



Scottish Land Commission
Coimisean Fearainn na h-Alba

Issued by the Tenant Farming Commissioner

CODE OF PRACTICE – Conducting Rent Reviews

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

Reaching agreement on the appropriate rent for an agricultural holding is one of the key interactions that take place regularly between landlords and tenants, and their agents. If handled well, on the basis of a transparent and objective consideration of all of the relevant facts and circumstances, it is a process that will result in an outcome that both parties are broadly satisfied with. If not handled appropriately, it can be a source of dispute and disagreement that leaves one party

or the other angry and disgruntled and that risks permanently souring the relationship between landlord and tenant. A rent review is a negotiation, based on evidence, and a 'take it or leave it' approach by either party is not appropriate. Agents representing either party should seek to promote a good ongoing relationship between landlord and tenant, and while observing their professional duty to their client, seek to negotiate a settlement that will be reasonably satisfactory and fair to both parties.



Background

The Legal Basis for Rent Reviews

Many landlords and tenants will normally be able to reach agreement on the basis of informal discussions, particularly where the current rent is at a level that each party is broadly content with and which may only need a modest adjustment to take account of inflation or any particular change in circumstances. However, where agreement cannot be reached by this means, the prescribed methodology to use will depend on the type of lease held.

1991 Act Tenancies

Section 13 of the Agricultural Holdings (Scotland) Act 1991 provides the basis for rent reviews where agreement cannot be reached by informal discussion, and all those involved are advised to ensure that they are familiar with the provisions that are set out in the Act.

Fixed Duration Tenancies

In the case of a Short Limited Duration Tenancy (SLDT) the parties are free to make their own arrangements as to rent, and variation of the rent during the course of the agreement is not regulated.

In the case of Limited Duration, and Modern Limited Duration, Tenancies (LDTs and MLDTs) and the Repairing Tenancy (once introduced), the parties are free to include arrangements for reviewing the rent within the terms of the lease, provided that such an agreement does not state that a rent review can only be initiated by the landlord or that it can only result in an upwards movement. However, if the lease contains no mention of rent review provisions, and agreement cannot be reached, the rent will be determined in accordance with Section 9 of the Agricultural Holdings (Scotland) Act 2003. In essence the methodology is similar to that under Section 13 of the 1991 Act.

Relevant Factors in a Rent Review

The aim is to determine the rent at which the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant after taking account of specific factors to be regarded, and some that are to be disregarded. The summary of the relevant factors affecting rent reviews in this Code is intended as a general guide to the main factors to be considered.

Generally speaking, regard is to be had to:

- a. Information about rents of other agricultural holdings and any factors affecting those rents
- b. The current economic conditions in the relevant sector of agriculture
- c. Any increase in the rental value of the holding resulting from the use of the land for a non-agricultural purpose.

The following factors should be disregarded:

- a. Any effect on the rent of the fact that the tenant is in occupation of the holding
- b. Any distortion in rent due to scarcity of lets
- c. Improvements carried out wholly or partly at the tenant's expense (whether grant aided or not) and for which the landlord has not allowed some benefit or allowance
- d. Improvements carried out by the landlord in so far as the landlord has received or will receive any grant towards the execution of the improvement
- e. The continuous adoption by the tenant of a standard of farming higher than required by the lease or normally practised in the district. This so called 'High Farming' is treated as a tenant's improvement
- f. Any reduction in rental value due to dilapidations caused by the tenant, use of the land for non-agricultural purposes or the carrying out of conservation activities.

continued

In effect, rent is only payable in respect of the land and fixed equipment provided by the landlord, whether at the start of the lease or later. If such work was grant aided from public funds, rent cannot be charged on it. Where the cost of an improvement is shared between landlord and tenant, rent can be charged on the landlord's share and the tenant's share is not taken into account. It follows therefore that a rent review must be informed by a full understanding of the extent of tenants' improvements and fixtures not belonging to the landlord.

The rent is to be determined on the basis of a hypothetical landlord and hypothetical tenant and may require consideration of a farming system and productivity level that is different from those practised by the sitting tenant.

