



## Report to the Scottish Ministers

# COMMUNITY EMPOWERMENT (SCOTLAND) ACT 2015

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Report by Trevor A Croft, a reporter appointed by the Scottish Ministers

- Case reference: CAT-410-1
- Site Address: Land opposite Castlebay Community School, Castlebay, Isle of Barra
- Appeal by Coimhearsnachd Barra agus Bhatarsaidh against the review decision by Comhairle nan Eilean Siar to uphold its decision to refuse the community asset transfer request
- The asset transfer proposed: land opposite Castlebay Community School from the Comhairle to the Coimhearsnachd
- Date of hearing session and accompanied site visit: 27 March 2019

Date of this report and recommendation: 6 December 2019

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**Proposed transfer of land opposite Castlebay Community School, Castlebay, Isle of Barra from Comhairle nan Eilean Siar to Coimhearsnachd Barra agus Bhatarsaidh**

• Case reference	CAT-410-1
• Case type	Community asset transfer review appeal
• Reporter	Trevor A Croft
• Appellant	Coimhearsnachd Barra agus Bhatarsaidh
• Planning authority	Comhairle nan Eilean Siar
• Other parties	None
• Date of application	4 August 2017
• Date case received by DPEA	23 May 2018
• Methods of consideration and dates	Written submissions Public hearing session on 27 March 2019 Accompanied site inspection on 27 March 2019
• Date of report	6 December 2019
• Reporter’s recommendation	Dismiss the appeal and refuse the community asset transfer request

**The appeal proposal**

The appellant proposes that 0.36 hectares of land at Castlebay, Isle of Barra, to be used for the construction of an all-weather playing field, be transferred to the Coimhearsnachd Barra agus Bhatarsaidh (the appellant). The pitch would be available for the use of all community groups on the islands. The appellant offered to pay a nominal amount of £1 for the site.

**The appeal site**

The site is located on the south side of the A888 through Castlebay, opposite the Castlebay Community School. It sits at a slightly lower level than the road, which overlooks it. Approximately rectangular, it is unkempt waste looking ground, covered mainly with a gravel surface. To the west is a supermarket and associated parking, to the south a football pitch surrounded by a wire mesh fence, and to the east rough vegetation and a children’s play area.

Coimhearsnachd Barra agus Bhatarsaidh

The Coimhearsnachd (Barra and Vatersay Community Ltd) is a community transfer body under the terms of Community Empowerment (Scotland) Act 2015. It is a community owned company whose aim is to support community development on Barra and Vatersay. It is managed by a volunteer board of directors drawn from the membership, the latter being open to residents of Barra and Vatersay. It employs two full time and one part time staff and is based on the voluntary action office in Castlebay.

Established in 2005, the company is supported by Highlands and Islands Enterprise, the Comhairle, the Crofters Commission and the Scottish Government. It also raises some revenue through the provision of environmental and renewable energy based research projects.

### **Consideration by the Comhairle**

The valid asset transfer request was received by the Comhairle on 4 August 2017 and on 9 January 2018 refused the request for the single reason it was considering major capital investment involving upgrading and remodelling of Castlebay Community School. Until design proposals are further developed, the Comhairle was not in a position to dispose of any adjacent land within its ownership.

Following a request by the Coimhearsnachd to the Comhairle for a review of the decision the review panel agreed to confirm the decision of officers to refuse the Asset Transfer Request.

### **The appeal to the Scottish Ministers**

On 22 May 2018 the appellant notified the Comhairle that it intended to appeal the review decision to the Scottish Ministers. The appeal was sent to the Scottish Government under the cover of an e-mail dated 23 May 2018. The Comhairle noted that all the relevant documentation was available on its web-site and that a notice was also erected on the relevant land. The Comhairle had not received any representations from third parties in relation to the transfer request. The appeal was passed to the Division of Planning and Environmental Appeals. All the papers have been placed on its web site.

### **The appellant's case**

The Barra community has been expecting the provision of an all-weather pitch since 1983. In 1984 a Countryside Commission for Scotland commissioned recommended this. At that time 2.8 hectares of land was transferred to the council and designated as the King George V playing field. A football pitch was developed but this suffers drainage problems and is unplayable much of the time.

The appeal site is subject to a minute of agreement between the Comhairle and Fields in Trust restricting its use to an all-weather sports pitch. The provision of such a pitch would be of great value to the local community. At present it is impossible for local teams to play matches at home as there are inadequate facilities, with the football pitch being unplayable.

This means any home games effectively have to be played 'away' so that if they do take place a ferry trip to Eriskay and then onward travel farther north is necessary. This makes participation with other teams very difficult.

The provision of a new pitch would be of value to the community by encouraging exercise and its use could be incorporated within the community school's physical education curriculum. It would be available all year round and as administration would be partly covered by volunteers costs would be much lower than with a council run facility.

If the request is refused it will mean a further delay, probably of at least five years before a pitch could be provided. Discussions have taken place with potential funding bodies but nothing can be taken forward until the land transfer is guaranteed.

The only reason for refusal is the perceived need by the council for land to decant classrooms and other facilities onto the land during the construction of a new community hub, including school and medical facilities and a construction compound. This is not necessary as other land is available to the north and north-west of the school site but the Comhairle has not responded to this proposal.

A nominal sum of £1 has been proposed as a discount purchase. This is justified as there are no other uses for the land because of the restriction to playing field use because of the minute of agreement between the Comhairle and Fields in Trust.

The appellant has a sound track record of development including a wind turbine and new marina, both of benefit to the community. The proposed development would bring great benefits to the community.

### **The Comhairle's case**

The existing primary and secondary school buildings are in a poor state of repair and redevelopment is the only sensible option. The Castlebay hospital and care home are also in need of redevelopment and discussions are being held with the Western Isles Health Board to provide a community hub incorporating education and health facilities on the existing school site. The Eoligarry primary school facility would also be located here.

The council has allocated £7 million from its capital budget towards a total cost likely to be of the order of £27 million. Discussions are in hand with the Scottish Government through the Scottish Futures Trust regarding financing the project.

During the construction of the project there will be a need to decant classrooms away from the existing site to allow the demolition and rebuilding. The appeal site is ideally located being on the opposite side of the road, the A888 through Castlebay. It is level and has easy access from the main road. The need to use the site for decanting is the only reason the Comhairle has for refusing the asset transfer request.

The Comhairle is supportive of the use of the site for an all-weather pitch and agrees there would be great community benefits from this. In the short term however this is outweighed by the benefits, in avoiding undesirable delay, that the availability of the land offers to the building contract in terms of a decanting facility.

### **Conclusions**

In line with Scottish Government guidance, I have assessed the request against the criteria set out in section 82 of the Act, best value themes, national outcomes and a check list of matters listed in the guidance in relation to assessment of outcomes.

In relation to the section 82 criteria in the Act, I find that establishing a third sector hub has the potential to:

- make a positive contribution to public health, social wellbeing and environmental wellbeing;
- provide a community facility with benefits particularly for younger people, encouraging sporting activity and exercise;
- provide a sports facility available for use by the local primary and secondary schools;
- enable local teams to have better participation with inter-island teams as the current pitch facilities are inadequate and often unusable; and
- correct a socio-economic disadvantage in a remote island community with a facility that is accepted as normal on the other outer Hebridean islands.

