can choose whether to accept this or to reject it. In this case, the concerns were considered by the panel, and thus shared with EYCDC, FES, and interested parties for their comment. However, the Panel had already been made aware of the situation and after further exploration and consideration were satisfied that there was no conflict of interest or lack of transparency. These comments were considered by the panel, and reflected into their conclusions, and form part of the final report.

The report itself aims to include the facts of the case and also the conclusions which the panel has drawn. The asset transfer request is likely to present some information as being factual and, if relevant to the recommendations, the report aims to set out what view the panel has taken of the factual position. Some things are not hard facts and may be judgments which the panel has reached based on their consideration of the evidence. These may be referred to as conclusions, making it clear that the recommendation of the panel is separate from but obviously very closely related to the findings in fact.

Scottish Ministers will need to understand the basis on which the recommendations are made and potentially to disagree with the recommendations of this report, and to be able to do so based on reaching a different opinion based on the same facts and conclusions.

The Forestry Enterprise Scotland Case

Forestry Enterprise Scotland (FES) is the agency responsible for managing the National Forest Estate⁷ on behalf of Scottish Government Ministers. They operate ten Forest Districts, managing and maintaining the woodland on the National Forest Estate. FES work includes planting, forest design, harvesting, marketing timber, conservation, working with local communities and organisations, and providing facilities and access for the public.

They have a clearly defined Forest Management Strategy⁸, set out in their three year Strategic Plan which is currently being reviewed.

FES Corporate Plan⁹ sets out through six themes how they plan to deliver public benefits from the National Forest Estate. It also explains how they contribute to the Scottish Government's aim of "creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth". The Corporate Plan document details FES priorities for the period 2017 - 2019.

FES also has specific District Strategies, and their Dumfries and Borders Strategic Plan¹⁰ lays out their vision for the overall area that includes Gamescleuch Forest and the Ettrick Marshes. Their overall aspiration for the Dumfries and Borders area as set out in this plan (page 15) highlights:

- **Healthy** ...achieving good environmental and silvicultural condition in a changing climate
- **Productive** ...providing sustainable economic benefits from the land
- **Treasured** ...as a multi-purpose resource that sustains livelihoods, improves quality of life, and offers involvement and enjoyment
- **Accessible** ...local woodlands and national treasures that are well promoted, welcoming and open for all
- **Cared for** ...working with nature and respecting landscapes, natural and cultural heritage
- **Good value** ...exemplary, effective and efficient delivery of public benefits

FES website promotes their wider Community Engagement programme which encourages the general population to get involved in the decisions affecting the future of the National Forest Estate. The public are encouraged to get in touch by means of consultations, land management plans, events etc.

⁷ <https://scotland.forestry.gov.uk/managing>

⁸ <https://scotland.forestry.gov.uk/supporting/strategy-policy-guidance/forestry-strategy>

⁹ <https://scotland.forestry.gov.uk/images/corporate/pdf/FES-strategic-plan.pdf>

¹⁰ <https://scotland.forestry.gov.uk/images/corporate/pdf/DumfriesBordersDsp2014-17.pdf>

The Forestry Commission Scotland (FCS) previously operated *The National Forest Land Scheme (NFLS)*, which gave community organisations, recognised non-governmental organisations (NGOs), and/or appropriate housing bodies the chance to buy or lease National Forest Land where they can provide increased public benefits.

The NFLS closed to applications on 11 July 2016. At this time, and with the advent of the Community Empowerment Act, FCS developed new guidance for the sale or lease of National Forest Estate land to community bodies through Forest Enterprise Scotland.

FES believe that they have been managing Gamescleuch Forest and the Ettrick Marshes on behalf of Scottish Ministers for many years and have a strong track record of being able to respond to the immediate needs of the Scottish forest estate that they manage. They have a long history of forest management and believe that they have solid infrastructure in place to understand the issues and cope with the challenges that such an estate presents. FES has, they state, a long term vision for Gamescleuch Forest and the Ettrick Marshes which is included as part of their overall Dumfries and the Borders Strategic Action Plan. This includes planting, forest design, harvesting, marketing timber, conservation, working with local communities and organisations, and providing facilities and access for the public. Although FES have been managing Gamescleuch Forest and the Ettrick Marshes for a considerable period, there have been questions raised over their maintenance of the Forest and Marshes and their indications to remove the boardwalks over the Marshes. This has led to members of the local community being so concerned that they have been willing to take action themselves.