Further useful guidance on conducting rent reviews in Scotland can be found in 'A Practitioner's Guide to Scottish Agricultural Rent Reviews,' a joint CAAV, SAAVA and RICS publication which can be obtained from CAAV. **A summary version can be downloaded [here](#).**

1. Key Principles

- 1.1 A rent review **should** be regarded as a negotiation, based on an objective and transparent consideration of available evidence, with the aim of reaching an agreement that both parties regard as being fair and realistic.
- 1.2 Rent **must** only be charged on land and fixed equipment provided by the landlord and must ignore any potential income contribution attributable to improvements and fixtures provided by the tenant.
- 1.3 Proposals and counter proposals **should** be presented in a form that is fully transparent and **should** contain sufficient detail to enable each party to understand and verify the other's calculations.
- 1.4 When comparable rents are offered as evidence, they **must** be appropriately and transparently adjusted to account for differences between the holding being compared and the holding where the rent is under review.
- 1.5 Each party **should** be afforded sufficient time to give full and careful consideration to proposals and counter proposals tabled by the other.



2. Initiating a Review

- 2.1 A rent review can be initiated by either landlord or tenant, as long as three years will have elapsed, at the date the new rent would take effect, since the last review. This is regardless of whether or not that review resulted in a change to the rent but on the assumption that in such circumstances the parties recorded their agreement that a review had taken place and that no change in the rent was the outcome.
- 2.2 In the case of 1991 Act tenancies the review date **must** coincide with the anniversary of the contractual termination date of the lease. In the case of the fixed duration tenancies (excluding SLDTs), unless the lease provides otherwise, the review can be instigated at any time provided that at least three years will have elapsed, at the date the new rent would take effect, since the last review.
- 2.3 The requirement for a rent review **must** be communicated in writing and (except in fixed term tenancies where the lease otherwise provides). The notice **must** be given not less than one year, and no more than two years, before the date on which the new rent would take effect (the rent review date). The written rent review notice is considered to have been served if it is delivered to the other party in person, or left at his proper address, or sent to the person by registered post or recorded delivery. Only the party who serves the rent review notice can insist on the case going to the Land Court for determination.

3. Conducting the Review

- 3.1 The person initiating the review **should** lead the process and initiate discussions. The other party **should** respond promptly so that there is an ongoing dialogue and exchange of information. Disagreements **should** be dealt with by dialogue and not by simply ignoring the latest communication from the other party.

4. The Timetable for Negotiations

- 4.1 If the rent cannot be agreed by a simple discussion or exchange of letters, landlords and tenants should follow the timetable set out below unless both parties have agreed otherwise. Landlords and tenants and/or their agents **should** meet on the farm no less than six months before the review date. By the end of that meeting, the person initiating the review **should** have given an approximate indication of the level of rent that is being proposed and the main variables that have been taken into account when arriving at that figure. The other party **should** make clear whether they have a markedly different perspective and why. It may be that agreement can be reached at this stage but if not, then at least the parties have a clear idea of their respective positions.
- 4.2 As soon as possible after that meeting, and no more than four weeks from the date of the meeting, the party who initiated the review **should** write to the other party with a formal proposal that is supported by relevant evidence and which is in sufficient detail to enable the other party to fully understand how the figure has been arrived at. When comparable rents are presented as part of the justification, regard should be had to the guidance on the use of comparables set out in paragraphs 5.1 to 5.5 of this Code of Practice.
- 4.3 As soon as possible, and no later than six weeks, after receipt of the formal proposal the other party **should** either agree to the proposal in writing or submit a counter proposal which **should** also be transparent and verifiable in the same way as the formal proposal.
- 4.4 Where the above steps don't result in agreement, further discussion will be necessary and **should** take place within six weeks of the submission of the counter proposal. Where both sides have provided transparent and verifiable support for their proposal it should be relatively easy to identify the areas of disagreement and to agree a reasonable compromise.

5. Provision of Evidence

Comparable Rents

5.2 Anyone making use of comparable rents as part of a rent review should take account of the case law which has established a preferred hierarchy with regard to the use of comparables in the establishment of rents for 1991 Act tenancies.

- a. The best source of comparables is open market lettings of similar tenancies but in the case of 1991 Act tenancies it is recognised that these will be few and far between
- b. The next best source of comparables is open market lettings of fixed duration tenancies
- c. The next best source is rents agreed between landlords and sitting tenants.

5.2 The use of known rents of similar holdings in the vicinity is a valid source of evidence that can be used to justify or challenge a rent proposal. Every effort should be made to choose holdings that are as similar in nature to the one where the rent is under review and due allowance **should** be made for any differences that exist. Adjustments **should** include allowances for:

- Differences in the nature of the land (elevation, soil type, etc)
- Differences in the provision of fixed equipment by the landlord, including housing and any surplus housing available for rent by agreement between landlord and tenant
- Differences in the lease conditions, particularly those impacting on repair and maintenance obligations
- Differences in the type of lease being used as a comparable and the impact of any post lease agreements

and any other material considerations affecting the level of rent paid at the comparable holding which would distort the comparison with the holding under review. In the case of open market lettings, consideration **must** be given to the question of scarcity of lets and marriage value and whether or not these have had a material influence on the rent offered.