However, I also find that:

- there is no guarantee of finance being available although discussions have been held with potential supporting bodies, both in the public and charitable sectors, the latter including the Robertson and Gannochy Trusts and the Garfield Weston Foundation; and
- its transfer now would prevent its use by the Comhairle for decanting classrooms and other services during the community hub redevelopment and [this could affect, or create unacceptable risks to, the whole viability of the Comhairle's project].

An assessment of the strengths and weaknesses of the proposals leads me to conclude that, on balance, although the appellant has put forward a very strong case in relation to the section 82 criteria, the risk of potential impact on the [feasibility and therefore viability] of the Comhairle's project is sufficient to recommend that the appeal be dismissed.

In relation to best value, I find that the proposed asset transfer request demonstrates best value in terms of governance and accountability, vision and leadership, effective partnerships, performance management and sustainability. There would be benefits for four of the five broad principles of sustainability including good governance, environment, sustainable economy and health.

Community support for the project is demonstrated by the appellant being a community organisation with its management drawn from community members. The only disadvantage is the loss of decanting space which the Comhairle claims would potentially affect the feasibility of the collaborative investment approach.

The Scottish Government's guidance in relation to alignment with National Outcomes refers to alignment with one or more outcome. I find that the proposed all-weather pitch would align closely with two outcomes, communities and health. It has the potential to contribute to a number of other outcomes, including promoting physical activity and education. Overall there would be significant support for national outcomes, thus making a strong contribution.

On the assessment of outcomes I find the project is very strong on governance, demonstrated by its track record on other projects. Its management is sound and the project well within its capabilities. Finance is only moderate at this stage because of a lack of ability to take discussions forward until the land ownership is resolved. There would be very strong community benefits that cannot easily be quantified in financial terms.

Overall, I conclude that there is potential for the proposed community asset transfer of the appeal site to deliver significant benefits in relation to the criteria set out in section 82 of the Community Empowerment (Scotland) Act 2015, the Scottish Government's National

Outcomes and the Scottish Government's best value themes, based on the evidence provided by the appellant and the discussions I heard at my hearing. The only disadvantage would be the lack of availability of the site for decanting during construction work of a project of broader community importance. Although the Coimhearsnachd has stated that other land is available for this purpose it has not been demonstrated to my satisfaction that this would be a viable solution in the short term. I therefore accept the Comhairle's view that granting the transfer at this time would create an unacceptable risk of delay to an important project and the feasibility of the collaborative investment approach. I find therefore there are well founded grounds for refusing the request.

### **Recommendation**

I recommend that the appeal be dismissed and the community asset transfer request be rejected.

Scottish Government  
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DPEA case reference: CAT-410-1

The Scottish Ministers  
Edinburgh

Ministers

In accordance with my minute of appointment dated 12 December 2018, I conducted a public hearing and site inspection in connection with a Community Asset Transfer request review appeal by Coimhearsnachd Barra agus Bhatarsaidh concerning land opposite Castlebay Community School, Castlebay, Isle of Barra. The Comhairle nan Eilean Siar had reviewed its decision to refuse the community asset transfer request and upheld its original decision.

I held a hearing session in Castlebay on 27 March 2019 and an accompanied site inspection the same day. I also drove unaccompanied around the wider surrounding area.

My report takes account of the appellant's asset transfer request dated 4 August 2017, the council's decision to refuse the request on 9 January 2018, the appellant's request for a review dated 29 January 2018, the council's review decision to confirm its original decision dated 4 May 2018 and the appellant's appeal submission dated 23 May 2018, together with the submissions responding to the appeal and submitted to the subsequent hearing held by me. I have also taken account of key documents associated with these principal stages of the request, refusal and review.

My report is laid out in five chapters. The first outlines background information, the second summarises the appellant's case, the third summarises the Comhairle's case, the fourth my reasoning and the fifth provides my overall conclusions and recommendation.

In May 2019 the Comhairle submitted further evidence in support of its case. The appellant was unhappy at this being sent after the hearing and expressed concern that there was no opportunity to discuss it properly. In view of this late submission I decided not to accept it and did not look at it. It has been placed on the file in the event that Ministers wish to consider it.

## CHAPTER 1: BACKGROUND

### The statutory context

1.1 Sections 77 to 97 of the Community Empowerment (Scotland) Act 2015 (the Act) introduced a right for a community transfer body to make a request to councils and a range of other public bodies to request the transfer of ownership of land or property to that body. The community transfer body must specify the benefits which it considers will arise if the request is agreed and how much it is prepared to pay for the asset. The Act requires the relevant authority, the Comhairle in this case, to assess requests against specified criteria and to agree to the request unless there are reasonable grounds for refusal.

1.2 A community transfer body is defined in the Act as being either a community controlled body or a body designated by the Scottish Ministers. A community transfer body making an asset transfer request for ownership must be incorporated as a company, a Scottish Charitable Incorporated Organisation or a community benefit society with a minimum of 20 members and a provision for transfer of its assets upon winding up. The appellant is such a body.

1.3 The relevant authority must decide whether to agree or refuse the request. The matters which must be taken into account in determining the request are set out in section 82(3) of the Act as follows:

- a. the reasons for the request;
- b. any other information provided in support of the request;
- c. whether agreeing to the request would be likely to promote or improve – (i) economic development, (ii) regeneration, (iii) public health, (iv) social wellbeing, or (v) environmental wellbeing;
- d. whether agreeing to the request would be likely to reduce inequalities of outcome which result in socio-economic disadvantage;
- e. any other benefits which might arise if the request were agreed to;
- f. any benefits that might arise if the authority were to agree to or otherwise adopt an alternative proposal in respect of the land to which the request relates and how those benefits compare with those arising from the asset transfer proposal;
- g. how any benefits from an alternative proposal relate to other matters the authority considers relevant (including, in particular, the functions and purposes of the authority);
- h. any obligations imposed on the authority, by or under any enactment or otherwise, that may prevent, restrict or otherwise affect its ability to agree to the request; and
- j. such other matters (whether or not included in or arising out of the request) as the authority considers relevant.

1.4 Section 82(4) requires authorities to make decisions in a way that encourages equal opportunities. Section 82(5) requires authorities to agree to the request unless there are reasonable grounds for refusing it. During the period when the request is being determined, the authority cannot dispose of the asset to anyone other than the community transfer body.

1.5 The Scottish Government has published Asset Transfer Guidance for Relevant Authorities, 2017 and Asset Transfer Guidance for Community Transfer Bodies, 2017 to support those involved in both parts of the process.

1.6. 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, carried out when that authority has originally dismissed a request by a community transfer body for a community land transfer.

#### Site location and description

1.7 The appeal site is located on the south side of the A888 through Castlebay, opposite the Castlebay Community School. Covering some 0.36 hectares the site sits at a slightly lower level than the road, which overlooks it. Approximately rectangular, it is unkempt waste looking ground, covered mainly with a gravel surface, which was re-laid some time ago, with areas of rough grass around the perimeter. To the west is a supermarket and associated parking, to the south a football ground surrounded by a wire mesh fence, and to the east rough vegetation and a children's' play area. At the time of my site inspection there was evidence of rubbish tipping with some burning towards the southern part of the site.

#### The appeal proposal

1.8 The appellant proposes that the land be used for the construction of an all-weather playing field. This would be available for the use of all community groups on the islands. The appellant offered to pay a token amount for the site. This price was set because at the time the request was submitted the evidence available indicated that the proposed transfer land was owned by the Comhairle, and not subject to any burdens in respect of Fields in Trust as on adjacent ground. Part of that land adjacent to the site that should have been reserved by for sport and recreational use had been built on by the Comhairle for housing. The low figure was therefore set in the context of compensation for the loss of land reserved for sport and recreation.

#### Coimhearsnachd Barra agus Bhatarsaidh

1.9 The Coimhearsnachd (Barra and Vatersay Community Ltd) is a community transfer body under the terms of the Act. It is a community owned company whose aim is to support community development on Barra and Vatersay. It is managed by a volunteer board of directors drawn from the membership, the latter being open to residents of Barra and Vatersay. It employs two full time and one part time staff and is based on the voluntary action office in Castlebay.

1.10. Established in 2005, the company is supported by Highlands and Islands Enterprise, the Comhairle, the Crofters Commission and the Scottish Government. It also raises some revenue through the provision of environmental and renewable energy based research projects.

#### Consideration by the Comhairle

1.11 The valid asset transfer request was received by the Comhairle on 4 August 2017 and acknowledged on 20 November 2017. The latter was also the validation date. The request was considered by group of the council's senior officer's acting under delegated authority. The decision, issued on 9 January 2018 was to refuse the request for a single reason:

“The Comhairle is considering major capital investment involving upgrading and remodelling of Castlebay Community 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 of any adjacent land within its ownership.”

1.12 A request by the (then) applicant for a review of the decision was received by the Comhairle on 29 January 2018. The review panel, consisted of five councillors. At an initial meeting on 29 March 2018 it was decided to convene a hearing, held on 3 May 2018. However as only three out of the five of councillors were present at the inaugural meeting of the panel those attending the hearing were restricted to the same three that had attended. Verbal representations were heard from all parties. Having considered these representations, and all the written submissions, the panel agreed to confirm the decision of officers to refuse the Asset Transfer Request. The panel’s decision was issued the same day.

1.13 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 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.

#### The appeal to the Scottish Ministers

1.14 On 22 May 2018 the appellant notified the Comhairle that it intended to appeal the review decision to the Scottish Ministers. The appeal was submitted under the cover of an e-mail to the Scottish Government dated 23 May 2018.

1.15 In its response the Comhairle noted that all the relevant documentation was available on its web-site and that a notice was also erected on the relevant land. The Comhairle had not received any representations from third parties in relation to the transfer request.

## CHAPTER 2: THE CASE FOR THE APPELLANT

2.1 Part of the appellant's original statement relates to the interpretation and application of the Asset Transfer Request (Review Procedure) (Scotland) Regulations 2016 which from the perspective of the appellant did not create a 'level playing field' and were not applied as intended in respect of the function (purpose) of a hearing, that is the Comhairle's review hearing.

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

- the information provided in connection with the request; and
- the reasons given by the Comhairle for its 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, in the appellant's interpretation.

2.3 The appellant notes that 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. It 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.

2.4 The appellant considers the decision fails adequately to take into account best value and the socio-economic benefits arising from the proposed development. It also feels the Comhairle failed to give adequate consideration to alternative proposals advanced by the appellant that satisfy the needs of both the local authority and the appellant.

2.5 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 and rebuild, as proposed by the Comhairle.

2.6 The appellant considers the evidence presented 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 would create a stronger sense of community identity, cohesion and involvement. The appellant accepts the Comhairle has similar objectives but argues 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.

2.7 The appellant understands that, under the guidance, "the authority must agree to the request unless there are reasonable grounds for refusing it". The basis of the decision should be informed by evaluating the request according to a set of assessment criteria. The appellant feels that not enough weight has been given to certain benefits and the objections advanced by the Comhairle can be addressed.

2.8 It considers the Comhairle has failed to apply and assess the best value and socio-economic benefit; focusing solely on a single position to the exclusion of all others; namely that the area of the appeal site is the only option available for providing a construction

compound and space for temporary classrooms for a proposed refurbishment/rebuild of Castlebay Community School. The appellant 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.

2.9 The appellant considers 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 – that is continuing with a joint programme with refurbishment/rebuild of the school. The ‘Future Sports Facilities for Barra & Vatersay’ report prepared under the Youth Café Project has shown slippage over decades. The appellant claims there is no evidence of finance being any closer to being secured.

2.10 The price and the transfer of an asset at less than market value is a possible assessment criterion. The disposal of an asset at less than market value is justified when the additional benefits of a proposal empower communities and align with local and national priorities to enable the delivery of best value across the public sector as a whole. 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 authority's policy objectives and local priorities as determined through Community Planning.

2.11 The Act does not say how much should be paid to purchase an asset or in rent and whether it should be at market value or at a discount. 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 would 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.

2.12 The history of the site and adjacent ground is relevant. In 1984 the successors to the Trustees of the Inhabitants of the island of Barra, with the consent of the National Playing Fields Association transferred 2.8 hectares of land to the then Western Isles Council to be dedicated as the King George V playing field. The existing football pitch was formed on part of the land. In 2003 the Trustees, with the agreement of the National Playing Fields Association, granted the Comhairle a minute of waiver from the dedication for 0.36 hectares which was used for house building. In 2015 Barra Football Club was granted planning permission for an all-weather pitch but this has now lapsed.

2.13 The appellant accepts the price offered by the appellant is less than the market value. The price was set at a nominal amount of £1 because when the request was submitted the evidence available indicated that the land was owned by the Comhairle 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 nominal figure was therefore set in the context of compensation for the loss of land reserved for sport and recreation.

2.14 The appellant says 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.

2.15 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 review hearing indicating the land is subject to a Minute of Agreement between the Comhairle and the National Playing Fields Association (also now known as Fields in Trust). The Minute of Agreement states the Comhairle granted Fields in Trust a right to designate the 0.36 hectare subjects as a public playing field in perpetuity from the last date of execution concluded on 18 October 2016, insofar as the subjects were available for designation. The Comhairle undertook from the designation 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 Fields in Trust.

2.16 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 is questionable. As things stand the obligations and restrictions would have aligned themselves with the proposal and facilitated the delivery of the project. That said, given the Comhairle's past record in reserving land for sport and recreation the appellant's preference would be for title to be transferred to ensure that 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.

2.17 The funding and financing of the project are dealt with 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.

2.18 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 appellant has the capacity to successfully deliver and maintain the project. The appellant has an established track record of delivering capital including a wind turbine at £2.45 million and marina at £1.5 million and has the capacity to deliver and operate the asset. All that is required is the site which would open up the opportunity. From the perspective of the local community the consensus is that it could make better use of the site than the Comhairle.

2.19 The Comhairle refused the transfer of the land on the basis that it 'may' be required for the community school project. The re-modelling and refurbishment plan, including estimated costs for Castlebay School, among others, was being prepared as far back as 2010 with a view to attaining educational property category B condition status as a minimum standard by 2018. This has not happened.

2.20 At the review hearing reference was made to £7 million having been set aside and a decision awaited from the Scottish Futures Trust regarding the remainder. This has not been forthcoming. 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. Inquiries reveal the Deputy First Minister has announced the Scottish Government's intention to develop Scotland's Learning Estate Investment Plan. The

Scottish Futures Trust is supporting the Scottish Government with the development of the Plan and in that context is in dialogue with Comhairle.

2.21 The appellant therefore questions 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 for an all-weather pitch the question is how many more years are the local community expected to wait for a facility that every other island in the area of the local authority already has.

2.22 The appellant questions the availability of the pitch if developed by the Comhairle. The Facilities Management Contract with FES FM Ltd for the operation of the Western Isles Schools Project 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. The result could be that access and 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.

2.23 The final paragraph of section 82(3) of the Act 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 appellant considers that the projects should be progressed separately given the stage of each project and the respective timescales. The fact the proposal has previously been granted planning permission, now lapsed, is also relevant in this context.

### Procedural issues

2.24 The appellant was informed on 29 March 2018 that the review panel agreed the asset transfer request should be determined by a hearing as it did not feel there was sufficient information in the paperwork alone and would like to hear from the parties. In accordance with the Hearing Session Rules as set out in the Asset Transfer Request (Review Procedure) (Scotland) Regulations 2016 the appellant 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 appellant). Prior to the hearing the appellant asked if there would be any legal representation in respect of title and conditions thereof and whether an invitation had been extended to Fields in Trust as an interested party. In terms of the latter the answer was no.

2.25 The hearing proceeding with opening verbal statements by both parties with the appellant 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 appellant 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.

2.26 Overall the review process placed all the burden of evidence on the appellant 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, in the view of the appellant, the minutes were so terse that they amounted to little more than a reiteration of the decision statement. The appellant strongly advocates 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 and being unlikely to overturn a decision made by its own officers.

2.27 In the absence detailed minutes of what was said at the hearing notes taken by the appellant 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."

2.28 The arguments advanced by the 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 (51 metres by 71 metres) would be required for a construction compound including storage of materials, vehicles and a welfare unit, and the siting of temporary classrooms. The panel was informed that should the area of land in question land be transferred pupils would have to be decanted elsewhere.

2.29 It was also stated that £7 million 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, although no evidence was provided.

2.30 The appellant's closing statement said that 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 the site 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.

2.31 The appellant 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 appellant 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 was 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.

2.32 It was brought to the panel's attention that the Comhairle's position was inconsistent with its previous position of draft lease issued, council reports offering lease or right to buy etc. The argument was advanced, 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, as then put, "hopefully this side of the summer" of 2019, that the school and all-weather pitches should not be linked together as a single capital project.

2.33 In conclusion the appellant 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.

## **CHAPTER 3: THE CASE FOR THE COMHAIRLE**

3.1 The Comhairle confirms the history of the community asset transfer request, its decision, that of the review panel and the subsequent decision by the appellant to appeal to the Scottish Ministers. There are no significant disagreements on the factual position as set out in the appellant's case above so these matters are not repeated here.

3.2 The Comhairle refers to its previous proposals for the provision of sports facilities in Castlebay dating back to 2001. It considers these are not relevant to the refusal as local authorities have to prioritise and balance investment requirements over their entire area. It considers that it has worked with the local community, reflected by the decision in December 2014 to authorise the Chief Executive, following confirmation that any potential title burdens are overcome, to sell or lease the area of land, allowing for negotiation on value to include the Castlebay School's use of the facility. A draft lease was never taken forward.

3.3 The Comhairle had initially identified £2.5 million in its 2013-2018 Capital Investment Plan for condition improvements at Castlebay Community School. Early on in this process it was determined that the £2.5 million was insufficient to fulfil the desired improvements and that Castlebay was to be prioritised in the 2018-2023 Capital Investment Plan for a major educational investment project.

3.4 The Comhairle has identified £7 million in its 2018-2023 Capital Investment Plan specifically for Castlebay School and has been in productive discussions with the Scottish Government and Scottish Futures Trust regarding the development of a Community Campus project jointly funded from the present allocation of Scottish Schools for the Future Programme. Discussions are also positively proceeding with Scottish Government and NHS Western Isles with regards to collaboration with the proposed Hospital and Care Facility project at Castlebay.

3.5 In December 2018 the Comhairle considered a report on this subject and agreed that:

- (a) the Comhairle note the proposal for the development of integrated education, health and social care, leisure and other public services facilities in Castlebay; and;
- (b) the Chief Executive and Director of Education, Skills and Children's Services were authorised to develop the proposal further, in partnership with NHS Western Isles, the Integration Joint Board and Scottish Government for further consideration by the Comhairle, and in consultation with the Barra and Vatersay community.

3.6 This level of investment planned for Castlebay provides the opportunity for a significant transformational change to the available facilities and services provided on the Islands of Barra and Vatersay. With both Health and Educational investment projects aligning, this would meet Scottish Government aspirations for a truly collaborative approach to infrastructure investment and service provision.

3.7 Architects have now been commissioned by Scottish Futures Trust to develop the collaborative project to a feasibility stage and meetings have been held with various Partners to determine the strategic outcomes of such a project. Enhanced sports facilities and re-routing of the road have been included within the initial discussions. Fields in Trust's interests are integrated into the proposals.

3.8 The Comhairle has undertaken community conversations in relation to transformational change throughout the Western Isles. At the Barra and Vatersay event there was a clear desire from the community that there should be collaboration between the two major projects being planned in the Castlebay area, that is the community school and health services. As part of its transformational change process the Comhairle will be inviting proposals from community groups for the delivery of services, such as leisure facilities, with the view to providing enhanced access and accountability where competent business cases are provided.

3.9 Should the request from the appellant for the transfer of land opposite Castlebay School be granted then this will restrict the space planning on the site, potentially affecting the feasibility of the collaborative investment approach. Whilst appreciating the appellant's desire to proceed with urgency to the provision of an all-weather playing facility, the Comhairle considers that delivering an integrated community campus project would be more cost effective and have the potential to exceed the current aspirations for sports and leisure facilities.

3.10 The Comhairle has an excellent record of working with communities and groups across the islands and, where possible, disposal of surplus assets to these bodies and facilitating their development and sustainability. In the past six years there have been 16 successful transfers of assets to community groups. There are also currently 12 open cases where community interest in an asset is being considered. Prior to the Community Empowerment Act being implemented, the Comhairle had a policy of seeking community interest in an asset prior to it being advertised on the open market.

3.11 The Comhairle has from the commencement of discussions on this particular site been aware of the interests of Fields in Trust and will continue to take recognition of these interests through deliberations and the conceptual aspects of any future development.

3.12 In November 2012 consultants undertook a condition assessment of Castlebay Primary and Secondary school buildings, which led to the prioritization of £2.2 million of investment within the 2013 – 2018 capital programme. £1.1 million of this was identified for the secondary school roof. On 4 March 2014 a technical team visited the school and met with school management in order to gain a better understanding of the scope of works to be delivered. It became apparent that there were significant technical and suitability issues which would not all have been solved with the level of financial provision identified. It was subsequently recommended that rather than invest £2.2 million at this point in time that Castlebay School be highlighted as the highest educational priority for investment in the 2018 – 2023 period.

3.13 This was discussed with the local community at a meeting on 18 February 2015. Subsequently the Comhairle identified £7 million in its capital programme 2018 – 2023 for Castlebay School and is currently in discussion with the Scottish Government over the development of a collaborative development of learning and health care facilities.

3.14 It is not the case that the Comhairle no longer wishes to transfer the area of ground. It merely wishes to defer consideration of the request pending the outcomes of its development and consideration of options associated with investment at Castlebay.

3.15 With regard to the St Brendan's hospital and care facility project and, separately, of the Barra and Vatersay Learning and community facilities project, the outline business case

was developed in partnership between NHS Western Isles (Western Isles Health Board - NHSWI) and the Comhairle. It set out the case for investment in health and social care services for the resident and visiting populations of Barra and Vatersay.

