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SCOTTISH LAND COMMISSION
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CODE OF PRACTICE – The Maintenance of the Condition of Tenanted Agricultural Holdings

This code of practice has been issued by Scotland's Tenant Farming Commissioner (TFC) after consultation with and support from, Scottish Land and Estates (SLE), the Scottish Tenant Farmers Association (STFA), the National Farmers Union Scotland (NFUS), the Royal Institution of Chartered Surveyors (RICS) and the Scottish Agricultural Arbiters and Valuers Association (SAAVA). It is issued under the authority of the Land Reform (Scotland) Act 2016 and is one of a suite of codes which are intended to guide and shape the behaviours and procedures which accompany the interactions and negotiations between landlords and tenants, including agents and intermediaries acting for either party. Their aim is to ensure that, wherever possible, landlord and tenant relationships and interactions are conducted in a spirit of mutual respect and understanding and with a view to reaching agreed positions which are reasonable and fair to both parties.

Where the code uses the word **must**, this means that the action is a legal requirement and failure to comply would constitute a breach of agriculture holdings legislation.

Where the word used is **should**, this indicates that failure to behave in this way may constitute a breach of the code of practice and an application reporting the alleged breach can be made to the TFC who will investigate.

Where the code **recommends** a course of action it means that this is good practice but, recognising that other approaches may be equally effective, failure to follow this recommendation will not in itself be a breach of legislation or the code.

While every effort has been made to provide an accurate presentation and interpretation of relevant legislation, it is not possible to cover every situation and users of the code should obtain professional advice appropriate to their own situation.

All users of this code should bear in mind that the function of the Tenant Farming Commissioner is to be impartial and concerned with the procedure and manner which parties adopt when dealing with each other. It is not the function of the TFC to mediate, arbitrate, or to persuade either party to see things the way the other does, or to forego any legal rights that they may have.



Introduction

It is in the interests of both landlords and tenants to maintain agricultural holdings in good condition so that they can fulfil their productive potential and provide a return for both landlord and tenant. This has been recognised in law through the development of “Rules of Good Estate Management” and “Rules of Good Husbandry” and through setting out, in statute, the respective obligations placed on both parties to provide, improve, maintain and repair the fixed equipment necessary to allow the holding to be efficiently farmed.

Application of the above principles is often complicated by the addition of post lease agreements that seek to transfer responsibilities between the parties, by lack of agreement over what constitutes fair wear and tear and lack of agreement over when a repair becomes a renewal or replacement. Unwillingness to tackle this issue and to reach agreement on where the responsibility lies is often a source of tension between landlords and tenants and can result in necessary repairs and maintenance being neglected.

It is recognised that many landlords and tenants are able to amicably reach informal agreements on the fulfilment of their respective obligations and it is not the intention of this code to interfere in that relationship but rather to provide a route towards agreement in circumstances where one party finds it difficult to secure the engagement of the other or where both have engaged but are finding it difficult to agree.



Background

Fixed Equipment

Whilst the responsibility for keeping the fixed equipment in good shape is a joint one, each party has a specific part to play. Unless otherwise altered in an enforceable post lease agreement, the responsibilities of landlord and tenant in respect of 1991 Act tenancies entered into after November 1948, Limited Duration Tenancies (LDT), Short Limited Duration Tenancies (SLDT) and the Modern Limited Duration Tenancy (MLDT) are set out below.

The landlord is required to: -

- At the start of the tenancy provide in a thorough state of repair such land, buildings and other fixed equipment as will enable the farm to be operated efficiently for the purposes for which it is let.
- During the tenancy to effect such replacement or renewal of the land, buildings and other fixed equipment as may be rendered necessary by natural decay or fair wear and tear.

The tenant is required to: -

- During the tenancy – maintain the land, buildings and other fixed equipment provided by the landlord in as good a state of repair (natural decay and fair wear and tear excepted) as they were in at the start of the lease.
- Maintain any land, buildings and other fixed equipment provided, improved, replaced or renewed by the landlord after the start of the lease in the same condition (natural decay and fair wear and tear excepted) as when they were added.

Leases entered into before November 1948 are regulated in accordance with common law and with the terms of the lease. While the common law provisions relating to the tenant's obligations are similar to the statutory provisions introduced after 1948, those affecting the landlord's obligations are less onerous. The landlord is bound to put the buildings and fences into such a condition as will render them capable of lasting, if treated with ordinary care, throughout the duration of the lease. The salient point is that the landlord is only responsible for the condition of the fixed equipment provided but not for ensuring that the nature of the fixed equipment was suitable for the purposes for which the holding was let.

