

Scottish Ministers
The Scottish Government St Andrew's House
Regent Road, Edinburgh EH1 3DD

Section 88 of the Act provides for an appeal to the Scottish Ministers following a review by the local authority (in this case Comhairle nan Eilean Siar). The Asset Transfer Request (Appeals) (Scotland) Regulations 2016 state under section 88(2) of the Act state that the notice of appeal must be served on the Scottish Ministers within the period of 20 working days beginning with, in the case of an appeal made by virtue of section 88(1) (a) of the Act, the date of the decision notice.

The letter informing Coimhearsnachd Bharraidh agus Bhatarsaidh (Barra & Vatersay Community) Ltd [community transfer body] of the Review Panel's decision, following the Hearing on 3rd May 2018, is dated 4th May 2018. This sets the start of the period with the end being 24th May 2018.

The [Guidance for Community Transfer Bodies](#) notes states the notice of appeal must include the following:

- *the name and contact address of the community transfer body -*
Coimhearsnachd Bharraidh agus Bhatarsaidh (Barra & Vatersay Community) Ltd, Castlebay, Isle of Barra, Eilean Siar HS9 5XD;
- *specify the land to which the asset transfer request relates -*
An area of land opposite Castlebay Community School, on the Island of Barra (site centred co-ordinates NGR NL 65944, 98360) extending to an area of 3,621m² with a right of access from the A888 public road as delineated in the attached (item 1) and;
- *include a statement setting out the reasons for appealing and the matters the community transfer body consider should be taken into account in determining the appeal –*
See below.

Statement

Part of the statement relates to the interpretation and application of the Asset Transfer Request (Review Procedure) (Scotland) Regulations 2016 from hereafter referred to as the Regulations which from the perspective of the community transfer body (CTB) did not create a 'level playing field' and were not applied as intended in respect of the function (purpose) of a Hearing. This can be thought of procedural issues.

The other part of the statement sets out the reasons for requiring a review in respect of the following:

- the information provided in connection with the request and;
- the reasons given by the Local Authority for their decision.
- The Act requires the relevant authority to assess requests transparently against a specified list of criteria and to agree the request unless there are reasonable grounds for refusal. The intent being to shift the balance of power clearly towards the community body ^{1/2} (also relevant in terms of procedural issues).

The CTB is of the opinion the decision to fails to adequately take into account best value¹ and the socio-economic benefits arising from the development.^{2/3} It also feels the local authority failed to give adequate consideration to alternative proposals advanced by the CTB that satisfy the needs of both the local authority and the CTB. The evaluation of the issues is best considered as a cost benefit analysis.

Proceedings to date

The basis for the statement is the evidence and information provided in connection with the asset transfer request and the subsequent local authority review and attendant hearing set against the reasons given by the relevant authority for their refusal of the request.

The reason for the decision dated 9th January 2018 to refuse the asset transfer request (submitted 4th August 2017 and acknowledged 20th November 2017) was given as follows:

*The Comhairle is considering major capital investment involving upgrading and remodelling Castlebay School. It is **envisaged that design proposals could extend beyond the current footprint of the site**, until design proposals are further developed, the Comhairle is not in a position to dispose any adjacent land within its ownership.*

It is appreciated that this response may be met with disappointment; however, the ultimate aim is to deliver the best investment solution to benefit the community as a whole.

Coimhearsnachd Bharraidh agus Bhatarsaidh (Barra & Vatersay Community) Ltd then exercised its right under the legislation for a review of the decision. The review was undertaken by an Appeals Panel comprising of five councillors with the Panel determining the process for undertaking the review: on the basis of written submissions or if there should be a Hearing session or another procedure, such as a site visit. Following an initial meeting on 29th March 2018 the Panel agreed the asset transfer request should be determined by a Hearing. As only three out of five of councillors were present at the inaugural meeting of the Panel those attending the Hearing were restricted to the same three that attended the inaugural meeting.

The Hearing was held on 3rd May 2018 and having considered the written submissions and the verbal representations from all parties, the Panel agreed to confirm the decision of Officers to refuse the Asset Transfer Request.

In arriving at its decision the Panel recognised the wide community support and the social, economic and public wellbeing that an all-weather pitch would bring. The Panel also recognised the major capital investment proposed for Castlebay Community School and the submission from Officers that until such time as funding was confirmed and design proposals developed the Comhairle would not be in a position to dispose of any adjacent land within its ownership as this may impact on the scale of development and lead to constraints and additional costs during

¹ Best Value is the requirement to make arrangements to secure continuous improvement in performance whilst maintaining an appropriate balance between effectiveness and economy.

² [Community Empowerment \(Scotland\) Act 2015: community transfer bodies' guidance](#)

³ [Community Empowerment \(Scotland\) Act 2015: asset transfer guidance for authorities](#)

construction. The Panel further noted the intention of the Director of Education and Children's Services to progress the new Castlebay Community School Development in partnership with the local community.

Cost benefit analysis

The asset transfer request seeks to allow the local community 'to drive change and achieve a goal'. It embodies local aspirations and has a long history dating back to the construction of the existing school which is now overdue for refurbishment/rebuild (items: 2; 3.1-3.6 and; 4).

The initial request and subsequent review present information and evidence relating to the following: **reason for making the request; the proposed use of the land; benefits of the proposal; funding/financing of the proposal and; community support** (forwarded separately). Only new evidence that has come to light since the Hearing on 3 May 2018 will be presented in the Notice of Appeal. The CTB is of the opinion the evidence presented to date demonstrates the transfer would address the well-being of the local community in its widest sense through providing a base for activities and services that are not otherwise be accessible (or available) to members of the community and will create a stronger sense of community identity, cohesion and involvement. In stating this the CTB does not advance the position that the Comhairle does not have similar objectives but rather that the best way to achieve the objectives of an all-weather pitch and a refurbishment/rebuild of Castlebay Community School is to advance them as separate capital projects.

Looking at the request from the perspective of the relevant authority is informative in terms the decision making process. It is understood that "the authority must agree to the request unless there are reasonable grounds for refusing it" with the basis of the decision being informed by evaluating the request according to a set of **assessment criteria**. The same assessment criteria provide a useful structure to show why the CTB feels not given enough weight to certain benefits and there are ways around the objections advanced by the relevant authority. In the following text the assessment a criterion being considered is highlighted in bold to guide the reader. In the interest of brevity (where possible) relevant documentary evidence is referred to in parenthesis and/or footnotes.

The CTB is of the opinion that in refusing the request the Comhairle has failed to apply and assess the **best value** (and socio-economic benefit⁴) in the given context; focusing solely on a single position to the exclusion of all others; namely, that the area of ground that is the subject of the request is the only option available for providing a construction compound and space for temporary classrooms for a proposed refurbishment/rebuild of Castlebay Community School. This is despite the fact that the CTB has presented evidence of an alternative more suitable site for the construction compound and temporary classrooms and argued that to inextricably link the programmes of the two capital projects is to the detriment of the local community. In this respect the CTB is of the opinion the evidence presented to date demonstrates the best value associated with the provision of an all-weather pitch would be achieved through the transfer of the area of land now rather than a continuation of the status quo (of a joint-programme with refurbishment/rebuild of the school that

⁴ 'Future Sports Facilities for Barra & Vatersay' report prepared under the Youth Café Project

has shown slippage over not months and years but decades and for which there is no evidence the finance is any closer to being secured (items: 2; 3.1-3.6; 4 and; 5).

Price and the transfer of an asset at less than market value is another possible assessment criterion. The disposal of an asset at less than market value is justified when these additional benefits empower communities and align with local and national priorities to enable the delivery of best value across the public sector as a whole.^{2/3} The feasibility study included as part of the evidence supporting the initial request showed the benefits arising from the proposed development align with both the Scottish Government's National Outcomes and to the local authorities policy objectives and local priorities as determined through Community Planning.

The Act does not say how much should be paid to purchase an asset or in rent, whether it should be at market value or at a discount. The CTB has to state in the request how much they are prepared to pay, alongside the benefits the project will deliver and the relevant authority has to decide whether to accept that price. When the price offered in an asset transfer request is less than the market value of the property, consideration needs to be given as to whether the proposed benefits justify the proposed discount (which will be accounted for as a "gift"). The benefits of the request should be proportionate to the value of the asset and the level of discount as any decision to transfer an asset must represent good use of public resources.

It is accepted the price offered by the CTB is less than the market value. The price was set at a token amount because at the time the request was submitted the evidence available indicated that the land to which the request was owned by the Comhairle [not subject to any burdens in respect of Fields in Trust] and that land adjacent to the site that should have been reserved by for sport and recreational use had been built on by the Comhairle. The low figure was therefore set in the context of compensation for the loss of land reserved for sport and recreation.

Obligations and restrictions can prevent, restrict or otherwise affect the authority's ability to agree to requests, whether these arise from legislation or otherwise. It is possible that special permission is required to dispose of a property, or title conditions or planning restrictions may state it cannot be used for certain purposes. New evidence (as to the boundaries and conditions to which the title of the land is subject and contrary to that known at the time the request was submitted) has emerged since the Hearing indicating the land is subject to a Minute of Agreement between Comhairle nan Eilean Siar and the National Playing Fields Association (also known as Fields in Trust) [item 6]. The Minute of Agreement states the Comhairle granted FIT a right to designate the Subjects as a public playing field in perpetuity from the last date of execution of these presents (concluded 18 October 2016), insofar as the Subjects were available for designation. The Comhairle undertook from the dedication date not to use the Subjects or permit the Subjects to be used other than as a public playing field and associated purposes except with the consent of FIT.

In summary, refusing the request on the basis that the land is required for a construction compound and temporary classrooms is inconsistent with the obligations and restrictions that apply to the title and refusal of the request on this basis should be questioned under this assessment criterion (item 6). The irony is that had this been the grounds for refusal (as it could have been) the obligations and restrictions would have aligned themselves with the proposal and facilitated the delivery of the project. That said the Comhairle still own the land and given their past record in reserving land for sport and recreation the CTB's preference would be for title to be transferred to ensure on the use

of the subjects is protected through both title and the burdens thereof as in the past protection of use through burdens alone has not been effective.

The **funding and financing** of the project are dealt with explicit in the 'Future Sports Facilities for Barra & Vatersay' report prepared under the Youth Café Project which was submitted as supporting evidence for the initial request. This report clearly outlines proposals for funding the capital build and the proposed use of the land and includes any development costs, ongoing maintenance and the costs of activities. The Comhairle was also informed on 9 March 2018 that the deadline for first round applications for the Sport Facilities Fund had been pushed back to 1st May and that there would be a 1st September intake. As matters stand the September intake is the only possible option but this depends on both the timetable and the outcome of the request.

The guidance notes also make the qualifying statement that any purported benefits arising from the request need to be assessed in the context of whether or not the CTB has the capacity to successfully deliver and maintain the project. It should be emphasised the CTB has an established track record of delivering capital (wind turbine £2.45M and marina £1.5M) and has the capacity to deliver and operate the asset. All that is required in this instance is the site which will open up the opportunity which from the perspective of the local community the consensus is the community can make better use of than the local authority.

The Comhairle refused the transfer of the land on the basis that it 'may' be required by the Comhairle for another capital project; namely, the refurbishment/rebuild of Castlebay Community School. Evidence has previously been presented that states the re-modelling and refurbishment plan, including estimated costs for Castlebay School (amongst others) was being prepared as far back as 2010 with a view to attaining category B condition status as a minimum standard by 2018. This has not happened. Somewhat ironically when the CTB has requested details of the design drawings, funding, programme and operational costs from the Comhairle they were not be forthcoming and yet the CTB was expected to advance the same evidence in respect of its proposal. In the Hearing reference was made to £7M having been set aside and a decision awaited from the Scottish Futures regarding the remainder. This position has been advanced by the Comhairle since the request was lodged with the only difference being slippage in the date as to when a decision was expected. Independent enquiries made by the CTB and Barra Sports Forum in terms of the current funding position funding for the proposed refurbishment/rebuild of Castlebay Community School by the Comhairle (item 7) indicate the current position is as follows:

The project does not form part of the Scottish Government's Schools for the Future investment programme.

In November 2017, the Deputy First Minister announced the Scottish Government's intention to build upon the success of the programme and develop Scotland's Learning Estate Investment Plan. The Scottish Futures Trust are supporting Scottish Government (sic) with the development of the Plan and in that context are in dialogue with Comhairle nan Eilean Siar.

The CTB therefore question not only the purported need of the land by the Comhairle to deliver the school capital project but also the timeline. Having waited since 1983 (item 2) for an all-weather pitch the question is how many more years are the local community expected to wait for a facility that ever other island in the area of the local authority already has.

Operational costs, should the Comhairle incorporate an all-weather pitch as part of part of the proposed refurbishment/rebuilt, are also relevant to the requested transfer. The Facilities Management Contract with FES FM Ltd for the operation of the Western Isles Schools Project (WISP) has the potential to limit access to facilities as a result of the hire cost. Figures obtained indicate the cost of hire a pitch for an hour are approximately £77 due to the let including staff and cleaning time either side of the let as well as the actual use of the pitch (information available on request). The upset of this is that access/use of facilities has the potential to be limited as a result of cost. This is one of the key drivers for community ownership and management of an all-weather pitch in Barra and Vatersay.

The final paragraph of section 82(3) requires the relevant authority to consider "such **other matters** (whether or not included in or arising out of the request) as the authority considers relevant". The guidance suggests community support for the proposals and any potential impact on other community groups might be considered here. The merit in associating the two capital projects needs to be considered in this context. The argument is advanced that the projects should be progressed separately given the stage of each project and the respective timescales. In terms of community support the reader is referred to 'Future Sports Facilities for Barra & Vatersay' report prepared under the Youth Café Project. The fact the proposal has previously been granted planning permission (now lapsed) is also relevant in this context.

Procedural issues

The CTB were informed on 29 March 2018 that the Panel agreed the asset transfer request should be determined by a Hearing as they did not feel there is sufficient information in the paperwork alone and would like to hear from the parties.

In accordance with the Hearing Session Rules [Asset Transfer Request (Review Procedure) (Scotland) Regulations 2016] the CTB requested permission for individuals to attend and to speak. However, the Comhairle did not provide advanced details of whom they would be asking to attend nor was any further evidence circulated (or requested from the CTB). The CTB prior to the Hearing did ask if there would be any legal representation in respect of title and conditions thereof and in respect of this whether an invitation had been extended to Fields in Trust as an interested party. In terms of the latter the answer was no.

The Hearing proceeding with opening verbal statements by both parties with the CTB providing a written copy of the statement. No written copy of the verbal statement by the Comhairle's officers was provided nor was any supporting written evidence supporting the verbal statements made by the Comhairle's officers presented for evaluation (either before or after the Hearing). The only opportunity for the CTB to question the evidence advanced by the Comhairle was in the summing up with the questioning of both parties being a matter reserved to the Panel.

Overall the Review process placed all the burden of evidence on the CTB with the lack of evidence supporting the grounds for refusal by the Comhairle (extending to and including the verbal statements by the Comhairle's officers at the Hearing) creating a dynamic where by everything had to be treated at face value. It was thought that the minutes would provide a true reflection at least of the opening and closing statements by both parties but in reality the minutes were so terse that they amounted to little more than a reiteration of the decision statement (items 5 and 8). The CTB

strongly advocate the need for an independent party to be present at the Hearing as otherwise there is the potential for the relevant authority to act as judge and jury with the relevant authority being unlikely to overturn a decision made by its own officers.

In the absence detailed minutes of what was said at the Hearing notes taken by the CTB attendees have had to be relied upon to expand upon the summary statement in the decision notice:

The Panel also recognised the major capital investment proposed for Castlebay Community School and the submission from Officers that until such time as funding was confirmed and design proposals developed the Comhairle would not be in a position to dispose of any adjacent land within its ownership as this may impact on the scale of development and lead to constraints and additional costs during construction.

The arguments advanced by the councillor officers for refusing the request related to a proposal to construct a new school and that the land which is the subject of the request being the only other land they own in the vicinity. This was further qualified by stating in the absence of a detailed design all options needed to be kept on the table. It was said the area (51x71m) would be required for a construction compound (storage of materials, vehicles and a welfare unit) and the siting of temporary classrooms. The panel were informed should the area of land in question land be transferred pupils would have to be decanted (location unspecified). It was also stated that £7M had already been set aside for the capital works and a decision from the Scottish Futures Trust was awaited to complete the funding package (no evidence to support either of these statements was provided). The panel was informed Castlebay Community School was the next major capital project and the number one priority. It was also said there would be 30% uplift in capital costs if site storage for materials, equipment and vehicles was not adjacent to the school (no evidence to support this figure was provided).

In its closing statement the CTB said had the Panel agreed to a site visit a more informed assessment, of whether or not the area of land was suitable for the purpose proposed by its officers in terms of both area and health and safety, would have been possible. This was expanded upon by saying site (51x71m) was not large enough to accommodate all the uses the council officers had mentioned with this being compounded by health and safety issues in respect of pupils and construction activities sharing a small area of land as well as the area of land being separated from the school site by the A888. The CTB also pointed out that it had identified and secured agreement in principle for an area of land to the rear of the school that was more suitably located, larger in area and did not have the same health and safety issues associated with it. The CTB also highlighted that the existing footprint of the school was already constrained with the secondary school effectively having no playground and limited outdoor sports facilities. The Panel were informed that one of the crofting tenants of the land behind the school had indicated an interest in 'selling' his croft in the longer term. Whilst, it is realised the process is more complicated than this the willingness of all parties (including both landlord and tenant) to engage is often the first obstacle to overcome. If this option was to be pursued it would offer the greatest flexibility not only in the short but also longer term as it would help to alleviate existing site constraints.

It was brought to the Panel attention that the Comhairle's position was inconsistent with their previous position (draft lease issued, council reports offering lease or right to buy etc.). The argument was advanced that given the school programme was years behind schedule and the

decision date for Funds from the Scottish Futures Trust was continually being set back having been January 2018 and now hopefully this side of the summer that the school and all-weather pitches should not be linked together as a single capital project. In conclusion the CTB stated its proposal addressed all the concerns raised by the council officers and more because of the location of the alternative land and the possibility of enlarging the footprint of the school on a long-term basis; not forgetting it would also deliver all the attendant benefits of a community owned and managed all-weather pitch sooner rather than later.