5.3 A landlord or tenant presented with comparable rents by the other party should be able to satisfy themselves that full disclosure of the nature of the comparable farm has been made and that all appropriate adjustments for differences have been made. Landlords and tenants are encouraged to make details of rent reviews available to other parties in search of suitable comparables.

5.4 The party presenting comparable rents **should** familiarise themselves with any implications of data protection regulations. If the other party is to be able to challenge the comparables it is likely that they will need to know, not just the rent paid but the name and location of the comparable holding. Disclosing these without the consent of the tenant and landlord of the comparable holding may be a breach of the data protection regulations unless it can be shown that disclosure without consent passes the 'legitimate interest' tests and follows the 'data minimisation' principles.

5.5 A rent proposal or counter proposal using comparables as evidence **should** show the nature and impact on the rent of the above factors in sufficient detail to enable the other party to understand and, if applicable, challenge the analysis.

Economic Conditions

5.6 The obligation to take account of current economic conditions in the relevant sector provides the opportunity to consider whether any significant movement in costs, output prices or support payments has taken place, or is anticipated, which might influence the negotiation. As with other parameters, a submission that there has been a material change that impacts on the negotiation **should** be accompanied by appropriate analysis and evidence. This might include evidence of a sustained fall or increase in commodity prices or an actual or intended increase or decrease in support payments since the last rent review. Evidence of impacts still to come within the next three years and evidence of impacts that have happened since the last review are both relevant to the discussion.

Farm Budgets

- 5.7 The Court of Session regarded the role of farm budgets in assessing open market rents as being one of last resort. While recognising that the profitability of the holding is a material consideration, the Court was of the view that there are many reasons why a credible offer made by a tenant in an open market situation would exceed the figure that a budget might be thought to justify.
- 5.8 It is clear, however, that it is not unusual for budgets to be advanced as evidence in rent reviews and not unusual for this to include cases that are heard by the Land Court. Therefore, while budgets may not be the primary source of evidence supporting a rent proposal, they have a potentially useful part to play in sense checking evidence from comparable rents and can be helpful in situations where appropriately adjusted comparable rents are difficult to source.
- 5.9 Where budgets are used, they **should** reflect the terms of the lease and the performance of the holding as if it were farmed by a hypothetical tenant and having disregarded the impact of tenants' fixtures and improvements.

The CPI Sense Check

- Where there have been no material changes in circumstances since the last review and none are anticipated, an adjustment to the rent to reflect an increase or decrease in the consumer price index may be an appropriate way to proceed but this should not be considered as an automatic adjustment. A proposal to adjust the rent in line with inflation should be presented for discussion and dealt with in the same way as the other factors that are taken into account.

6. Resolving Disagreements

- 6.1 If all parties follow the steps set out in this Code it should be possible, in the vast majority of cases, to reach agreement. It is recognised, however, that there will be a few cases where this cannot be achieved and that some form of third-party involvement may be necessary to help resolve the issue. Application to the Land Court to have the rent determined remains an option, provided that the statutory timeframes are complied with, but the Land Court itself, in its published guidance on rent reviews, states its preference for settlement by negotiation over formal litigation.
- 6.2 A variety of alternative methods of dispute resolution (ADR) are available and further guidance and advice can be found in the Land Commission publication '**The Use of Alternative Dispute Resolution in the Scottish Agricultural Holdings Sector**' [available here](#). Landlords and tenants who cannot reach agreement after following the steps set out in this Code **should** agree to consider the use of mediation, arbitration or expert determination as being a cheaper and less stressful way of resolving the issues. Before submitting a dispute to the Land Court or any of the other methods of dispute resolution it is important that the parties involved identify areas of agreement and are able to clearly identify and describe the areas where agreement cannot be reached so that the third party is only required to consider these, and not the whole negotiation.

7. Reporting an Alleged Breach of this Code

- 7.1 If you believe that another party involved in discussions covered by this Code has been in breach of the principles and procedures set out in this Code, you can report the alleged breach to the TFC who will consider whether an investigation is appropriate.

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 **01463 423 300**.



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Scottish Land Commission
Coimisean Fearainn na h-Alba

Contact us

@ tfc@landcommission.gov.scot

📞 01463 423 300

🌐 www.landcommission.gov.scot

Find us on:

