

PE1729/C

Comhairle nan Eilean Siar submission of 22 October 2019

The National Assistance (Assessment of Resources) Regulations 1992 (“the Regulations”) do not define “assets”. The Petition Briefing notes that the Scottish Government’s Charging for Residential Accommodation Guidance (“CRAG”) does not make explicit mention of croft property (in fact, the CRAG makes no reference to croft property at all). The Briefing also notes that the Scottish Government leaves the interpretation of the Regulations and the CRAG to local authorities.

Elected Members within the Comhairle first raised the issue of whether croft property should be included in the definition of “assets” for the purposes of the Regulations about 15 years ago. The Comhairle sought external legal opinion from Counsel at that time and was advised that croft land would normally be considered to be a capital asset. As is noted in the Petition Briefing, it was stated by a civil servant from Scottish Government at the Scottish Parliament Cross Party Group on Crofting on 31 October 2012:

Crofts and croft tenancies are assets, in the same way as family homes are assets. The sales of each of these are conducted on a regular basis through outlets within the crofting counties.

The Comhairle was also advised by Counsel that it would not be entitled to make a general exclusion of croft property from the calculation of residents’ resources. That is not to say that the particular circumstances of an individual case would preclude the exclusion of an asset, be it croft or any other property.

The Comhairle has followed Counsel’s advice in its interpretation and application of the Regulations. The law does not appear to have changed.

There is an implication in the Petition Briefing that the Comhairle’s view that croft property is “likely” to be classed as a capital asset suggests some ambiguity in the law or uncertainty on the part of the Comhairle. However, that would be to misunderstand the position. Counsel’s advice, in answer to the question of whether or not the value of croft property should be taken into account for the purposes of the Regulations, was:

The answer to this question will depend on the personal circumstances of the resident. It is likely in many cases that the croft will require to be taken into account, but there may be some personal circumstances of the resident which will mean that it should be disregarded.

The use of the word “likely” did not reflect any ambiguity as to whether or not croft property should in general be considered to be an asset for the purposes of the Regulations. It simply reflected the fact that a local authority might exercise its discretion to disregard a specific asset, depending upon the circumstances of the particular case.

The present advice from officers to Elected Members is that the Comhairle is correctly applying the Regulations and the CRAG.

Some Elected Members remain concerned at the lack of a definition of “assets” in the Regulations and at the perceived unfairness of the practice of taking croft property into account when assessing capital. Following a recent Seminar for all Elected Members, earlier this month the Comhairle decided to remit consideration of those issues to its Communities and Housing Strategic Member Officer Working Group. That Group has not yet met but agenda items are expected to include:

- The interpretation of “assets” within the Regulations in respect of croft property, and whether or not it should include croft property;
- The extent to which the practice of assigning (i.e. selling) croft tenancies on the open market constitutes an abuse of the principles of crofting tenure;
- How, in respect of this matter, the Scottish Ministers’ duties in respect of island communities in the Islands (Scotland) Act 2018 should operate to protect and sustain crofting communities which are prevalent in the Western Isles; and
- Aside from croft property potentially being considered an asset for the purposes of the Regulations, whether the law provides, or should provide, any mechanism for a local authority to force the sale of such property in order to realise the value of that asset.

The Comhairle would welcome any guidance, and further clarification of the law, from the Scottish Government on the matters covered by the Petition. It must be noted that exempting croft property from the Regulations would have a significant financial consequence in respect of the ability of local authorities in crofting communities to recover care charges.