Obligations in Relation to Good Estate Management and Good Husbandry

The rules of good husbandry are set out in schedule 6 of the Agriculture (Scotland) Act 1948. In essence, the occupier of the holding (the tenant) is required to maintain a reasonable standard of efficient production, as respects both the quality and quantity of the produce, while keeping the unit in a condition to enable such a standard to be maintained in the future.

The rules of good estate management are set out in schedule 5 of the Agriculture (Scotland) Act 1948. In essence, the management by the owner of the land

(the landlord) is to be reasonably adequate to enable the occupier to maintain efficient production as respects both the quantity and quality of the produce from the unit.

Post Lease Agreements

Landlords and tenants should be aware that with effect from November 2003, any post lease agreement made after this date, and which relates to 1991 Act tenancies and Limited Duration Tenancies, that purports to transfer the landlord's or tenant's responsibilities, as set out above, to the other party is considered to be null and void.

Any such post lease agreement made for 1991 Act tenancies before 2003 still has effect unless, before a statutory rent review determination, the tenant gives notice to the landlord that the agreement is to be nullified as from the review date.

Failure to meet these Obligations

Landlords and tenants both have recourse to the law if they believe that the other party is failing to meet their obligations. The consequences of an adverse Land Court judgement can be serious for both parties. In extreme cases, a tenant may be required to quit the holding and a landlord, once the full provisions of part 10 of the Land Reform (Scotland) Act 2016 are in force, may be subject to an enforced sale of the holding. It is therefore very much in the interests of both parties to work together to agree a fair and reasonable approach to ensuring that both parties meet their obligations. The purpose of the code is to prescribe behaviours and procedures which will assist in achieving that objective.

Tenants Improvements

This code applies to the fixed equipment provided by the landlord. Many holdings will also have buildings and equipment provided by the tenant and qualifying either as a tenant's improvement or a tenant's fixture. It is generally accepted that the maintenance of such additions is at the discretion of the tenant but tenants (and landlords too), must be aware of the need to comply with regulations concerning health and safety, pollution control and other matters affecting the condition of fixed equipment.

1. Key Principles

- 1.1 Landlords and tenants **must** comply with their respective legally binding obligations towards the maintenance/repair/renewal of the fixed equipment and as regards the condition of the holding.
- 1.2 Landlords and tenants **should** regularly meet to discuss the condition and to agree on what needs to be done, and by whom, to ensure that obligations are met.
- 1.3 Landlords and tenants **should** maintain, and retain, effective records of agreements made and repairs and maintenance carried out.
- 1.4 Landlords and tenants **should** agree on an appropriate approach to the preparation and maintenance of a record of condition.

2. Record of Condition

- 2.1 A record of condition is a highly relevant and useful document which should convey a clear idea of the state in which the farm was when the record was made. It is a vital source of evidence of compliance by the landlord and tenant with their respective obligations relating to fixed equipment. It provides the basis for future dilapidation and improvement discussions and provides a starting point for discussions leading to agreement on a programme of repairs and maintenance.
- 2.2 Statute requires a record of condition to be made when a 1991 Act secure tenancy or a MLDT is granted. In addition, a landlord or tenant may, at any time during such tenancies, require the making of a record of condition of the fixed equipment on, and the cultivation of, the holding. There is flexibility to agree on the scope of the record, which may cover all or part of the holding. Landlord and tenant can agree on who **should** make the record and the cost should normally be shared. The tenant may also require the making of a list of any improvements or fixtures supplied by the tenant.
- 2.3 In the case of LDTs, SLDTs and MLDTs the parties **must** agree, at the onset of the lease, on a schedule of the fixed equipment to be provided by the landlord and on its condition.
- 2.4 It is common, in the case of 1991 Act tenancies, for there to be no record of condition or for it to be inadequate in terms of reflecting the current nature and extent of the fixed equipment and the condition of the holding. In such circumstances it is **recommended** that landlords and tenants should agree to commission the preparation of a record of condition at shared cost. The use of digital photography in the making of the record is **recommended**, as is the taking of soil samples.
- 2.5 Where either party exercises the right to request that a record of condition should be made they **should** attempt to agree the scope of the record with the other party.
- 2.6 If the landlord and tenant are unable to agree who should be appointed to produce a record of condition, they may ask Scottish Ministers to appoint someone to perform the task.

3. Meeting to Discuss Repairs and Maintenance Necessary to Maintain or Improve the State of the Holding

- 3.1 Failure to engage in constructive dialogue about repairs and maintenance is a common occurrence and both parties **should** therefore be prepared to meet at regular intervals to review the state of the holding and to agree on a schedule of works necessary to ensure that each party is meeting its obligations.
- 3.2 Either landlord or tenant may request such a meeting at any time. It is **recommended** that such a discussion should take place at least every 5 years and may be part of any rent review discussions.

4. Agreeing a Schedule of Work

- 4.1 The logical outcome from the above meetings is an agreed schedule of measures which are agreed to constitute fulfilment of the respective obligations of both landlord and tenant towards the fixed equipment and the condition of the holding.
- 4.2 Following initiation of a meeting by either party, the parties **should** meet, within one month, on the farm to review and discuss the condition of the holding and to identify necessary repairs and maintenance. A written record of the meeting **should** be produced and agreed by both parties.
- 4.3 Within one month of the on-farm meeting the party initiating the meeting (or by agreement, the other party) **should** produce a proposal which sets out the schedule of work that is proposed for both landlord and tenant over the next 3-5 years. This **should** include an indication of timing and, where appropriate, should signal options for further discussion. The schedule **should** be at a level of detail that avoids ambiguity.
- 4.4 In some cases, the schedule may link individual obligations during the 5-year period to a longer term agreed framework. For example, an agreement that the tenant repaint external paintwork at 10-year intervals or that the landlord replace fencing on a 25-year cycle.
- 4.5 Where an obligation is likely to involve significant expenditure for either party it is important that both parties are realistic about affordability. If there is a large backlog of work or a significant cost to be incurred by one party, compliance with an obligation may need to be scheduled over a longer period than might be considered desirable by the other party.
- 4.6 Where one party lacks the financial resources to meet their obligations within a reasonable timescale, the other party may wish to consider offering to pay for part of the other party's obligations in return for an adjustment to the rent. This type of agreement **should** be clearly documented by the parties.
- 4.7 Where wear and tear has been exacerbated by lack of maintenance by the tenant, thereby placing an unfair obligation on the landlord to renew or replace, the parties may wish to agree that it is appropriate for the tenant to make a contribution towards the cost of replacement or renewal.
- 4.8 Discussion of the proposed schedule **should** continue until both parties are content about as many matters as possible. The content and outcome of all discussions **should** be recorded in writing so that both parties are clear about what the issues are, what has been agreed and what remains to be agreed.
- 4.9 Both parties **should** respond timeously to communications from the other with a view to agreeing the schedule within a 6-month period.

5. Delivering the Schedule of Work

- 5.1 The agreed schedule **should** be regarded as a binding contract between the parties and failure to deliver by either party may constitute a breach of this code of practice (and may also be a breach of contract depending on circumstances). Tenants and landlords **should** therefore ensure that they are fully aware of their statutory obligations and that they have the necessary will and resources to meet the obligations set out in the schedule before agreeing to its contents.

6. Dealing with a Failure to Agree

- 6.1 The ease with which agreement is reached will vary depending on the nature of the landlord/tenant relationship and the complexity of the issues involved.
- 6.2 In circumstances where the steps set out in this code fail to produce agreement it is **recommended** that both parties agree to involve a third party before resorting to litigation. A range of Alternative Dispute Resolution mechanisms are available.
 - (i) Mediation is most useful where the main reason for failure to agree may lie in the nature of the relationship between the two parties. A trained mediator, with no allegiance to either party, will not attempt to decide who is right and who is wrong but will work with both parties to try to broker agreement.
 - (ii) Expert determination can be helpful, particularly where the dispute is of a technical nature. The expert will use his skill and experience, taking into account the points put by both parties, to offer an opinion which can be binding if the parties agree it should be so.
 - (iii) Arbitration involves the consideration of evidence submitted to the arbitrator by both parties and the decision by the arbitrator, based on an assessment of the evidence and reference to any relevant legislation, is normally binding.

7. Reporting an Alleged Breach of this Code

- 7.1 If you have been directly involved in discussions over repair and maintenance obligations and believe that another party to these discussions has been in breach of the principles and procedures set out in this code of practice you can report an alleged breach to the TFC who will investigate the allegation.

Information about reporting an alleged breach and how this will be investigated can be found on the Scottish Land Commission website www.landcommission.gov.scot or by calling 0300 244 4452.

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