FES made their decision not to award an asset transfer of Gamescleuch Forest and the Ettrick Marshes to EYCDC based on the evidence presented to them by EYCDC as of 26 June 2017. FES issued their refusal decision to EYCDC on 3 November 2017, leaving EYCDC until 1 December 2017 to submit an application for review to Scottish Ministers. FES have also raised on various separate occasions with Scottish Government Officials their concerns regarding the statutory procedures of Part 5 of the Act regarding asset transfer, which gives the community group as part of their review request an opportunity to comment to Scottish Ministers on the original decision made by FES, and does not allow FES to do likewise. Officials have recognised this feature of the legislation, and have endeavoured to give FES opportunities to comment on the review, and to make their responses to the independent panel.

The site is currently managed by FES who has raised concerns about EYCDC's ability to manage the site should they be awarded an asset transfer. FES has concerns over EYCDC's ability to respond to such things as arboreal diseases, e.g. Phytophthora which Larch Trees are susceptible to and would require removal and treatment to the site within a short period of discovery. They would then need to be replaced tree for tree as required under forestry agreements. FES have raised concern over EYCDC's infrastructure, and ability to deliver/ manage the site, with an over reliance on perhaps one or two individuals, or the EYCDC Board requiring to be involved in the daily actions of maintaining and managing the site.

FES highlights the requirement for large scale machinery which is needed to be used on the site to manage the commodities present, and that this requires a great deal of capital to buy, upkeep, and to operate – something that may be beyond EYCDC’s ability to deliver. However, it is the Panel's understanding that for an enterprise on the scale of that proposed by EYCDC, it would not be necessary for them to own or operate large scale machinery; for felling, the felling contractors would provide that, and the same would no doubt apply at the thinning stage. Smaller items of machinery, if necessary, could be acquired or leased, and the panel does not see this as being beyond EYCDC's ability.

Materials needed to maintain and replace contentious issues such as the boardwalks traversing the Ettrick Marches would need to be costed and factored in, also working with the relevant experts to explore the most suitable methods of replacement, taking into account public safety and materials durable enough to withstand the environment, and also complementary to the survival of this precious resource.

FES also highlights the perceived difference in understanding of the Forestry Manager role. EYCDC have recognised the need for a Forest Manager and plan to employ someone in this role. They see the role as functionally different to the existing role of Forestry Manager with FES, acting on a smaller economy of scale and remunerated accordingly. FES/FCS have great experience of this role, employing Forestry Managers throughout Scotland, and are aware of the need for someone with the right levels of experience, understanding of the issues, and qualifications to fulfill this role – this would have to be pitched at an appropriate level of seniority to attract a suitable candidate.

The Ettrick and Yarrow Community Development Company Case

EYCDC were established in 2010 to address the concerns, increasingly voiced over a period of years, that changing land use and demographics, particularly at the upper end of both valleys, was leading to question marks over whether people would continue to live and work in these areas. The loss of hill sheep farms to commercial forestry and game birds, high house prices, coupled with the loss of cottages to rent and the falling rolls of the local schools, were all identified as concerns.

Some long-standing services had been lost like the village post office and shop but services regarded as essential now to most of the population, such as reliable mobile phone coverage and broadband, were still not available.

It was recognised that without new families and people of working age staying in the valleys, life for everyone would be less secure in the short-term and possibly unsustainable in future. A number of actions were taken to address these issues and a Community Development Company was formed which allows them to hold property and raise funding to give an ongoing vehicle for some of the schemes identified to help the valleys.

They also believe that FES have not been managing the forest in the most sustainable way, nor have they been managing the marshes to their satisfaction, as evidenced by the FES desire to remove the boardwalk.

They have a good track record of delivering community projects, including:

Renewable Energy Mapping

This was a project carried out in collaboration with the Southern Uplands Partnership (SUP) in 2016.

Its purpose was to identify small-scale renewable energy opportunities – Wind, Hydro and Solar - within the Ettrick and Yarrow Valleys. The approach was to look at a wide range of potential opportunities – exposure and wind speed for wind energy, river gradient and flow for hydro energy, aspect and orientation for solar energy – and test them against an equally wide range of constraints such as planning considerations, environmental impact, amenity and recreation conflicts, construction access, grid infrastructure and connectivity, and local energy demand.

The result of the exercise was a series of maps that indicate those opportunity areas which have the highest potential for further development based on the available renewable resource, access suitability and proximity to the local grid network. The idea was to share this information by making it publicly available so that land owners and the community could explore possible project developments, which was achieved.

The Ring of the Loch Walk at St Mary's Loch

This Project was the Development Company's first significant project. Its aim was to create a walk right round St Mary's Loch in the Yarrow Valley with the aim of attracting more visitors to this spectacularly scenic area, to the benefit of local businesses, hotels, cafes and B & Bs, to enhance those visitors' experience by providing opportunities to visit previously inaccessible areas and viewpoints, and to encourage visitors to explore this little-known part of southern Scotland.

An 11 km route right round the loch was therefore devised. After obtaining approval to the route from all the various landowners and residents around the loch, and being awarded the necessary funding from SSE, the path works were carried out – draining and surfacing existing sections of path, creating new paths to link existing paths, creating completely new sections of shoreline and moorland paths, and installing gates, stiles and bridges. Waymarkers, fingerposts and information boards were made and erected, and a descriptive leaflet and guide to the walk was printed.

The walk was officially opened in August 2015 and has proved to be a huge success.

The Bodesbeck Road – linking the Ettrick and Moffat Valleys

This project explored the possibility of re-establishing this old drove route that had fallen into disrepair as a means of giving the residents of the upper Ettrick Valley access to services in Moffat, and providing easier access for visitors to the valley. Furthermore, improved road links between the upper Ettrick and Moffat – with its proximity to the main Carlisle to Glasgow motorway – would make the area a far more attractive proposition for potential businesses and residents and could help reverse the population decline in this area. Forestry is a major industry in the upper Ettrick Valley and a possible timber extraction route that provided a quick link to the motorway network would also be very attractive to the timber industry.

A feasibility study was therefore commissioned from a consultant specialising in hill road construction to look at possible low-grade routes over Bodesbeck Law, the hill that separates the Ettrick Valley from the Moffat Water. This study concluded that a number of routes were feasible, and established that the Planning and Roads authorities of both Scottish Borders and Dumfries and Galloway Councils were, in principle, supportive.

EYCDC are a well-established community development company with a good track record of community engagement and successful project delivery behind them. Their Board has a wide range of relevant experience including that of forestry management, tree felling, accountancy, rural and farming issues, resource management etc.

They are very enthusiastic about the possibility of taking on Gamescleuch Forest and the Ettrick Marshes and have a wide variety of ideas for the site including (but not limited to):

- Tree felling and replanting/ timber management
- Restoration of Boardwalk areas of the Ettrick Marshes
- Restoration of the public footpaths throughout the site including clearing trees that are blocking paths as a result of wind blow.
- Replacement and updating of the way markers and public information boards
- Creation of Affordable Housing to attract young people to the area
- Walking/ guided tours throughout the site
- Horse riding routes
- Dark Sky tours
- Habitat management
- Traditional skills workshops, such as dry stone diking and path management
- Establish cycle routes
- Save the currently closed primary school by turning it into an exhibition space for celebrated local Scottish poet James Hogg (1770 – 1835)
- Possible introduction of electric bicycles.

EYCDC feel these ideas and more will not only have the benefit of developing the forest in a sustainable manner for forestry and community benefit, but also attracting increased numbers of tourists which will help the local economy and maximise the potential of the area, giving full regeneration to a currently underutilised resource.

Although enthusiastic about taking on the site, EYCDC have indicated that their Board will be hands on at first, involved in the day to day running of the site. This is something that would have to be reviewed, and they would have to plan for a longer term solution to their operation, as ownership requests involving asset transfer require a two tier structure going forward. It would be expected to have a Board sitting separately to a management company, with the Board giving strategic advice and direction, and the management company being accountable to the Board.

There may be a degree of concern that there might be too much pressure on Board members to deliver day to day management activities, and one or two members of staff may be overwhelmed with tasks expected to be completed. This approach does not account for contingency arrangements to cover illness etc. This points at a possible naivety from EYCDC in their ability to deliver, and they may have to give greater consideration to staffing needs and planning.