3.16 The case for change is based on the need to develop a fully integrated model that delivers safe, effective and person-centred care by consolidating health and social care and ambulance services within suitable facilities in order to:

- Respond to the changing needs of an ageing population located on a remote island;
- Provide a sustainable service by driving out inefficiencies and minimising cost pressures expected to arise by 2030/31 in relation to growing demand for services;
- Deliver a wider range of services closer to home;
- Provide appropriate facilities for the resuscitation and retrieval of patients;
- Ensure compliance with regulatory standards, particularly in relation to reducing fire safety and health acquired infection risks;
- Provide appropriate mortuary facilities as there are none currently; and
- Provide modern fit-for-purpose facilities that enable safe ways of working, and improve health and social care user experience.

3.17 This project offers a particularly unique opportunity to design and implement an integrated care system that could be replicated in other areas of Western Isles and nationally to support the national strategy to move towards a successfully integrated system of adult health and social care for Scotland.

3.18 Continuing with existing arrangements is not a feasible option if NHSWI is to continue to deliver high quality and safe services to the population of Barra and Vatersay. The age and condition of the existing facilities, which will continue to deteriorate over time, present significant challenges in complying with current and future regulatory standards, particularly in relation to increased fire safety and health acquired infection risks.

3.19 A feasibility study, undertaken in 2012, recommended that addressing this through a refurbishment programme is not possible, due to the lack of alternative capacity available on the island to absorb the displaced demand that would arise during the required 12-month decant of patients and residents. Divesting in the existing facilities that are housed within St Brendan's Hospital would result in the islands of Barra and Vatersay becoming the largest island population in Scotland with no access to accident and emergency services, short term medical beds, and outpatient services. This would create a significant clinical risk as it is essential, particularly given the geographic challenges of the island, that the population has access to emergency facilities to allow the resuscitation and retrieval of patients, as well as appropriate mortuary facilities when required.

3.20 Similarly the Comhairle continues to have a need to provide safe and compliant residential accommodation on the island. In the absence of an integrated solution, the council will need to identify an alternative site for a standalone development, which is likely to prove challenging given constraints around timescales and capital funding availability.

3.21 While investing in appropriate health facilities and residential housing is essential, this project is more than a building solution. Creating an integrated facility that brings together health, social care, ambulance services and provides housing with extra care is fundamental to maximising the benefits of this project for patients and service users, as well as delivering the local integration strategy that is integral to both NHSWI and the

Comhairle's medium term strategies and the success of Western Isles Health and Social Care Partnership.

3.22 In addition, there are wider socio-economic factors to consider since any divestment in services would result in reduced employment and reduced access to safe and effective care. This would significantly impact on the sustainability of the Barra population. Investment objectives.

3.23 The following investment objectives have been agreed to address the need for change:

- Infrastructure to deliver a wider range of fully integrated services closer to home;
- Facilities and pathways to support more people to live independently at home, or in a homely setting in the community, for as long as possible;
- Fit for purpose, modern facilities that comply with fire, health and safety, and infection control regulations to improve physical access to services and enable the delivery of safe, effective care with dignity;
- A flexible care hub for the Barra locality that will enable improved response times and provide safe spaces suitable for the resuscitation and retrieval of patients and the delivery of urgent and intermediate care;
- A health and social care locality hub that will enable co-located multi-disciplinary teams to deliver well-coordinated care that reduces duplication and minimises gaps in service provision; and
- A model of care that makes the best use of resources and reduces inefficiencies.

3.24 A short-list of options has identified the preferred option which involves new co-located facilities with a fully integrated workforce and offers the best value for money. This is because it provides fit for purpose facilities which support integrated working and the delivery of safe, high quality, patient-centred care. This minimises risk and results in the highest level of non-financial benefits. In addition to this it offers the most efficient solution with recurring revenue cost savings.

3.25 The scope of the current project, consistent with the preferred option set out in the outline business case, comprises:

- Provide St Brendan's hospital (including three 72-hour NHS beds, two resuscitation and retrieval bays and multi-purpose consulting rooms), dental facilities, primary care facilities, and an ambulance station;
- Eight tenanted houses with extra care units and two flexible units; and
- A fully integrated health and social care team.

3.26 The main advantages of this proposal are:

- Purpose built, fit for purpose compliant health facilities – reducing current risks to patients, staff, and service sustainability;
- Co-location of all services promotes integration of teams, enabling the delivery of more coordinated care and improving patient / service user experience;
- Creation of an ambulance station improving response times and providing storage;
- Providing housing with extra care will support residents to live independently;
- Flexible units provide opportunities to improve choice for services such as respite and palliative care;
- Reduced risk when unable to evacuate patients from the island due to weather and transport failures; and

- Provide suitable place of safety for mental health patients.

3.27 The outline business case was approved by Scottish Government in April 2018 and the development of the project, in terms of outline and detailed design, specification and procurement, is progressing through the hub North framework.

3.28 The Comhairle had for a number of years adopted a whole estate approach to its capital and repairs and maintenance programme for the school estate. The school rationalisation programme provided a mechanism for school investment which has seen a transformation in the school estate. All Comhairle schools with the exception of Castlebay are in a condition B category and have benefited from considerable investment. Eight out of 24 schools are now new buildings and the scale of redevelopment at Leverhulme Memorial School is such that it would also qualify as a new build. On this basis, 51% of pupils are educated in new buildings, 31% in primary and 78% in secondary.

3.29 Castlebay Community School is the only in a category C condition and is recognised to be in poor condition with major challenges in providing an education fit for the 21st Century. During the school rationalisation review and community conversations the Barra and Vatersay community accepted that investment in Castlebay School required to be postponed until the 2018-2023 Capital Programme. Castlebay School is therefore the current priority for school investment by the Comhairle.

3.30 A number of options have been considered, focusing on retaining elements of the school and integrating other services such as further education, the third sector, early years and some Comhairle functions. The £7 million of its capital funding 2018-2023 is on the basis that external funding will also be required.

3.31 Whilst condition and suitability ratings for Eoligarry Primary School are rated as satisfactory, the condition of both the primary and secondary elements at Castlebay School are rated as poor, with the suitability of the secondary element rated as bad. Both schools are well below capacity currently. There is an opportunity to seek funding to support the development of a new 2 - 18 campus in Castlebay which would include the Eoligarry provision.

3.32 The building project could offer value to the wider community looking beyond the demands of school use. The investment could offer wide benefit for the whole community if envisaged creatively from the outset. There is a growing emphasis on collaboration and partnership approaches between education departments, other local authority service areas, health services, colleges, third sector providers and the wider community. The investment could offer benefit to a wide range of service areas, with a focus on shared aims, if such an ambition is embedded within the strategic context. This approach ensures ambition informs the space planning principles, the strategic brief and the specification of spaces to suit.

3.33 Consultants, SPACE strategies Ltd, have been appointed by the Comhairle to facilitate the development of the strategic context, the space planning framework and strategic brief for the new facility. In considering the development and delivery of two significant investment projects by the public sector on Barra and Vatersay, the Comhairle submitted an exploratory proposal to Scottish Government in May 2018 for an integrated public sector development, the key strategic objectives for which would comprise those of

the separate projects but which, when combined, would result in further significant improvements to the delivery of public service in the community of Barra and Vatersay.

3.34 This recommended the integration of the current hospital, health and social care development with that of the community school and other Comhairle services in Barra. An integrated facility of this kind has the potential to provide significant added value for education, health, leisure and other public services while at the same time providing potential to reduce overall public expenditure in procurement, construction and whole life costs. This proposal suggested that the planned hospital, social care and housing proposal be integrated with the community/school proposal on the school site and adjacent areas.

3.35 Discussions with the Scottish Government were facilitated through the Scottish Futures Trust in October 2018 between the Comhairle and NHS Western Isles. There was unanimous support for this proposal to be developed further, and if it meets critical criteria in terms of service provision, space, construction and costs, that it move as quickly as possible to full evaluation stage.

3.36 The Comhairle agreed in December 2018 to:

- note the proposal for the development of integrated education, health and social care, leisure and other public services facilities in Castlebay; and
- authorise the Chief Executive and Director of Education, Skills and Children's Services to develop the proposal further, in partnership with NHS Western Isles, the Integration Joint Board and Scottish Government for further consideration by the Comhairle, and in consultation with the Barra and Vatersay community.

3.37 The Scottish Futures Trust has since engaged with Ryder Architecture to take forward a masterplanning exercise to set out a rationale for an integrated facility. This integrated proposal will only be considered viable if it can be delivered without significant delay to the existing hospital and social care proposal, for which a full business case has not been concluded at March 2019. Initial evaluation suggests that this is a realistic and achievable aspiration. The Comhairle and Scottish Government have a strong track record in delivering educational and other major infrastructure developments on time and on budget. It is anticipated that, with the work already done, the integrated proposal could be developed and delivered by 2022/23.

## CHAPTER 4: REASONING

4.1 Section 88(2)) of the Act provides that where a local authority, following a review, has refused an asset transfer request to which the review relates the community transfer body may appeal to the Scottish Ministers. Section 82(3) sets out matters which must be taken into account when an asset transfer request is made by a community transfer body.

4.2 In statutory terms the starting point for the appeal must therefore be section 82(3). The two sets of guidance, which are non-statutory, contain similar texts. Chapter 13 in each considers the assessment of asset transfer requests. Neither document refers to the consideration of section 82(3) matters but instead set out criteria for assessing requests. These are, in brief:

- seven best value themes to ensure that a property can be sold or leased at less than market value where there are wider public benefits to be gained;
- alignment with one or more of the Scottish Government's national outcomes; and
- consideration against a checklist of matters set out in paragraph 13.10 of the authority guidance.

### **Delivery against section 82(3) matters**

#### The reasons for the request

4.3 The local community has been pursuing the provision of an all-weather sports pitch since 1983 without success. Barra and Vatersay are the only principal islands in the Comhairle's administrative area without access to such a pitch and associated facilities unless undertaking a significant ferry crossing. The football pitch adjacent to the appeal site is small and poorly drained and is frequently unusable. This restricts the amount of time during which it can be used. "Home" games in local inter island leagues have to be played away because of the lack of facilities. I am satisfied that the need for the provision of a pitch is fully justified and this need is also supported by the Comhairle.

#### Other information provided

4.4 At the appeal hearing the appellant provided a comprehensive video presentation integrated with witness statements. This covered the history of the proposal and the background to the present need as outlined above. The appellant has been in discussion with a number of charitable trusts about potential funding but is limited in the extent to which these can be taken forward without any guarantee about the land acquisition. These include the Robertson and Gannochy Trusts and the Garfield Weston Foundation. I am aware from previous experience that these bodies have substantial sums to disperse annually and have an excellent record in supporting local communities.

4.5 The appellant states it has identified an area of land to the rear of the school that it considers more suitably located, larger in area and without the health and safety issues of crossing the main road that the appeal site suffers from. One crofter is said to have indicated a willingness to 'sell' his land. Whilst recognising that this would have to go through due legal process to deliver that outcome, the appellant believes that a decision to use this land would remove the only real objection to the transfer request that the Comhairle has. The Comhairle remains unconvinced of the viability of this as an alternative option, and is unaware of any other alternative sites within a realistic distance of the appeal site. I comment on this option at paragraph 5.3.

4.6 It is noted that the Comhairle's reason for refusing the transfer request does not rule it out permanently but states simply that until design proposals are further developed it is not in a position to dispose of any adjacent land within in its ownership.

4.7 From the evidence provided it is clear that there can be no confirmation of funding for the appellant for the project from public or charitable sources without a guarantee of the land acquisition. This leaves the appellant, in the current situation, of being unable to move forward with a community supported project that it is states will bring many benefits.

4.8 No details have been provided on any transfer value for the appeal site. The Act does not set out appropriate valuations. Chapters 11 and 12 of the guidance deal with price, valuation and means of obtaining a value. The appellant proposes a nominal sum of £1 and there was agreement that the district valuer be called on to provide a value. The guidance says this should be commissioned jointly by parties. I am unaware that this has been done. The purpose of such a value would be to put a figure on the discount offered, or 'gift' figure by the Comhairle.

4.9 The guidance makes clear that transfer bodies should not assume that transfers will be at a nominal sum. In seeking best value for a site, however, relevant authorities have the ability to dispose of sites at less than market value where there are wider public benefits to be gained.

4.10 If a transfer should take place it would be for the Comhairle to assess whether any non-financial benefits would justify a reduced price.

#### Economic development, regeneration, public health, social or environmental wellbeing

4.11 The project itself would not generate significant economic development although there would be some limited provision of jobs through the construction phase and in the management and maintenance of the pitch. This is not seen as a major justification for the pitch provision.

4.12 The present open ground is an eyesore, with its unkempt appearance and potential for attracting fly tipping. An all-weather pitch would remove this and encourage use of the area for the public good. It is in a prominent position in Castlebay and its regeneration would provide a boost in association with the new education and health facilities on the north side of the road.

4.13 The pitch would encourage greater participation in a variety of pitch based sports amongst people who do not want or are unable to travel to facilities on other islands. There is the potential for a significant improvement in public health through the encouragement of exercise and participation in team sports.

4.14 Social wellbeing would arise through the increase participation in team sports available to the wider community. The benefits of being able to play "home" games in Castlebay against teams from other islands would support inter-island activities and increase social interaction.

4.15 For the same reasons as set out in paragraph 4.12 above the removal of an eyesore vacant site and its replacement with an attractive pitch in active use would encourage environmental wellbeing.

#### Inequalities of outcome resulting in socio-economic disadvantage

4.16 The socio-economic disadvantage in this case arises from the community not having access to an all-weather pitch, the provision of which is now accepted as a normally available facility in many communities. This would be removed by the provision of the pitch.

#### Other benefits

4.17 The provision of the pitch would mean an important community asset in a remote and fragile island community that is disadvantaged by its location at the southern end of the Outer Hebridean chain. There is an argument that the provision of the pitch by the community would also relieve the Comhairle of that responsibility.

#### Benefits of an alternative proposal

4.18 There are no alternative long term proposals for the site. The use of the local area for sports was established by the provision of land for sports facilities as the King George V playing fields. It is on this ground that the present pitch is located, to the south of the appeal site. Part of this ground has been used for housing development, contrary to the restrictions of use of the site, by virtue of a minute of waiver from the then National Playing Fields Association (now Fields in Trust). The appeal site is therefore in an area of established sports use and its transfer would compensate for the loss of land used for housing. There is agreement that an all-weather pitch is an appropriate use for the site. I have no evidence of other sites being examined for a sports pitch but my site inspection suggested no likely sites within the confines of Castlebay. In addition the minute of agreement between the Comhairle and Fields in Trust confirms that the only acceptable use of the appeal site is for sporting facilities.

4.19 It is however the Comhairle's intention that in the short term, that is the next five years, part of the land could potentially be used to decant mobile classrooms and other community buildings and construction facilities during the redevelopment of the community campus. This was the only reason for the refusal of the transfer request.

4.20 The principal benefit of this would be in making the redevelopment easier in terms of finding other land to fulfil this temporary use. It would be easier in the short term than utilising the croft land referred to above in that relatively little preparation would be required. This would be primarily the placing of temporary Portacabin type classrooms and offices and construction compound on the site. The proximity of the appeal site adjacent to the community campus make this an attractive proposition, although there are counter concerns on health and safety grounds because of its location on the opposite side of the A888 from the redevelopment.

#### Comparison of benefits of an alternative proposal with other benefits

4.21 The benefits of using the site for decanting would be short term and still leave the community seeking an all-weather pitch in the longer term. It is a question of judgement as to whether the benefit of having that short term use would exceed that of the community being able to press ahead with the all-weather pitch having already waited several decades

for that provision. The former would include ease of running the redevelopment contract whilst the latter would bring forward the social and community benefits referred to above.

#### Authority obligations affecting its transfer abilities

4.22 I am unaware of any obligations under statute or otherwise that would affect its ability to transfer the land in question.

#### Other matters which the authority considers relevant

4.23 Given the single reason for refusing the transfer request the Comhairle has not raised any other matters that do not relate to the community facilities redevelopment.

#### **Demonstration of Best Value**

4.24 Paragraph 13.7 of the Scottish Government guidance states that the evidence provided to support the asset transfer request should be considered in relation to the seven best value themes. These themes are set out in a table on pages 59 and 60 of the authority guidance (and 60 and 61 of the transfer body guidance) and are: vision and leadership; effective partnerships; effective governance and accountability; use of resources; performance management; sustainability; and equality.

4.25 The appellant's vision and leadership was clear from its presentation at the appeal hearing. It has a clear view of how it wishes to take forward the development of the all-weather pitch and has made significant progress in terms of promoting contacts with potential charitable bodies, as mentioned above, as well as Government agencies such as Sports Scotland with regard to funding.

4.26 The principal outcome would be the availability of the pitch for all local pitch based sporting organisations and the Castlebay schools at a reasonable cost and potential use throughout the day and in evenings.

4.27 I am satisfied that the appellant has the ability and commitment to run the proposed pitch, carry out proper short and long term maintenance and attract significant use by the local community. As a local organisation it has already demonstrated its ability through its initiatives for the development of a wind turbine and marina referred to above. These have required sound financial management as well as the vision to take the projects forward.

4.28 The appellant would work with the wider community and particularly sports clubs that would be the principal users of the pitch. Guidance will be provided by Fields in Trust. As the pitch would be a public facility it is likely that a major user would be the two Castlebay Schools, primary and secondary. A close partnership with the Comhairle would be essential in managing this use.

4.29 The appellant already has in place a governance structure with a managing board drawn from its membership which is available to all on the islands. There is support from the Scottish Government as well as the Comhairle, Highlands and Islands Enterprise and the Crofters Commission with support on specific projects from independent charitable bodies. Annual reports to its supporting bodies demonstrate its abilities and achievements in supporting the community.

4.30 It is hoped that the grant aid funding from public and private bodies will be reduced over the years but there is no specific projection as to how this will be managed. The income from its renewable energy activities has the ability to be developed further and other business opportunities are being considered. The present employment of two members full time and one part time indicate an economy of resource application.

4.31 It must be recognised that with a population of less than 1,200 people and its remote location the island will never be fully self-supporting and external financial aid will be necessary. The appellant is no different from the whole of the Comhairle's area in this respect.

4.32 The achievement of its objective in providing the community facility would be measured by the public use it achieves and its attractiveness in bringing other sporting teams to the islands that would otherwise be unable to come because of a lack of facilities. The existing board has clear aims and being made up of members of the community is well aware of its responsibilities to it.

4.33 The guidance sets out five broad principles of sustainability:

- promoting good governance;
- living within environmental limits;
- achieving a sustainable economy;
- ensuring a stronger healthier society; and
- using sound science responsibly.

4.34 Whilst these are designed for projects of all types, including those with major capital and revenue expenditure, the principles are relevant to this small project. Good governance has already been demonstrated by the board through its existing activities. The project demonstrates a wise use of land resources in keeping with the long term use of the adjacent area for sports, albeit that the current pitch now has major deficiencies with much of its time being unusable because of drainage issues. The proposed pitch would make sound use of a long term semi-derelict area that was first proposed for this nearly 40 years ago, and would be well within its environmental capacity.

4.35 As stated above the economy is unlikely to become fully self-sustaining but the project would help local teams as well as the schools to carry out fixtures locally without the need to travel off the island. In its own small way this will be of help in saving travel costs for the islanders.

4.36 In terms of health the availability of the pitch will help promote a more active lifestyle, particularly amongst younger people engaged in team sport. This would be one of the primary benefits of the proposal, leading to a healthier society.

4.37 There is no direct scientific input to the proposal but as physical education is an important part of the school curriculum, with understanding of the human body and physical activity, there would be indirect links to science through physical activities.

4.38 As Barra and Vatersay are the only main island communities without easy access to an all-weather pitch the provision would help bring equality with other island communities. I have not been made aware of any specific equality problems that require to be addressed on the islands.

## **Alignment with Scottish Government National Outcomes**

4.39 Paragraph 13.4 of the guidance for authorities advises that asset transfer at less than market value is justified when the benefits empower communities and align with local and national priorities to enable the delivery of best value across the public sector as a whole. It adds that such benefits are likely to align with one or more of the Scottish Government's National Outcomes, determined by the Scottish Ministers under the terms of section 1 of the Act. It also states that, whilst the benefits may also contribute to the realisation of council or community planning policies and priorities, the value of the benefits should be judged on a broad basis, not only in relation to the council to which the request is made.

4.40 The outcomes relate to a broad spectrum of activities across many fields of national activity. They include children and young people, communities, health and education, and the environment. The development of an all-weather pitch would contribute in particular to communities, by helping to bring people together, and health, by promoting physical activity. Education. The environment would also benefit for the reasons outlined above.

4.41 Overall, taking into account the confines of a small island community the proposal would make a significant contribution to the national outcomes.

## **Assessment of outcomes**

4.42 Paragraph 13.8 of the guidance states that it is helpful to have in place a framework to ensure that all issues have been fairly considered and clearly recorded and that this can be placed alongside a similar assessment of best value themes and any other relevant factors. The following matters are suggested for consideration:

- value to relevant authority in existing use;
- value for alternative use/redevelopment;
- value for proposed and other community purposes;
- level of community benefits;
- likelihood that benefits will be delivered over a five-year period; and
- impact of project failure.

4.43 Paragraph 13.9 suggests assessment on a one to five scale to provide an overview of the request. Level one is defined as very strong, level two strong, level three moderate, level four weak and level five poor. The emphasis on each level is on governance and financial arrangements, best value characteristics and related project benefits.

4.44 Governance is very strong as evidenced by the track record of the appellant in the sound management of the organisation and its ability to deliver relatively high cost items such as the wind turbine and the marina. Its management is sound and the project would be well within its development capabilities.

4.45 The financial arrangements at this stage can be said to be no more than moderate in so far as no decisions have been taken by potential funding bodies. This would change with a guarantee of the land transfer. It is likely that continuing support would be required for revenue although there are no specific figures. However best value characteristics are strong including the support for the community and future wellbeing through sporting activity.

4.46 The related project benefits stem from the availability of a sports facility in a community that is the only one on the Comhairle's area that does not have relatively easy access to an existing facility. There would be very strong community benefits, as discussed above, that cannot be assessed in financial terms.

4.47 Overall the land is of little value to the Comhairle in its present state other than as potential ground for decanting, as set out in its reason for refusal. Its value is constrained by the minute of agreement with Fields in Trust regarding the use of the land for a sports facility, which effectively supports the project.

4.48 Theoretically the land could be used for other purposes such as housing development but this would betray the long term understanding and legal position about its use for sports facilities. In reality the land therefore has little alternative value.

4.49 The value of the land lies in its availability for sporting purposes as effectively established since about 1983 and the subsequent transfer of 2.8 hectares of land to the then National Playing Fields Association to form the King George V playing field.

4.50 As stated above the community benefits are not readily stated in financial terms. It would however be a very great advantage to the local community to have an all-weather pitch. Subject to agreement on funding there is every likelihood of the project being delivered within the next two years.

4.51 Once the development has taken place the worst scale scenario would be the collapse of the appellant and the taking over of the project by the Comhairle as part of its educational responsibilities including sporting development. This would mean that any investment made would effectively be safeguarded.

## CHAPTER 5: OVERALL CONCLUSIONS AND RECOMMENDATION

5.1 A notable feature of the appeal proposal is the overall support for the principle of developing an all-weather pitch in Castlebay, including from the Comhairle. The single reason for refusing the request is to have readily available land to decant classrooms, community uses and a construction compound during the redevelopment and expansion of the community hub.

5.2 According to the appellant there is alternative and better placed land to the north and north-west of the existing community hub, which also comprise most of the site for the redevelopment. The Comhairle states that an all-weather pitch would be incorporated within the redevelopment project but there is no guarantee that this could be done within the next five years.

5.3 During my accompanied site inspection as part of my hearing we walked around the north side of the school, which backs onto the croft land which the appellant says is available for transfer to the Comhairle. The eastern part of the ground, which I understand is the area potentially offered to the appellant, slopes fairly steeply from the north towards the existing school and contains many rocky outcrops. This is likely to be difficult to develop and in my view is unsuitable as a decanting site. To that extent I share the doubts of the Comhairle, although, in contrast, the western part is relatively level and at present under rough grazing. From what I saw it looks to be potentially developable land but this would have to be properly assessed and the use and willingness of the current owner to make available established. It is likely from the various drawings produced that some of this land may be needed for car parking and play areas, depending on the final scheme adopted, although this need not necessarily prevent its use as decanting ground.

5.4 As croft land there would need to be due process to make it available for the project, which I understand may include taking it out of crofting tenure. The Crofters Commission is a supporter of the appellant. I understand that two crofting tenants would be involved who have also expressed support for the project. While I note the indicated willingness of the landowner to come to an arrangement to make land available, my overall conclusion is that there is no guarantee that the land is suitable and could be made available without undue delay. Equally the Comhairle is unaware of any other potentially suitable sites within a realistic distance of the appeal site. I carried out an inspection of the wider surrounding area but no evidence was provided for me of other alternatives and none was immediately apparent.

5.5 The Act allows for the transfer of land at a discount, which would effectively comprise a 'gift' element towards the project. I do not have any figures for the land value but even if transferred at a nominal £1 the discount would appear not to be significant when seen against the £27 million plus cost of the new community hub development.

5.6 The Comhairle presents a strong reason for wanting to maintain control of the appeal site in the short term. It would make for easier decanting and is conveniently close to the redevelopment to minimise inconvenience. This is significant given the complexity of the whole integrated project and the need for flexibility in fitting the whole new complex into the land available. The importance of the development project to the wider community, as set out by the Comhairle and reflected in Chapter 3 is clear. Maintaining control of the site would fit easily into relevant contract planning and enable the project to move forward without undue delay. I am persuaded that there is a genuine risk of undesirable delay to

the combined scheme in terms of loss of flexibility and project management. This would result from the uncertainty about the alternative decanting site suggested and could result in unacceptable risks to the whole viability of the Comhairle's proposal as an integrated project.

5.7 Against this the community has been waiting many years for an all-weather pitch. The present football ground is unplayable much of the time and suffers badly from waterlogging and poor maintenance of the drainage.

5.8 Reaching a conclusion is therefore a very fine balance. There is no guarantee at this stage that funding for either project will be achieved but it seems likely that the Comhairle is in a stronger position than the appellant. The latter's position would change significantly however if the land were to be guaranteed and much ground work has already been achieved with potential charitable trust donors. I have been impressed by the appellant's submissions, and in particular the professionalism of its presentations at the hearings. It has presented a very strong case for the transfer of the land and I have every sympathy for the continuing frustration felt at the continuing delays in providing an all-weather pitch.

5.9 There would however be very real benefits to the overall Barra and Vatersay community in the provision of new educational and health facilities to which the Comhairle is so clearly committed. This is shown in the extensive work so far carried out. The use of the appeal site for decanting as an integral part of the project is clearly a beneficial solution and one that would clearly work to the project's advantage. I am not satisfied that the alternative ground identified could provide a satisfactory short term solution to this aspect of the project.

5.10 I conclude that there would be considerable benefits to a remote island community from the transfer proposal in the short and long term. These benefits however must be balanced against my findings that there is a real and unacceptable level of risk of potential delay to the overall community hub project if the option to use the appeal site for decanting is removed. In the event of Ministers being minded to dismiss the appeal this would not terminate the all-weather pitch project but potentially delay it until the end of the community hub redevelopment. On the other hand it would present an opportunity to combine the pitch within the overall project. It would also be necessary for Ministers to understand and, as appropriate, emphasise to the Comhairle the importance of the all-weather pitch to the community and the need for this to be provided with as little delay as possible.

5.11 In the event of Ministers being minded to allow the appeal I have not been informed of any conditions being proposed by either party. Paragraph 8.21 of the guidelines states that conditions are not necessary to make a transfer request complete. Chapter 14 discusses the use of conditions to protect a discount but in the circumstances of this case, where the future use of the appeal site is already protected by the minute of agreement over future use, and there is thus no real alternative value, I am unaware of any threat to the Comhairle's position in this respect.

5.12 Should the appeal be allowed Ministers should also issue a direction under section 85(5)(c), as provided for by section 88(3) to the local authority regarding the issue of a new decision by the authority including any conditions they may see fit.

Recommendation

5.13 I recommend that the appeal be dismissed and the community asset transfer request be refused.

*Trevor A Croft*

Reporter

## Appendix 1

### Attendance at hearing

#### The appellant

Chris Denehy: parent, resident, junior sports coach and member of Barra Sports forum

Euan Scott: parent, resident and officer of Coimhearsnachd Bharraidh agus Bhatarsaidh (Barra & Vatersay Community) Ltd

Paul McGuire: parent, resident, junior sports coach and member of Barra Sports forum

Betty McAtear: grandparent, resident and former councillor

Iain Gerard MacNeil: parent, resident, community councillor and member of Barra Sports forum

Colin Rennie: Manager (Scotland), Fields in Trust (operating name for the National Playing Fields Association)

Sarah MacLean: parent, resident and board member of Coimhearsnachd Bharraidh agus Bhatarsaidh (Barra & Vatersay Community) Ltd

James Davidson: resident, parent, Captain of Barra Football Club

#### The Comhairle

Iain Mackinnon, Director for Investment Delivery

Calum Mackenzie, Head of Property and Infrastructure

Tim Langley, Legal Services Manager