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**THE PARABLE OF PORTOBELLO:
LESSONS AND QUESTIONS FROM THE FIRST
URBAN ACQUISITION UNDER THE SCOTTISH
COMMUNITY RIGHT-TO-BUY REGIME**

John A. Lovett* and Malcolm M. Combe**

Towards the end of its first term, the newly constituted Scottish Parliament, brought into being by the United Kingdom's Scotland Act 1998, passed the Land Reform (Scotland) Act 2003 by a convincing margin of 101 votes to 19. On March 16, 2016, the Scottish Parliament voted through what is now the Land Reform (Scotland) Act 2016 by an even more convincing 108 votes to 14. The short titles of those two statutes, not to mention the cross-political party support for the contents of both acts, demonstrate that land reform is a vital policy interest in contemporary Scotland. Both statutes contain provisions that aim to facilitate or, in some cases, compel transfer of land from an existing landowner to a community body. Another new statute, the Community Empowerment (Scotland) Act 2015, expands the community right to buy introduced by the 2003 legislation from purely rural application to the whole of Scotland, while also introducing new rights of community acquisition for land left underused or in a detrimental state. All of this legislative activity has been accompanied by a cultural shift favoring community ownership of land and continued financial support for community land acquisition schemes. This essay considers the drive toward community land ownership in Scotland with reference to a recent community acquisition in Portobello, a community on the outskirts of the Scottish capital, Edinburgh. It draws a number of lessons from this first urban acquisition under the Scottish community right-to-buy regime and raises questions about such acquisitions as well.

* * *

We met Ian Cooke at the Skylark Café at the quiet end of the High Street in Portobello at half past noon on a Thursday in June. The sky was a radiant blue. We could smell the salt air and hear seagulls call to each other as they soared on currents blowing in from the North Sea. Over salads and dusty lemonade, Ian, the director of the Development Trusts Association

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Scotland,¹ and also a native of Portobello, told us the story of how a group of 70 concerned residents formed a loose organization two and a half years ago and how that informal group organized itself into a more formal corporate body called Action Party (technically a company limited by guarantee).² Ian explained how that entity took advantage of the recent expansion of a land acquisition tool originally made available to community groups in rural areas to acquire ownership of a prized community asset—the former Portobello Old Parish Church.

After lunch, the three of us strolled to the old church and its accessory buildings on Bellfield Street. We walked through the old church pews, peered down at the altar from the church's grand balconies, clambered through the gardens and gravestones (although we were assured there were no bodies on the site), meandered through the church's social halls and offices, all of which, until just a few years ago, would have been filled with church groups, services, wedding receptions, and meetings between the minister and the congregation. We met Emma Griffiths, the Development Manager that Action Party recently hired to raise funds for the renovation of the church. Throughout our visit, we learned more about the community that came together to acquire the old church and its vision for how this property might serve the community in the future.

Looking back on our encounter with Ian and our visit to Portobello, a number of lessons emerge. This essay acknowledges Action Party's achievement and articulates some of those lessons (while posing some additional questions) for property law scholars, property lawyers and anyone interested in how Scotland's new land reform legislation might be used to promote the twin goals of increased community ownership of land and buildings and the promotion of sustainable development.

We hope this reflection will be useful to readers in many places. It provides a detailed and intimate portrayal of how crucial elements of Scotland's remarkable new land reform legislation are beginning to work in an urban setting. In the Community Empowerment (Scotland) Act of 2015, the

1. Development Trusts Association (DTA) Scotland is an "independent, member-led organization which aims to promote, support and represent development trusts in Scotland." It has over 250 development trust members—community led organizations that seek to "improve the quality of life of people all across Scotland. In 2016, DTA Scotland converted into a SCIO (Scottish Charitable Incorporated Organisation)." *About DTAS*, DEV. TR. ASS'N SCOT., <https://perma.cc/GC7K-GX3J>.

2. Under UK company law, regulated by the Companies Act 2006 (U.K.), there are several entity forms that can be adopted by legally incorporated companies. The most common is the private company limited by shares, in which investors purchase shares and are only exposed to the extent of that investment. Another option is a company limited by guarantee. With this form of company, members agree to guarantee the debts of the company up to a certain, often nominal, amount. This form tends not to be used commercially but is often used as a vehicle for non-profit entities. *See generally Set up a charity*, GOV.UK, <https://perma.cc/PYW9-E5GJ>; *Company Limited by Guarantee*, SCOTTISH COUNCIL FOR VOLUNTARY ORGS., <https://perma.cc/G9CY-3BNS>.

Scottish Parliament expanded the reach of Part 2 of the Land Reform (Scotland) Act of 2003, which previously gave community groups the right to assert a preemptive right to buy land (effectively a right of first refusal) in rural areas, and extended it to urban land as well.³ In the same 2015 legislation, the Scottish Parliament also granted community groups a right to buy abandoned, neglected or environmentally detrimental land even when the land is not offered for sale by the owner.⁴ The following year, under Part 5 of the Land Reform (Scotland) Act of 2016, the Scottish Parliament also legislated to give community bodies a similar right to force a sale of any land in Scotland (rural or urban) to further sustainable development.⁵ This essay traces how a loose group of concerned residents in one particular place organized itself into a coherent community organization with sufficient agency and legal authority to take advantage of these new community empowerment tools. Scholars, lawyers, and activists interested in community development in the United States, Scotland, or any country seeking to expand community ownership of land will be interested, we think, in the lessons we learned in Portobello and the questions it poses for the future.

I. CONDITIONS FOR A SUCCESSFUL COMMUNITY RIGHT-TO-BUY ACQUISITION

Action Party's drive to acquire the old church and its social halls on Bellfield Street in Portobello is only one community acquisition story. Future events are likely to reveal other mixtures of circumstances that can lead to a successful community acquisition, particularly of urban land and buildings.⁶ That said, what follows is our preliminary assessment of conditions that might predict a successful community right-to-buy acquisition.

A. *Significant Threat and Significant Opportunity*

When we asked Ian what was the single most important condition for a community acquisition in Scotland today, his response was swift and

3. Community Empowerment (Scotland) Act 2015, § 36 (2019) (amending the Land Reform (Scotland) Act 2003, § 33).

4. *Id.* § 74 (introducing a new Part 3A to the Land Reform (Scotland) Act 2003). The right to buy abandoned, neglected or detrimental land came into force on June 27, 2018, although it is as yet untested by any community body.

5. Land Reform (Scotland) Act 2016, §§ 45–73 (2019). A community body's right to buy land when the current owner is blocking sustainable development is slated to come into force at some point in 2019. The Scottish Government has just opened a consultation on the regulations relating to this new right: <https://perma.cc/0073-L29G>.

6. For a formal report based on interviews of twenty individuals representing private landowners in Scotland and discussing practices that have allowed some landowners and communities in Scotland to overcome barriers to community land based activities, see Annie McKee & Deb Roberts, *Good Practice in Overcoming Barriers to Community Land Based Activities*, JAMES HUTTON INST., June 2, 2016, <https://perma.cc/QA49-L6W9> (report for the Scottish Government).

firm—“a significant threat and a significant opportunity.”⁷ Ian is no doubt right in identifying this initial double-edged predicate. In Portobello, the significant threat appeared suddenly and was easy to spot. For many decades, the Church of Scotland had operated three churches in Portobello.⁸ In response to dwindling congregations,⁹ and after issuing reports of its plan to consolidate the three churches into one,¹⁰ the Church sold one of the churches to a private developer who turned the property into private housing.¹¹ In early 2016, the Church made public its plan to close and sell the second of those churches—the Old Parish Church on Bellfield Street.¹² This announcement set off alarm bells in the community, although it seems fair to say the Church’s publicly reported and partially progressed consolidation plans meant the community was not wholly blindsided by the planned sale.¹³

But the Church’s announcement also presented an opportunity to Portobello. As we learned through our tour, the primary church building and its quite extensive ancillary halls were in reasonably good shape. Although extensive renovations will be necessary to turn the entire collection of buildings into a repurposed community hub, the buildings had neither been abandoned nor entirely neglected. Clearly, the buildings were not actively harming the community.¹⁴ Although attendance at Sunday services might have tailed off as compared to decades earlier, the primary church building and its accessory spaces were still being used.¹⁵

What made the opportunity presented by the Church’s announcement more striking, though, was the social and geographic environment in Portobello. Originally a separate town (or Royal Burgh), Portobello was formally

7. Interview by John A. Lovett and Malcolm M. Combe with Ian Cooke, Director of Development Trusts Association Scotland (June 7, 2018).

8. David McCann, *Portobello to be left without Kirk presence*, EDINBURGH EVENING NEWS, Mar. 22, 2014, <https://perma.cc/6DGH-C6YF>.

9. Dwindling congregations have led to a consolidation of the Church’s estate all over the country. For example, the village of Kilbarchan in Renfrewshire, near Glasgow (where one co-author grew up) recently amalgamated two churches into one. *Sadness as Kilbarchan church closes its doors*, THE GAZETTE, July 6, 2015, <https://perma.cc/QQE8-3SZ9>. For particulars on that sale, see <https://perma.cc/MXB9-9GG4>.

10. McCann, *supra* note 8. In addition to this newspaper article announcing the Church’s plans, Ian Cooke also informed us that there was local knowledge of the potential merger and associated divestment plans owing to discussion in the respective church congregations.

11. *Portobello church hall makes way for townhouse trio*, URBAN REALM, Dec. 16, 2016, <https://perma.cc/Q5JG-63EP>.

12. Ian Swanson, *Portobello Residents Rally in Bid to Buy Bellfield Church*, EDINBURGH EVENING NEWS, Jul. 1, 2016, <https://perma.cc/L4RV-BYA9>.

13. *Id.*

14. Thus, this was not a case that could have justified use of Part 3A of the Land Reform (Scotland) Act 2003, as introduced by the Community Empowerment (Scotland) Act 2015, section 74. These provisions were not in force at the time of the acquisition, having entered into law on June 27, 2018.

15. Swanson, *supra* note 12.

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incorporated into the sprawling City of Edinburgh in 1896.¹⁶ In the Victorian era, Portobello thrived as a holiday resort for middle-class families from Edinburgh and Glasgow who came to enjoy its promenade and wide sandy beach.¹⁷ Although holidaymakers still arrived into the 1970s, in subsequent decades discount airline fares to Mediterranean beach resorts and other foreign attractions increasingly lured Scottish families away from traditional domestic holiday sites like Portobello.¹⁸ Around the same time, Portobello also lost its manufacturing base, including the closing of a power station that had been an important source of local employment.¹⁹

Beginning in the early 2000s, however, Portobello's fortunes began to turn. Artists, bohemians, young professionals and others realized that the area still offered a strong housing stock in close proximity to the commercial center of Edinburgh (just a twenty-minute bus ride away).²⁰ These advantages coupled with good local schools, Portobello's natural amenities—its still wide beach and bracing North Sea air—and the emergence of a number of housing developments in and around Portobello all led to a local renaissance and helped to reverse the population decline of previous decades.²¹

So, given the social and geographic context, the old church and its ancillary buildings on Bellfield Street were not marginal at all. The sheer extent of the property was surprisingly large. Although they needed work, the buildings were far from dilapidated. In sum, the property was quite well situated for community redevelopment. Residents and neighbors could see with their own eyes the transformative potential in the property that the Church wanted to sell.

These various components crystalized and, in effect, merged when a group of Portobello residents wrote to the Church of Scotland and asked for a six-month delay in the Church's efforts to sell so that the group could conduct a feasibility study and obtain funding to buy the property. The Church—to the surprise of many—declined to offer such accommodation.²² But, as it turns out, complications with title to the property interrupted the Church's plans for a quick transfer.²³ This delay provided a crucial window of time within which the community could organize.

16. W.M. GILBERT, *EDINBURGH IN THE NINETEENTH CENTURY* 176 (1901).

17. ARCHIE FOLEY & MARGARET MUNRO, *PORTOBELLO AND THE GREAT WAR* (2013).

18. David McLean, *Lost Edinburgh: Portobello Bathing Pool*, *EDINBURGH EVENING NEWS*, Mar. 11, 2013, <https://perma.cc/BCU8-3JNX>.

19. *See generally Heritage*, PORTABELLO HERITAGE TRUST, <https://perma.cc/2BSY-TJKF>. The Portobello Heritage Trust is a Scottish charity.

20. Interview with Ian Cooke, *supra* note 7.

21. *Id.*

22. Ian Swanson, *supra* note 12.

23. Interview with Ian Cooke, *supra* note 7.

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*B. Coherent Community: Understandable Boundaries
and a Sense of Place*

The second condition for a successful community acquisition relates to the twin presence of threat and opportunity but concerns the nature of the community in which these initial conditions appear. The relevant community, we believe, must be one defined by comprehensible boundaries and knit together by a collective “sense of place.”

Because of its distinctive history as a separate town sustained and animated by its relationship with the sea, and its unique geographic location, separated from the rest of Edinburgh by Holyrood Park and a modest sized but distinct commercial and light industrial zone, Portobello feels like a distinct place. When the first informal group of concerned citizens began to meet, these individuals almost immediately began to define themselves with reference to a place.²⁴ Indeed, when seventy people attended the first public meeting to respond to the possible sale of the old church in April 2016, these individuals agreed to pursue community ownership and establish an organization—Friends of Bellfield—derived from the street upon which the old church stood.²⁵ Later, when Ian Cooke helped Friends of Bellfield form the company limited by guarantee known as “Action Party,” that body could define itself in terms of a clearly defined geographic area. Bellfield is bounded on its west by King’s Road, a street that divides Portobello from Edinburgh proper, on its east by a street dividing it from another suburb, on its south by a street named after one of Portobello’s most famous sons (the entertainer Sir Harry Lauder), and to its north by something even more famous and important for the shaping of Portobello than Sir Harry, namely the waters of the Firth of Forth.²⁶

C. Human Capital, Social Capital, and Inspiring Dreams

The third cluster of conditions necessary to achieve a community acquisition involves intangible assets: human capital, social capital, and an inspiring collective vision. Human capital is simply the individual human

24. For a discussion of the important role that community engagement and place can play in achieving the human rights objectives of land reform legislation in Scotland, see the discussion paper produced as part of the Scottish Land Commission’s “Land Lines” series. Kirsteen Shields, *Human Rights and the Work of the Scottish Land Commission*, SCOTTISH LAND COMM’N, May 2018, at 12–14, <https://perma.cc/98RR-TVYK>.

25. Action Party, ‘*Save Bellfield*’ Public Meeting, ACTION PARTY, Apr. 16, 2016, <https://perma.cc/X69Z-H79U> [hereinafter *Save Bellfield*].

26. See <http://rcil.ros.gov.uk/RCIL/default.asp?category=rcil&service=home> (click in the box titled “Subjects” in the relevant entry) (last visited May 10, 2019) for a description of the area as documented in the Register of Community Interests in Land under reference CB00202. The “202” in the reference signifies this was the 202nd Scottish community to register such an interest.

capabilities of the community's residents. That human capital need not be extraordinary. In Portobello, the individuals who formed Friends of Bellfield and later Action Party were generally not trained community activists.²⁷ None held a doctorate in economic development. There were no lawyers, building professionals or business persons. The only lawyer who helped the effort was unrelated to any member of the group but just wanted to lend his support. By no means disempowered, the members of Friends of Bellfield were regular people—diversely skilled it is true—who thought of Portobello as their home and wanted to make it a better place.²⁸

Perhaps more important than human capital per se is the social capital of the community seeking to acquire property in community ownership.²⁹ We learned from Ian Cooke that all but one member of the executive committee of Friends of Bellfield and later Action Party—the core group that drove the project—were employed, and that a group of women in their thirties who had energy, social media skills, and access to local school networks, played a particularly important role in the project's successful development.

Evidence of the latent social capital present in Portobello surfaced as soon as the community became aware of the Church of Scotland's firm plans to sell the Old Parish Church. As noted earlier, first a meeting was held to discuss the seemingly imminent sale, and Friends of Bellfield was formed.³⁰ Next, that group asked the Church for time to study the feasibility of acquiring the property and raising funds.³¹ After the Church declined to give the group a chance to undertake those steps, the group put on a well-attended Cabaret Night at which it launched a petition and recruited volun-

27. Action Party, *Background to Proposed Portobello Community Buy out of Bellfield Old Parish Church*, ACTION PARTY, Apr. 9, 2016, <https://perma.cc/V4MF-UVKA>.

28. We acknowledge that the range of directorial occupations listed on the publicly accessible Companies House website (which contains information about all UK companies, including Action Party) demonstrates there was a relatively broad skill-set available to draw on. See Companies House, *Search the register*, COMPANIES HOUSE, <https://perma.cc/XK3Y-H646>. It should also be noted that Ian Cooke himself brought a great deal of community development experience, including his involvement with DTA Scotland and the Scottish Government appointed Land Reform Review Group. As such, the group demonstrated key traits that are useful for such an initiative. See ROB HOPKINS, *THE POWER OF JUST DOING STUFF: HOW LOCAL ACTION CAN CHANGE THE WORLD* 68–69 (2013).

29. Social capital refers to the social networks and norms of reciprocity and trustworthiness that arise from these networks and that together allow actors within these networks to achieve collective ends or to achieve them more efficiently. See ROBERT D. PUTNAM, *BOWLING ALONE* 19 (2000); James Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S96 (1988). For a more detailed discussion of the concept of social capital, see John A. Lovett, *Can Charter Schools Save Cities? Social Capital in Urban Public Education*, *HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECON. INEQUALITY* 161–73 (Ray Brescia & John T. Marshal eds., 2016).

30. *Save Bellfield*, *supra* note 25.

31. Ian Swanson, *supra* note 12.

teers to knock on doors.³² It also organized stalls for community events and set up a Facebook page and website to raise funds and build community support for the nascent community acquisition.³³ All of this activity culminated in the group obtaining over 1,500 signatures on its “Save Bellfield Petition.”³⁴

Once Action Porty was formed and registered with Companies House in August 2016, as required by UK company law,³⁵ more evidence of social capital continued to mount. Within four days of the company’s formal recognition by Companies House, the new entity had 340 registered members.³⁶ The next month over 200 people attended an open house hosted by Action Porty and 106 individuals submitted written comments in support of the proposed community acquisition of the property that had now come to be known as Bellfield.³⁷

All of this community activism still might not have led to a positive outcome in the absence of a final intangible ingredient. In November 2016, Action Porty released its formal vision statement for the redevelopment of Bellfield.³⁸ The old church would be transformed into a multi-purpose, fully accessible “community hub” providing: affordable meeting and activity space; a flexible arts and social venue; ceremonial space for life celebrations; a café; gardens welcoming to older people and families; and, finally, “a place to share the history of Portobello and to shape its future.”³⁹ We think this final vision statement was important, and not just because the Scottish Government agreed that the “proposals should contribute posi-

32. Action Porty, *Save Bellfield/Action Porty Campaign*, ACTION PORTY (June 28, 2016), <https://perma.cc/U5YY-G3XV>.

33. *Save Bellfield*, *supra* note 25.

34. This figure, reported to us by Ian Cooke, represents 25% of all eligible residents in the community of Portobello, a fact which went a long way in eventually convincing the relevant Scottish Ministers that there was strong community support for the eventual community acquisition. See Portobello Community Council, *Save Bellfield: Campaign Update*, PORTOBELLO CMTY. COUNCIL, Aug. 23, 2016, <https://perma.cc/5MWL-WMTW>.

35. Companies House, *Search the Register: Action Porty*, COMPANIES HOUSE, <https://perma.cc/SJ2S-43NT>.

36. Action Porty, *Our Community Right to Buy Registration has been Successful!*, ACTION PORTY (Sept. 13, 2016) <https://perma.cc/5H8H-J26W>.

37. Interview with Ian Cooke, *supra* note 7.

38. Urban Animation, *Portobello Old Parish Church, Bellfield Street: Appraisal Report for Action Porty*, URBAN ANIMATION (Dec. 2016) <https://perma.cc/U8GX-2493>.

39. These objectives for the redevelopment of the Old Parish Church represent a synthesis of the work that Action Porty achieved in collaboration with two consultancy teams, Urban Animation and Athena Solutions, that Action Porty engaged to help it complete assessments of the development options for the property. Ian Cooke graciously supplied us with multiple drafts of those reports. The quoted language comes from Ian Cooke’s own power point presentation synthesizing these detailed reports. All documents are available with the authors. See Urban Animation, *supra* note 38; HAZEL ALLEN, ATHENA SOLUTIONS, PORTOBELLO OLD PARISH CHURCH, BELLFIELD STREET: SOCIAL ENTERPRISE PLAN 1–50 (2016).

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tively to the sustainable development of the land and the local community of Portobello.”⁴⁰ If Action Party’s leaders had not announced a big and inspiring vision for Bellfield, we are not sure the community would have followed it with the same zeal and determination. The lesson here is that a bold vision can help mobilize a community’s latent social capital.⁴¹

D. *Just Enough Money, Just in Time*

The fourth ingredient for a successful community acquisition is an obvious one—money. Community acquisitions require funding at two stages of the process. First, some initial seed money is critical to help pay for preliminary assessments to determine whether a community acquisition is even feasible and to form a recognizable community body that will satisfy the criteria under any of the relevant statutory schemes for community acquisition. In Portobello, this initial seed money arrived in the form of a £16,000 consultancy grant from the Scottish Land Fund.⁴² This grant allowed the community to complete a wonderfully detailed and imaginative feasibility and options study, to pull together the beginnings of a business plan, and to complete the initial work necessary to create Action Party.

Of course, a significantly larger amount of money is needed for the actual community acquisition once Scottish Ministers grant their consent to a proposed acquisition. In this case, almost all of the actual purchase money came in the form of a £647,500 grant from the Scottish Land Fund, which in turn receives its funding from the Scottish Government.⁴³

40. We quote the letter on behalf of the Scottish Ministers’ approving Action Party’s application to have its preemptive right to buy land (the right of first refusal) entered in the Register of Community Interests in Land, which is accessible via that register under reference CB202. Letter from Colin Gray, on behalf of Scottish Ministers, to Mr. Cooke (October 21, 2016) (on file with authors). The Scottish Ministers stated four grounds for their conclusion that there would be a positive contribution to the sustainable development of the land and the local community if Action Party’s interest in the land was realized: (1) “Developing the site into a multi-purpose community hub”; (2) “Developing a high quality and flexible arts, social and income generating venue” [with the potential for the site to be a visitor destination]; (3) “Exploration of micro energy generation possibilities on the site”; and (4) “Making the garden open for public use”. For further analysis relating to sustainable development, see Part C below.

41. We note that the community in Portobello did have one previous brush with issues of community claims to land, albeit the complex problem of whether inalienable common good land could be appropriated by a public authority for the purpose of building a new high school. See generally Malcolm M. Combe, *Lessons in Scots Law: the Common Good School*, 17 EDIN. L. REV. 63 (2013).

42. Highlands and Islands Enterprise, *The Scottish Land Fund*, HIGHLANDS AND ISLANDS ENTER, <https://perma.cc/YD7X-QSWK>; Action Party, *The Story so Far*, ACTION PARTY <https://perma.cc/R4GQ-N4MP>.

43. See The National Lottery Community Fund, *Portobello Residents receive £647k to Pursue Community Ownership Ambition*, THE NAT’L LOTTERY CMTY. FUND (Feb. 17, 2017), <https://perma.cc/W8RN-WAFX> (explaining the details of the grant award, and that the Scottish Land Fund’s program is “funded by the Scottish Government and delivered in partnership by the Big Lottery Fund and Highlands and Islands Enterprise”). That at least a good portion of the funds for community land acquisitions come from the sale of lottery tickets is an important policy factor according to some land reform advo-

E. All Politics is Local—The Community Ballot

Meanwhile, even before the Scottish Land Fund made its final funding decision and even before Scottish Ministers granted their consent, another important step in the community acquisition process had to be completed: an independently run community ballot to gauge whether a majority of the Portobello community actually supported the proposed acquisition of Bellfield.⁴⁴ At this stage, all of the elements of a successful community organizing effort noted above came together to accomplish the task. After the Scottish Government appointed an independent consultant to run the ballot, Action Party engaged its own independent consultant, Electoral Reform Services (ERS), for technical assistance.⁴⁵ With the help of ERS, Action Party then took advantage of its now strong network of engaged members and reached out to as many residents of Portobello as it could find to explain exactly what the acquisition ballot would look like when it arrived in residents' mailboxes and, moreover, to explain that the ballot was not an annoying solicitation but a crucial step in realizing the organization's vision for Bellfield.

All of this field work paid off impressively. Once the ballots were mailed and collected, the results were striking. More than half of all eligible residents (51% to be precise) mailed in their ballots, a turnout that contrasts favorably to the most recent municipal election in Portobello in which only 47.6% of eligible voters actually voted.⁴⁶ Moreover, of those who voted, 98.7% cast their ballots in favor of the proposed acquisition of Bellfield.⁴⁷

This ballot story is significant in two respects. First, the success of the ballot suggests that Action Party delineated the boundaries of Portobello quite sensitively. A wider geographic delineation of the community could have come back to bite as the legislation mandates that there must be both a suitably strong turnout and a majority among those that actually vote before the Scottish Ministers can be satisfied that the community supports the acquisition.⁴⁸ Second, the ballot process served a purpose broader than simply confirming community approval; it galvanized the wider community, increasing the community's commitment to the project as a whole.

cates because it means that if people do not approve of what lottery revenues are used for, they need not buy a lottery ticket. ANDY WIGHTMAN, *THE POOR HAD NO LAWYERS* 199–00 (2015).

44. Action Party, *Bellfield Ballot Result!*, ACTION PARTY, Apr. 5, 2017, <https://perma.cc/YPY9-PSK3>.

45. *Id.*

46. Edinburgh Government, *Local Government Election Results 2017*, EDINBURGH GOV'T, <https://perma.cc/F6K6-ZPEX>.

47. Action Party, *Bellfield Ballot Result!*, *supra* note 44.

48. Land Reform (Scotland) Act 2003, § 52 (2019).

F. Valuation Matters

Another important aspect of the community acquisition process had to be accomplished at essentially the same time as the ballot initiative was underway—appraisal of the property, or, in the terminology of the Scottish legislation, valuation.⁴⁹ Although perhaps not the most glamorous aspect of a community acquisition, the importance of a “fair valuation” should not be underestimated.⁵⁰

Here, the appraiser (technically a valuer) hired by the Church of Scotland valued the Bellfield property at £650,000.⁵¹ The appraiser hired by Action Party valued the property at £600,000 but identified £50,000 worth of essential repairs, which Action Party argued should be deducted from the final valuation.⁵² The “independent valuer” appointed by the Scottish Government under statutory mandate listened to both parties but split the difference, eventually valuing the entire Bellfield property at £600,000.⁵³ What does this teach us? For one thing, neither side’s appraisal was that far off-base, yet it was crucial that Action Party could offer a professional and reliable appraisal of its own.

G. Law Matters

One final background prerequisite for a successful community acquisition cannot be overlooked: the importance of law and, in particular, the fact that the Scottish Parliament had created the statutory mechanism that allowed all of this activity to occur. The law in question, of course, is the

49. *Id.* §§ 59–60A.

50. In the case of a preemptive community right to buy under Part 2 of the Land Reform (Scotland) Act 2003, formal valuation occurs only after the community interest has been successfully registered and only if and when the landowner puts the property on the market—an act which sets off a chain of notifications whereby the owner notifies the Scottish Ministers of the transfer proposal (§ 48), Scottish Ministers notify the registered community body of this (§ 49), then the community body indicates its intention to take advantage of its registered preemptive right to buy, at which point Scottish Ministers have seven days to appoint a valuer (§ 59). This valuation is done on a “market value” basis, which is essentially what the valuer thinks the value on the open market would be between a willing buyer and a willing seller, and may be appealed (§ 62). To effect the transfer of land, the community makes the “offer to buy”, at either the set valuation, the appealed valuation, or at the price agreed between the parties (§ 56). Away from the Part 2 preemptive right, in the case of a community body’s attempt to force an involuntary sale of neglected, abandoned or detrimental land under Part 3A of the Land Reform (Scotland) Act 2003, or a community body’s attempt to force an involuntary sale for sustainable development purposes under Part 5 of the Land Reform (Scotland) Act 2016, the landowner need not put the eligible property on the market. In these cases, valuation only takes place once the Scottish Ministers grant their consent to the proposed involuntary sale. *See id.* § 97S; Land Reform (Scotland) Act 2016, § 65 (2019).

51. Interview with Ian Cooke, *supra* note 7.

52. *Id.*

53. *Id.*; *see also* Ian Swanson, *Portobello Church Set to Become First urban Buy-Out*, EDINBURGH EVENING NEWS, Sept. 26, 2016, <https://perma.cc/G4WQ-9PE5>.

Land Reform (Scotland) Act 2003, which initially provided a mechanism for communities to obtain a preemptive right to buy land in rural Scotland, and was later expanded to the whole of Scotland (at just the right time for Action Party, as explained below).⁵⁴

To be sure, there are wrinkles in the current legislation.⁵⁵ The steps necessary for a community group to obtain formal recognition from the Scottish Government as a “community body” endowed with the actual power to take advantage of a preemptive right to buy when the landowner is ready to sell are by no means simple and easy to accomplish.⁵⁶ Similarly complex and challenging steps will apply to the rights to force an involuntary sale when these are fully introduced. Technical assistance from bodies like the Development Trusts Association Scotland or Community Land Scotland⁵⁷ (an interest group seeking to further community land ownership) will continue to be essential for community groups to position themselves to take advantage of their statutory rights. Small grants to obtain professional services of lawyers and land use planning consultants will be necessary to jump-start other successful community acquisitions. More guidance from the Scottish Government in implementing the regulation on how to define a “community” for the purpose of balloting and establishing the target of sustainable development goals will no doubt be helpful. And a stable, statutory source of funding for the actual purchase of property at the end of the community acquisition process must remain in place for community acquisitions to become more common, particularly in urban areas, where land values tend to be higher on average as compared to rural areas.⁵⁸

But we should not forget that the Scottish Parliament did something remarkable in 2003 and something even more remarkable in 2015 and 2016. It gave marginalized communities a reason to believe that they can become players in the marketplace for rural and urban land. These communities can now bring property owners, whether owners of large rural estates or even an entity as historically powerful as the Church of Scotland, to the bargaining table to discuss the transfer of property either in the shadows of the new legislation or under the formal auspices of that legislation.⁵⁹

54. Community Empowerment (Scotland) Act 2015, § 36 (2019) (amending the Land Reform (Scotland) Act 2003, § 33).

55. See Malcolm M. Combe, *Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?*, 2006 JURID. REV. 195 (explaining the legislation). Some, but not all, of the wrinkles in the original 2003 legislation were smoothed by reform in the Community Empowerment (Scotland) Act 2015. See Malcolm M. Combe, *Digesting the Community Empowerment Act*, 60 J. L. Soc’y SCOT. 8, 40 (2015).

56. See Land Reform (Scotland) Act 2003, § 34 (2019).

57. See CMTY. LAND SCOT., <https://perma.cc/4KW4-NMST>.

58. Interview with Ian Cooke, *supra* note 7.

59. A voluntary transfer in the “shadow” of the law is often the best route for community acquisition of land. Recognizing this fact, Community Land Scotland, a prominent interest group promoting

H. Luck and Timing

One final set of conditions should be mentioned. Action Party was fortunate inasmuch as it sought to acquire property from a landowner committed to selling, despite that landowner's preference to sell to a private developer. It is always possible that a landowner may decide to back out of a sale notwithstanding the time, energy, and emotion that a local community has put into a potential transfer. This transpired recently in the Renfrewshire village of Lochwinnoch,⁶⁰ a more rural setting than Edinburgh, albeit not too far from Scotland's biggest city, Glasgow. In Lochwinnoch, the local community mobilized to acquire an old bottling plant, which was lying unused near the center of the village.⁶¹ Despite the community incorporating as a suitable body, registering interest, and even having a ballot, the landowner eventually decided not to sell to anyone at all (that is to say, the landowner preferred the option of no transfer to a transfer to the community).⁶²

The new powers to force a sale in certain circumstances under the 2015 and (when the relevant provisions are brought into force) the 2016 legislation may offer a community like Lochwinnoch some hope in the future. But for now, the failed acquisition effort there left that community drained of volunteer energy and finances and, moreover, with an underused asset in a strategic location.

In contrast, Action Party's attempt to register its preemptive right to buy under Part 2 of the Land Reform (Scotland) Act 2003 benefitted from a committed seller and fortuitous timing. Thanks to the Scottish Parliament, that legislative scheme had just been amended to allow for registration of such interests in urban as well as rural land,⁶³ only a few months before the Church of Scotland finally brought forwards its plans to sell Bellfield. If the Church had cleared up some apparent title problems more quickly and got-

increased community land ownership in Scotland, has negotiated a "joint and voluntary 'Protocol for Negotiated Sales'" with Scottish Land & Estates, the leading interest group for Scottish landowners and rural businesses in Scotland. Scottish Land and Estates, *Community Land Scotland and Scottish Land & Estates: Protocol for Negotiated Sales*, CMTY. LAND SCOT. (May 2016), <https://perma.cc/E2EA-HX73>. Meanwhile, the authors of a recent study for the Scottish Land Commission (a body established by the Land Reform (Scotland) Act 2016 charged with analysing Scotland's land law and policy and steering future land reform) report that in many instances community groups say that having the legislation in the background has been hugely helpful as they entered negotiations with landowners about potential acquisitions. See Rob Mc Morran, Anna Lawrence, Jayne Glass, Jon Hollingdale, Annie McKee, Diane Campbell & Malcolm Combe, *Review of the Effectiveness of Current Community Ownership Mechanisms and of Options for Supporting the Expansion of Community Ownership in Scotland*, SCOTTISH LAND COMM'N (2018), <https://perma.cc/Z3R2-5C8U>.

60. *Soft Drinks Site Buyout Goes Flat*, BBC NEWS, Sept. 10, 2007, <https://perma.cc/QA6N-5QDH>.

61. *Id.*

62. *Id.*

63. Community Empowerment (Scotland) Act 2015, § 36 (2019).

ten its property to market a few months earlier, this community acquisition might never have come to pass.⁶⁴ Just as in life, luck and timing matter in the context of community acquisitions.

II. OTHER COMMUNITY ACQUISITIONS UNDER LAND REFORM LEGISLATION OR IN ITS SHADOW

Before offering some specific questions that remain unanswered for Portobello, we are moved to observe that the community acquisition there must be situated in a broader context of land reform law and indeed land culture in Scotland that has contributed to a number of other successful community land acquisitions over the last twenty-five years. As regards the law, this is a shifting story, with legislation playing anything from no role to a pivotal role.

First, the key bellwether buyouts of the North Lochinver Estate in the northwest Highlands by the Assynt Crofters Trust (1993),⁶⁵ the Isle of Eigg (1997),⁶⁶ and the Isle of Gigha (2002)⁶⁷ all occurred before the enactment of the Land Reform (Scotland) Act 2003.⁶⁸ More recently, a community body in Garbh Allt (in the northeast Highlands) acquired ownership of 3,000 acres after being approached by the local landowner who wanted to sell his or her land to the community.⁶⁹ As these acquisitions demonstrate,

64. Scottish land reform legislation establishing a preemptive right to buy differentiates between “timeous” applications (that is to say, applications made prior to the land being exposed for sale, with the tests for Ministerial approval of those applications being regulated by the Land Reform (Scotland) Act 2003, § 38) and “late” applications (where a landowner has already exposed the land for sale, with the tests for such an application being augmented by § 39). Though it is possible for a community to use a late application to interpose itself in the marketing process after the land has been exposed for sale and before a contract for the transfer of land has concluded, the legislation imposes higher threshold tests in relation to a late application than for a timeous application. For example, the factors bearing on whether the application is or is not in the public interest cannot simply be finely balanced for a late application; instead, they must strongly indicate that the application is in the public interest (§ 39(3)(c)), as can be seen from the public documents on the RCIL under reference CB00202, accessible via <http://rcil.ros.gov.uk/RCIL/default.asp?category=rcil&service=home> (last visited May 10, 2019). Action Party’s application was classified as “timeous”.

65. Alison Campsie, *Assynt Crofters Celebrate 25 Years of Historic Estate Buyout*, THE SCOTSMAN, July 4, 2018, <https://perma.cc/R3MM-9F68>.

66. *Eigg Toasts 20 Years Since Community Buyout*, BBC NEWS, June 14, 2017, <https://perma.cc/2CFR-6WZB>.

67. Garry Peterson, *Isle of Gigha Heritage Trust: Reshaping Land Ownership in Scotland*, SEEDS OF GOOD ANTHROPOCENES, <https://perma.cc/3P8U-6G4L>.

68. See also JAMES HUNTER, FROM THE LOW TIDE OF THE SEA TO THE HIGHEST MOUNTAIN TOPS: COMMUNITY OWNERSHIP OF LAND IN THE HIGHLANDS AND ISLANDS OF SCOTLAND, ch. 1, 2, 3, and 4 (2012). In Assynt, the ability of individual crofting tenants to compulsorily acquire title to the land they leased (in accordance with the Crofters (Scotland) Act 1993, sections 12–19) and the prospect of several of them doing so *en masse* did contribute to the buyout, although it proceeded on a non-statutory basis thereafter.

69. *Crofting Townships Near Helmsdale in Community Ownership*, BBC NEWS, June 14, 2018, <https://perma.cc/PV6Q-7MME>.

shifting perceptions towards community ownership along with access to suitable funding—whether from public sources or, in the case of Eigg, a significant anonymous philanthropic donation—can often be more important than legislation aimed at redistribution.

Of course, legislation can also be a crucial lever. Quite recently, the Isle of Ulva (on the west coast of Scotland) came into community ownership, a development that was warmly welcomed by the Scottish Government.⁷⁰ At the time of the acquisition, the island had a population of six.⁷¹ Just as in Portobello, Part 2 of the Land Reform (Scotland) Act 2003 operated to prevent the sale of Ulva to someone outside the community.⁷²

Similarly, the Hebridean communities of Galson and Pairc on the Isle of Lewis benefitted from the existence of the crofting community right to buy found in Part 3 of the Land Reform (Scotland) Act 2003.⁷³ That legislation allows crofting communities to force a sale of lands in crofting areas of the Highlands and Islands of Scotland.⁷⁴ Even though Galson and Pairc did *not*, in the end, deploy their statutory rights under that act to achieve their land acquisition goals, the presence of the legislation smoothed the path to a voluntary transfer.⁷⁵

The new Community Asset Transfer Scheme brought in by Part 5 of the Community Empowerment (Scotland) Act 2015 should also be men-

70. See Roseanna Cunningham, *Success for Ulva*, RURAL & ENV'T BLOG (Feb. 1, 2018), <https://perma.cc/B3BK-SA5Q>. The former landowner did not, it seems, wholly welcome all aspects of the acquisition. Shortly after the acquisition he posted a statement online. Jamie Howard, *Howard Family Statement*, ISLE OF ULVA, <https://perma.cc/LY5V-KJAQ>. His views were reported in a variety of outlets pre and post-acquisition. See Magnus Linklater, *Ulva Highlights the Problems of Land Reform*, THE SUNDAY TIMES, June 4, 2018, <https://perma.cc/7PZB-V7Q7>; Alistair Munro, *Island's Former Owner Hits Back at Ulva Takeover*, THE PRESS & J., June 26, 2018, <https://perma.cc/894S-UBKS>.

71. Although the island's population is small, the residents in the north west of the Isle of Mull—the adjacent island—also became involved in this land acquisition. Indeed, the acquiring community body took the name “North West Mull Community Woodland Company Limited,” as detailed in the Register of Community Interests in Land under reference CB00221, <http://rcil.ros.gov.uk/RCIL/default.asp?category=rcil&service=home> (last visited May 10, 2019).

72. *Success for Ulva*, *supra* note 70.

73. See Malcolm M. Combe, *Ruaig an Fhèidh*: 3, 58 J. L. SOC'Y SCOT. 3, 31 (2013) (reviewing some of the human rights issues occasioned by a compulsory transfer under Article 1 of the First Protocol to the European Convention on Human Rights which protects peaceful enjoyment of property). The scheme of Part 3 of the Land Reform (Scotland) 2003 Act and associated secondary legislation was tested in court in the case of *Paicr Crofters Ltd. v. The Scottish Ministers*, [2012] CSIH 96 (Scot.), where the Scottish Court of Session approved the relevant legislation as ECHR-compliant. The relatively weaker Part 2 right of preemption has not been tested in court but it seems fair to infer that it would also survive such a broad challenge.

74. Community Empowerment (Scotland) Act 2015 (2019).

75. So far, this essay has not said much about the landholding system called crofting, owing to its restricted geographical extent within Scotland and highly esoteric nature. See generally DEREK FLYN & KEITH GRAHAM, *CROFTING LAW* (2017). For present purposes, we note simply that enacting specific land reform legislation gave crofting communities and other communities a potent backstop position when negotiating with their respective landowners for the acquisition of land.

tioned.⁷⁶ This statutory regime allows local community bodies to request assets from Scottish public bodies, including the local municipal authority.⁷⁷ Although the legislation does not obligate the public sector body receiving an asset transfer request to comply, the legislation does require the public body to evaluate the community's plans and make an honest assessment of them. The lesson here is that while Scotland's land reform legislation is not always formally invoked in every community acquisition, it has played a crucial role in bringing landowners and community groups to the bargaining table.

Finally, the Scottish Government's plans for a "compulsory sale order," which it has committed to bringing forward during the term of the current Scottish Parliament (that is to say, before the next Scottish Parliamentary elections in 2021) should also be mentioned.⁷⁸ This commitment follows from a Scottish Land Commission Proposal to introduce a device that would enable planning authorities to require land that has been vacant or derelict for an extended period to be sold by public auction to the highest bidder.⁷⁹ As there is not even draft legislation at this stage, however, it seems too early to comment on this possibility, save to note that there might soon be another option to stimulate the transfer of land to community ownership in Scotland.

III. QUESTIONS STILL TO BE ANSWERED—SUSTAINABLE DEVELOPMENT AND ALTERNATIVE USES

After we left Portobello and continued to reflect on our visit, a few questions kept surfacing in our minds and our conversations—both with friends of Scottish land reform and with land reform skeptics. First, we could not help but wonder whether Action Party will succeed in making the old church into a community asset that continues to support sustainable development in the long run, and more particularly, whether it will be able to generate a sufficiently robust revenue stream to maintain the facility and

76. Community Empowerment (Scotland) Act 2015 §§ 77–97 (2019).

77. *Id.* at § 79.

78. See Question S5W–20043 (lodged November 19, 2018) and the corresponding answer from Kevin Stewart MSP for the Scottish Government (on November 28, 2018) stating that “[w]e are committed to bringing forward proposals during the course of this Parliament to introduce a Compulsory Sales Order mechanism to help tackle the blight of abandoned buildings and small plots of land in our towns and communities.” The Scottish Parliament, *Question S5W-20043*, THE SCOTTISH PARLIAMENT, (Nov. 28, 2018) <https://perma.cc/9X6D-JSBD>.

79. Scottish Land Commission, *Compulsory Sales Orders: A Proposal from the Scottish Land Commission* SCOTTISH LAND COMM’N (Aug. 13, 2018) <https://perma.cc/YHM2-C6QA>.

hire staff, and whether it can generate enough ongoing enthusiasm to overcome possible volunteer fatigue.⁸⁰

The answer to this last question must be that the proof of the pudding will be in the eating. It is just too early in the process to know. We cannot help but observe, however, that the sense of enthusiasm towards the scheme is palpable (as evidenced by our site visit, the online buzz, the Scottish Land Fund's support and indeed the community ballot). It appears the people of Portobello want this project to work, and on our visit, we witnessed that a local business had already loaned mobile bar apparatus to allow a social event to take place in one of the halls soon. And events have already started: Action Porty hosted a varied launch event on June 23, 2018;⁸¹ and the South London Jazz Orchestra played when it was in the area for the famous cultural event the Edinburgh Festival Fringe.⁸² Perhaps all we can say with certainty now, though, is that the community wants the strategic asset of the old parish church and its social halls to work for the community.

With respect to the more particular question of a revenue stream, once again, time will tell. While the law has aided Action Porty until now, new challenges await. Where previously the Church of Scotland enjoyed certain "ecclesiastical" relief from fiscal or other requirements, a community body like Action Porty will not automatically benefit from these same exemptions.⁸³ Of course, the Scottish Parliament might be able to respond to these challenges with specialized legislation in the areas of tax reform or other regulated areas. Such legislation would make it easier for a community group like Action Porty to create revenue streams and employ sufficient staff to keep the hub viable in the long run assuming this is possible according to the limited legislative competences of the Scottish Parliament within the UK constitution.⁸⁴

80. See Ciaran Mulholland et al., *Impact Evaluation of the Community Right to Buy*, SCOTTISH GOV'T SOC. RES., 16–17 (2015), <https://perma.cc/B4F3-NRYB> (drawing on Robert McMorran et al., *Reconstructing Sustainability: Participant Experiences of Community Land Tenure in North West Scotland*, 33 J. RURAL STUD. 20 (2014)); see also Sarah Skerratt, *Enhancing the Analysis of Rural Community Resilience: Evidence from Community Land Ownership*, 31 J. RURAL STUD. 36, 42 (2013) (using the term "volunteer burn-out").

81. See Action Porty (@ActionPorty), TWITTER (June 23, 2018, 11:30 AM), <https://perma.cc/TUU6-MYDT>.

82. See SLJO (@SLJO_London), TWITTER (September 2, 2018, 6:32 PM), <https://perma.cc/F3UV-F259>.

83. The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (Wales) Order, 2018 No. 1087 (W. 227).

84. If such reform was not possible in terms of the Scotland Act 1998, the UK legislature could always act instead. Of course, initiatives in Westminster might not receive as much support and attention as they likely would in the Scottish Parliament.

Our last question concerns whether Portobello might have been better off if government funds had been used for some other public project. This is very hard to know, and impossible to analyze without straying into the realms of the counter-factual.⁸⁵ We can hope the initial and continued involvement of local people instead of more distant officials from the City of Edinburgh Council or even Scottish or UK politicians will help justify the investment of Scottish Government funds in the long run. Revisiting Bellfield in five, ten or twenty-five years will throw more light on the issue, and further illumination may emanate from elsewhere, such as the second urban acquisition of an old bowling green in the city of Aberdeen (also with a degree of public support).⁸⁶ For now, it seems to us that securing this striking, sentimental and—most importantly—viable asset for the community of Portobello was not an unreasonable use of public funds.

IV. CONCLUSION

Scotland is a fascinating case study for contemporary land reform law, with all of the associated theoretical, sustainable development, and takings-related issues that such reform entails. Within Scotland, there are several fascinating individual case studies. Portobello is but one of them.

We remain wary of the temptation to sanctify excessively the acquisition of an old church and disclaim the ability to see many portentous signs at this early stage. Then again, the first executed urban community right to buy in Scotland is an exciting event that will certainly attract further study. This essay has attempted to tease out the early lessons available to us while highlighting further areas that should be watched to measure the long-term success of the acquisition. As for wider lessons from Bellfield, the circumstances of its acquisition will obviously not be duplicated in every community in Scotland, and it will be a little while before all the implications of this acquisition are revealed. That notwithstanding, the parable of Portobello still deserves to be told.

85. A comparison with the Isle of Ulva here is equally premature, but also hard to resist. One correspondent with a regional Scottish newspaper bemoaned the expenditure of public funds on the community acquisition of Ulva, noting the money could have been better spent on: “1. Decent broadband and phone signal across the islands. 2. Paying for the upgrade of the ferry to Iona road, which is single track and in dire condition. 3. Badly needed upgrade of council houses and building of affordable homes. 4. Proper support for the Mull GP service [the general practitioner medical service].” Angus MacDonald, *There are better ways to spend £4m on Mull and Ulva*, THE OBAN TIMES (sub. req.), June 28, 2018, <https://perma.cc/3PJ2-YPS4>.

86. See Jon Hebditch, *Community trust completes Bonnymuir buyout*, THE PRESS & J., September 6, 2018, <https://perma.cc/S7FG-UR3H>. The authors of this essay visited the site of this second urban community right-to-buy acquisition in March 2019. To the authors at least, the prospects for turning the old bowling green into a community garden and community center look bright.