EYCDC cited communication difficulties with FES, and although communication started out positively with both parties, this appears to have broken down somewhere. An indicator of this is the amount of documents submitted for the Scottish Ministers review from EYCDC (51 documents). They mentioned to SG officials that they did not know what FES required, and had they known, they would have submitted more at the time. Scottish Government legislation is clear that when an asset transfer request is submitted, the Relevant Authority must cooperate with the community group clearly stating what is required. The group felt that they were not properly listened to by FES and that FES did not fully understand their plans for the site. EYCDC went as far to say that they felt FES simply did not want to give up the site and they wanted to manage it themselves i.e. to extract profit from it.

It appears to the Panel that procedural issues are at the heart of the communications difficulties in this case. FCS, for many years, operated the National Forest Land Scheme, which was a voluntary scheme without statutory time limits, and there was therefore time for much discussion between the parties on an informal basis. However, under the Act, FES must now meet the statutory timescales, and should follow Scottish Government (SG) Guidance.

Paragraph 8.24 of the SG Guidance states that the authority "should advise the community body at an early stage of any negative consequences, and discuss whether these can be addressed or mitigated"; There was no written communication to this effect by FES to EYCDC.

Paragraph 10.4 of the SG Guidance states that "dialogue between the parties should continue throughout the process", and "relevant authorities can request clarification or more detail on any issues which they feel are necessary for their decision. This will help to avoid situations where a request is refused on the basis of a lack of information which the community body could have provided if they had been asked".

Unfortunately, although there were conversations between both parties, the community body never received a formal written communication highlighting those areas where more information was needed, and were thus unaware of the degree of detail which FES expected on some aspects of the Request. The Refusal Notice was issued when it was still open to FES, under paragraph 15.4 of the SG Guidance, to ask for this further information, and at the same time advise EYCDC of a potential delay in issuing their decision, and seek their agreement to an extension of the time period.

Other Factors

1. Local Support

The picture of local support appears mixed from the evidence given by both parties, and that of the interested parties. One of the reasons FES gave for rejecting the application at the time was the lack of sufficient evidence outlining local support.

FES asked EYCDC to provide evidence of community engagement on 26 June 2017. E.g. minutes of meetings with results of votes taken, if any; copies of leaflets / presentations to the community; copies of the articles in the local papers; photos of stands at shows, etc.

EYCDC responded on 17 August 2017 by providing:

- nine full sheets of signatures from local people in support of the application.
- information that they spoke directly to 120 local residents in a five mile radius of the site, and of these 120, 112 signed their petition in favour of the application.
- a photo of an EYCDC community stand was also provided.
- proof that EYCDC physically posted notification of two public meetings to discuss the possible transfer in the actual site as part of the process too.

As part of the review, EYCDC also provided letters of support from:

- Upland Partnership
- Visit Scotland Regional Director
- Scottish Borders Council Convener
- Ettrick and Yarrow Tourism Association
- Economic Development Officer from Scottish Borders Council
- Local Community Council
- Business Gateway
- Foundation Scotland – who awarded a £10,000 grant to EYCDC in support of their application to repair the boardwalks (conditional on EYCDC successfully completing the AT case and receiving funds from the Scottish Land Fund).

FES felt that canvassing methods used by EYCDC to gauge local support were poor, and there is also some evidence from local residents that raise concerns over EYCDC's plans to run the estate.

2. Interested Parties

Interested parties had the opportunity to respond to the review as part of the statutory process. There were four respondents as part of the statutory process, and two outwith the statutory process and the responses were mixed. Three were generally against the asset transfer to EYCDC stating concerns over impact to environment, wildlife, and infrastructure, one against it due to lack of transparency and two were in favour of the asset transfer.

3. Costs

The market valuation of the site in question as at 31 March 2017 was £975,000. EYCDC offered FES £875,000 on 16 August 2017 to buy the site i.e. with a £100,000 (10%) discount. This was subject to EYCDC receiving the £875,000 to purchase from their ongoing Scottish Land Fund application. It was the view of the independent panel that an option for EYCDC could possibly be to forward sell timber (as it is currently at a high price per cubic metre) to raise the value of the discount.

FES point out that it is not just the loss of a site valued at £975,000 that is in question. Other things for them to factor would include the loss of annual timber income, and the displacement/ potential loss of many forestry jobs connected to the site (though any FES jobs lost may well be compensated for by jobs retained or created in the local community itself). Scottish Ministers must therefore carefully consider these additional costs, and the further question of economic functionality of the site.

Conclusions and Recommendations

FES

FES argument appears predominantly based on their doubts over EYCDC's ability to manage the site – e.g. lack of ability to cope with arboreal diseases/ lack of infrastructure to manage site/ lack of ability to deliver etc. They seem to have doubts about EYCDC's solution to recruiting a Forestry Manager for the site (and also have concerns over differences in the understanding of this role).

FES also have concerns over EYCDC's general capacity to deliver day to day management of site – i.e. the need for large scale machinery, the maintenance and management of this/ the requirements to replace the boardwalks.

FES has been managing the site efficiently and effectively on behalf of SG for many years and are proven to be able to respond to immediate needs. That said, members of EYCDC have raised concerns about their levels of forest maintenance, and their perceived threats to remove the boardwalks, leading some community members to take action themselves. FES may have their own long term plans for the site that are deliverable and that they see as being in best local interests, although EYCDC would likely disagree with this statement. FES have a long history of successful forestry management and can draw on this experience at Gamescleuch. FES stated concerns over EYCDC being able to respond to their original decision as part of the review process, but they (FES) could not do likewise. However, once the Scottish Ministers review was received, EYCDC submitted 51 supportive documents to the review stating that they did not know what FES required as part of the initial asset transfer request.

FES should therefore not have accepted the initial asset transfer request if they thought that EYCDC had not provided enough information at the time. Furthermore, FES only subsequently asked to see one of the 51 documents submitted by EYCDC (the Business Plan for Gamescleuch and Ettrick), which makes it difficult for the panel to understand why they raise the issue of EYCDC being unable to provide more information. Repeatedly throughout the process officials from the SG Community Empowerment team offered FES opportunity to provide further information.

EYCDC

EYCDC feel they have not been properly listened to by FES and that FES do not fully understand their plans. This is further corroborated by their submission of 51 extra documents as part of the review process. EYCDC feel FES simply do not want to give up the site and want to manage it in their own way. (i.e. to make profit) at the expense, the local community argue, of farming and the local community more generally.

It is of note that, once they were aware of the concerns noted by FES in the Refusal Notice, they were able to respond to each concern in detail in the document headed "Application for Review", noting in many areas raised by FES that the necessary information had in fact been provided, either in the Business Plan, or the document headed "Economic Impact and Best Value Considerations".

Where an issue had not previously been covered, they were in many cases able to provide a response which the Panel thought was satisfactory.

EYCDC have many good ideas for the site that could potentially greatly benefit the site and also the community. They have the backing of a supportive skilled and experienced Board who display strong evidence of understanding the issues. The EYCDC Board have the will to get involved first hand, but would need to carefully consider the longer term needs of the organisation and that of the site, and operating the site as a Board managing a separate development company tasked with delivery. This itself may be an issue to consider the risk, as a community transfer body under the Act must have a two tier system in place. They may be a little naïve in their ability to deliver and may need to further consider staffing needs, i.e. set out plans for staffing and organisational structure beyond the immediate phase of taking on the resource.

From the evidence presented there appears to be a mixed picture of local support. FES highlighted that canvassing methods used by EYCDC for local support were poor, and some guidance on how this should have been carried out would have been useful. A small number of local residents have also raised concerns over EYCDC's plans to run the estate. However, on investigation, the methods used for canvassing local support by EYCDC are not unusual, and are concurrent with an organisation of their size and rural locale. The small number of local residents concerned with the AT application seems in line with any request, and not reflective of the overall picture. EYCDC have secured good local support from local agencies and partners, which may form the basis of sound partnership working going forward. They have displayed clear active evidence of attempts to secure funding, and have displayed ideas of income generation, and longer term planning.

General

There is a question of Scottish Ministers requirements for the site – do Ministers wish to put this particular area of forest into community control, or do they wish to harvest/ manage the trees for economic reasons? There is the question of community empowerment and the needs of forestry management to consider.

In the opinion of the panel, there is no reason why these two requirements should be incompatible with one another.

Cost of transfer of site is linked to this, and has to be factored into the Panel's thinking. This is not just the £1m approx. figure for the transfer, but also the lost revenue per annum which FES currently receive. On the other hand, it could be the generation of new local jobs, and an increase in longer term tourism in the area.

The communication breakdown issues between the two parties also had a large bearing on the outcome of the request, and although FES commendably offered to discuss alternative outcomes with EYCDC and to work through some of the issues cited, EYCDC were left with only a few days to make such an important decision. This helped the panel better understand why they put in their application for review when they did.

On considering their recommendations to Scottish Ministers, the Independent Panel looked again at the decision made by FES on 27 September 2017 and considered this decision for themselves, taking into account the evidence and information provided by EYCDC to FES at the time, the evidence and information received from all parties since then, and other factors such as the site visit and the Panel's own reflections. The FES Evaluation Panel report assessed the asset transfer application on five separate criteria (Benefits, Viability, Community and Wider Public Support, Management of the National Forest Estate, and Utilisation) and ultimately awarded EYCDC a score of 7 out of a possible 60 using their own criteria.

What was not clear to the Independent Panel was how the methodology was used by FES to agree this scoring method and criteria. A summary of the findings of the independent panel is provided in the table below:

FES Criteria	FES panel summarised findings	FES Score	Independent Panel comment and recommendations
Benefits	<ul style="list-style-type: none"> • FES panel felt there was a lack of overall vision for the long term future of Ettrick Valley and what outcomes would be for local community. • Financial plan appears marginal and financial benefits identified are limited. • Proposals will generate very little income for the community. • Majority of income outwith grants is from timber harvesting, and unclear whether new jobs will be created. • Non-financial benefits not well quantified. • No mention of equality issues. • Concerns over EYCDC ability to take on forest management, and liability of taking on the board walks. • Lack of quantifying outcomes that does not justify £100k discount. 	4 out of 10	EYCDC provided both 10 and 25 year income projections for the site. The 25 year projection, though, only included felling income up to year 11, although felling would continue regularly and sustainably for an indeterminate period. This was an error by EYCDC who should have included all of the felling income. They indicated revenue generating streams and ways that they could bring in money to the site which in turn would regenerate the site and thus benefit the local community. Non-financial benefits were identified by EYCDC such as increase in tourism, regenerated local area, and celebrating local

			<p>historical poet to name a few. The Development Company's proposals to tackle fuel poverty and social isolation amongst older inhabitants chimed closely with SG policy. Sometimes it can be just as important to retain jobs in rural areas as it is to create new ones! EYCDC have strong levels of experience at Board level in financial management, and also forest management and therefore have the experience required for such a site.</p> <p>It is also worth mentioning that asset transfer is not solely about income generation or managing a piece of land in the same way as it has been done. New ideas and community engagement in new ways are not necessarily negative outcomes.</p> <p>It must also be asked what benefit accrues to the local community from FES's current method of managing the forest, etc.? The answer from the local community would appear to be very little, and this is the position that the community wish to try to change by the acquisition of the land.</p>
Viability	<ul style="list-style-type: none"> • Governance information is "thin" • Unclear who will be delivering which outcomes • Marginal financial sustainability • Concerns over costs/ long term maintenance of boardwalks • No information on outcomes in business plan. • Lack of overall vision of how planned activities will impact the valley. 	1.8 out of 6	<p>EYCDC have a strong Board in place with a range of expertise including financial management. They have an appointed Chair, Secretary, and Treasurer. In the immediate period following any asset transfer of the site, it would be for the Board to get the development company's Gamescleuch enterprise operational. This would require plans to be put in place to implement an organisation to deliver the day to day duties with the Board reverting to strategic advice and directional</p>

			<p>support i.e. a two tier structure as required under AT legislation. EYCDC have previous experience of managing projects, and it would not be unusual for their Board to carry out initial operational matters until they establish a longer term structure going forward. Some Board members have substantial project management experience.</p> <p>The boardwalks are but one part of the EYCDC overall vision, and they have secured funding from Foundation Scotland to start work to replace these if they are successful.</p> <p>Their vision is believed to be is a long term vision for the area and EYCDC are abundant with plans and ideas how they could improve the area.</p>
Community and Wider Public Support	<ul style="list-style-type: none"> • Good evidence from EYCDC in engaging with members local to the site, but unclear how represents wider EYCDC or community views. • One or two community members concerned about increased visitor numbers • No evidence of wider partnership working. 	1.2 out of 2	<p>EYCDC canvassed local support in an acceptable way, and have responded to FES requirements of supplying additional information to support this when asked. They have canvassed over 100 local residents in a 5 mile radius with an approximate 75% - 80% supportive response. It is the view of the panel that this is a more than adequate illustration of how the group has fulfilled this commitment. There will always be local people who object to new projects such as this, and the numbers mentioned here are proportionate to what might be expected. This in itself should not be a reason to disallow the community group to take on the site.</p> <p>EYCDC have provided ample wider partnership examples with supportive letters received from a wide variety of sources including Visit Scotland; Scottish</p>

			Borders Council; Ettrick and Yarrow Tourism Association; Foundation Scotland to name a few.
Management of the National Forest Estate	<ul style="list-style-type: none"> Locally productive forest would be halved by community acquisition Concerns of felling coupes on visible landscape FES to remove boardwalks unless community take on responsibility and management. FES likely to incur additional administrative costs as there would be need for shared access through centre of the wood. Loss of productive forest area locally to FES. 	0 out of 2	Economic income generation is not a criterion for asset transfer requests under this legislation. Value is a consideration, but also includes the wider community benefit, and this seems a weak argument from FES. The community have already outlined their plans to manage and restore the boardwalks. Potential loss of income to the relevant authority and shared access agreements should not be deciding factors in the outcome of the AT case. Although forest would be lost to FES, it will still remain productive; EYCDC intend to harvest much the same timber which FES would harvest, but do it differently, whilst still replanting for future harvesting. There is no overall loss of harvested timber.
Weighted Score		7 out of 20	
Utilisation	<ul style="list-style-type: none"> Scale of AT request disproportionate to level of activity and outcomes of project. Lack of clear long term vision. Benefits of ownership and management of forest are most significant part of request but benefits do not derive from ownership – EYCDC not fully considered costs, skills, and capacity required. FES Panel recommended : <ul style="list-style-type: none"> Business plan written at high level, lack of detail on implementation and outcomes Lack of overall vision Communities main objective is restoration of boardwalks 	1	<p>The scale of the AT request is limited only by the ambition of EYCDC. They have plans initially to harvest timber in order to start generating income, and they will, with good management, eventually be able to grow a rounded organisation that leads many diverse activities delivering— both economic and community benefits. It is unfair to say they have not fully considered costs, skills, and capacity required.</p> <p>FES point out that as part of the AT process EYCDC were able to provide additional information whereas they had to make their original decision based only on what information was provided</p>

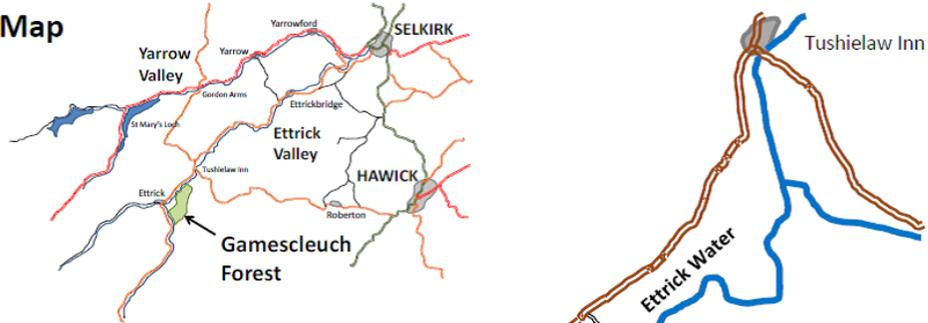
	<p>– not clear scale of asset transfer request is proportionate to delivery of these objectives</p> <ul style="list-style-type: none"> • Further consultation with the community and with FCS should be carried out to identify and mitigate negative impacts • EYCDC should review and provide further information on the resource required to develop and implement a forest management plan • Community should be asked to provide further detail how activities and outcomes to be delivered to the community in addition to local business. • Evidence provided does not demonstrate benefits will offset the negative impact on management of the NFE, the increased costs, and loss of income from timber sales. 		<p>at the time. This may well be true, but FES did have the opportunity to ask for more information but did not do so. Since then, EYCDC provided a total of 51 supportive documents to the Scottish Minister's review, of which FES only asked to see one of them, this being the Business Plan. The Business Plan is a 47 page concise document, written in detail explaining their plans and with costs attached.</p> <p>It is the view of the panel that the EYCDC application supports a vision for the whole area in question which takes both an economic and community based focus : the boardwalks are merely one part of this overall vision.</p> <p>The panel feel that EYCDC have provided more than enough evidence as part of the review, and perhaps could have provided more at the initial request of FES. However, FES should not have accepted the AT request if they were not happy with the levels of information provided at the time, and FES have also had ample opportunity to review the 51 documents submitted by EYCDC since, yet chose only to review the Business Plan.</p> <p>The panel also question the FES scoring system and find it difficult to understand the rationale for this.</p>
Final Weighted Score		7 out of 60	

FINAL RECOMMENDATION

The Independent Panel recommends that in consideration of all the evidence presented, and based in fact and conclusion of the case, The Scottish Ministers overturn FES's decision to refuse the application by EYCDC and instead grant the application from EYCDC to purchase the 173 hectares of Gamescleuch Forest and the Ettrick Marshes in question from The Scottish Ministers.

Appendix 1

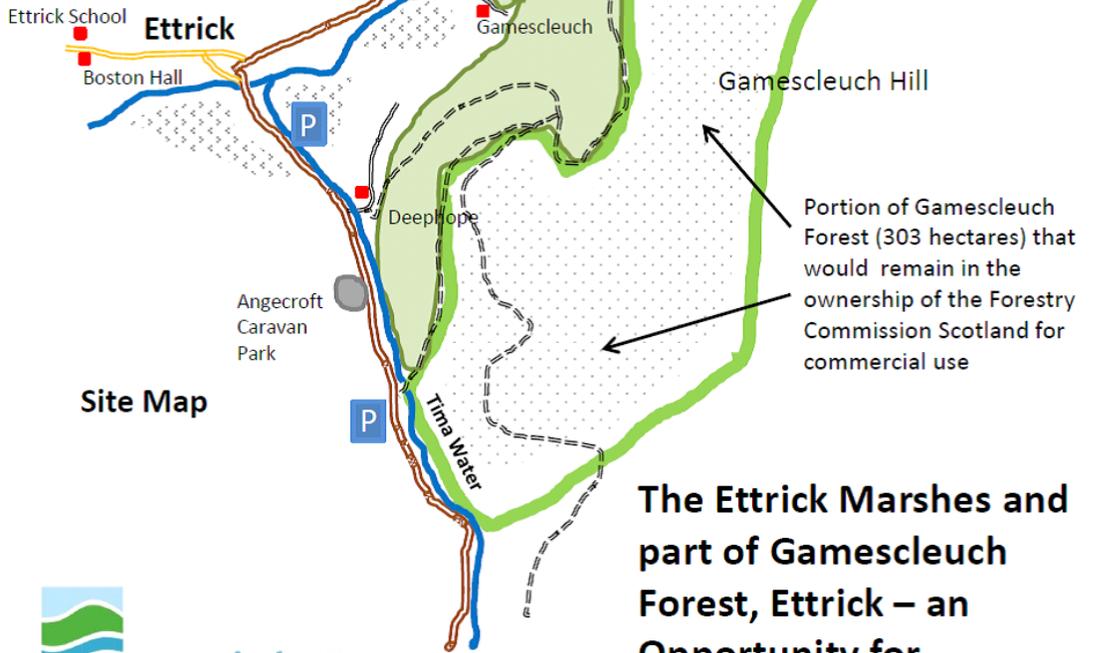
Location Map



Portion of Gamescleuch Forest (173 hectares) that could be purchased by the Community for forest and wildlife regeneration, small-scale commercial forestry, woodland craft employment and recreational opportunities

Extent of the Ettrick Marshes (42 hectares of wetland conservation area) contained within the possible Community purchase

Site Map



Portion of Gamescleuch Forest (303 hectares) that would remain in the ownership of the Forestry Commission Scotland for commercial use

The Ettrick Marshes and part of Gamescleuch Forest, Ettrick – an Opportunity for Community Ownership



Acknowledgements

The independent panel would like to acknowledge the support of both Forestry Enterprise Scotland, and the Ettrick and Yarrow Community Development Company in providing all the information used as part of the review. Thanks to those who helped out on the day of the panel site visit to Ettrick, and the use of the Boston Hall.