

Agreeing and Recording Tenant's Improvements

Recommended Guidance for Landlords and Tenants

published jointly by the
National Farmers Union of Scotland
Scottish Land and Estates
Scottish Tenant Farmers Association

in association with
The Scottish Government's Independent Adviser on Tenant Farming

Final Version 15 October 2015

Introduction

In recent years the level of capital intensity in Scottish farming has risen significantly. Traditionally on tenanted farms most fixed capital was provided by the landlord and working capital by the tenant, but increasingly on secure and long duration tenancies some tenants are becoming substantial long term investors in their own right. This has raised important issues in relation to investment security for the tenant, particularly for immovable investments with a productive life that may exceed the expected duration of the tenancy itself.

Legislation already exists to enable a tenant to invest in an “improvement” secure in the knowledge that it will potentially be eligible for compensation from the landlord at way-go, but this legislation is not always fully understood or adhered to. This in turn can lead to uncertainty and conflict, it may cause a tenant to defer his retirement, and it may even discourage long term investment in the farm. The Agricultural Holdings Legislative Review Group (AHLRG) considered this issue, and made recommendations for a retrospective amnesty and a code of practice to address this that are now included in the Land Reform Bill 2015.

The NFUS, SLE and STFA have welcomed these proposals, and as an additional interim measure they have decided to bring into effect industry led guidance in order to help. The guidance relates only to new improvements that the tenant wishes to undertake. However landlords and tenants are strongly urged to adopt a similar approach in relation to tenant’s fixtures, as a detailed inventory of both will usually be important in rent review calculations. Nothing in this guidance should be taken to imply that any particular improvement will necessarily result in compensation at a future date.

The guidance deals only with agreeing and recording new improvements, and so does not address uncertainties arising out of past actions. However under the terms of the Agricultural Holdings (Scotland) Act 1991 the tenant may require the making of a record of existing improvements and/or fixtures on the farm. Amendments introduced in 2003 make this process relatively flexible and potentially less costly than in the past. Such a record provides an important basis for rent reviews and for way-go negotiations, and the industry bodies encourage all landlords and tenants to establish one if they have not already done so.

Core Principles

The guidance is underpinned by three core principles –

1. The landlord and tenant have a *shared* responsibility to ensure that new tenant’s improvements are agreed and/or recorded in a timely manner before they are implemented.
2. The tenant should not normally expect a new investment to be treated as a tenant’s improvement unless all statutory notice and consent requirements have been adhered to (but note proposals for a retrospective amnesty in the Land Reform Bill 2015).
3. The landlord should not *unreasonably* object to or refuse consent for a new tenant’s improvement, and should be guided in this by the terms of the SLE Landowner’s Commitment. In particular, unless there is good reason the landlord should not object to or refuse consent for any of the following –
 - a. Investment in fixed equipment or land improvement which is reasonable and desirable on agricultural grounds for the efficient management of the holding.
 - b. Upgrading living accommodation to a reasonable level compatible with modern standards and expectations.
 - c. Environmental enhancement or business diversification where the investment is being encouraged and financially supported through a Scottish Government promoted scheme.

Basis of the Guidance

The guidance has no statutory basis and is built on an assumption of reason and reasonableness among all involved. It builds on existing legislative provisions which allow certain investments to be treated as tenant's improvements, often subject to the tenant giving notice and/or the landlord consenting in accordance with statute. The guidance applies to 1991 Act and limited duration tenancies.

The industry bodies recognise that a great many landlords and tenants have for generations agreed tenant's improvements between themselves on the basis of entirely informal and sometimes relatively casual dialogue. While understandable this practice carries with it significant risks for both parties, especially if the landlord's or tenant's interest unexpectedly changes hands (such as on death). This guidance is not intended to intervene in the working of such relationships where they exist, but if used sensibly it provides the basis for a simple written confirmation of informal understandings that will put both parties on a more secure footing.

The Procedure in Practice

Responsibility for ensuring that proposed tenant's improvements are notified and/or consented in a timely manner is a shared one, falling on tenant and landlord jointly. The benefits accrue to both parties, and neither has any interest in there being unwarranted delays or a need for consideration of proposals on a retrospective basis. Landlords and tenants are strongly advised to ensure that the details of tenant's improvements are contained in a record that is always kept accurate and up to date.

The guidance consists of a simple step by step procedure that will normally be initiated by the tenant, but where the landlord also has a responsibility to prompt initiation of the procedure in circumstances where he is aware that it should be. It creates a structured discussion based on open and transparent reasoning, and it includes the option of involving a third party to facilitate dialogue.

The guidance should be read in conjunction with schedule 5 of the Agricultural Holdings (Scotland) Act 1991. The procedure described below applies primarily to improvements coming under part 1 of schedule 5. Those coming under part 2 should follow steps 1 and 2 only as below. Where an item comes under part 3 (i.e. no consent or notice required) tenants need not follow this procedure but should normally as a courtesy inform the landlord of the improvement and request that it be noted. Relevant evidence (such as receipts) should be retained by the tenant for future reference (for example at rent review or way-go).

The main steps of the recommended procedure are summarised in appendix A and are as follows –

Step 1 – Written Proposal

The procedure should be initiated by the tenant through preliminary informal contact. The conversation should include an explanation of the business and/or personal drivers behind the proposed investment, and explore any consequential implications for the holding and/or the landlord's wider interests.

The tenant should then write formally to the landlord giving 3 months notice of his intention to carry out the improvement and setting out in detail what it entails and enclose plans where appropriate (see appendix B). The letter should clearly identify whether the item comes under part 1 or 2 of schedule 5 (i.e. whether consent or only notice is required).

A copy of this joint industry guidance should be included with the written proposal to ensure that both parties follow the same procedure, and a careful note should be kept by both parties confirming that each step has been fulfilled (see appendix C). These notes may, by agreement, be subject to inspection by the Scottish Government's Independent Adviser on Tenant Farming at a later date (see below).

Step 2 – Written Response

Where an item comes under part 1 of schedule 5 the landlord should respond within 30 days of step 1 either giving consent or objecting to the proposal pending an on farm meeting to discuss the matter further. Where a request for such a meeting is made this should include in as much detail as possible the issues that are to be discussed, and in particular details of any reservations that the landlord may have. This may include suggesting amendments and/or conditions, and where there are serious reservations these should be fully explained. In some circumstances an on farm discussion will be unnecessary, and the parties should go straight to step 4.

Where an item comes under part 2 of schedule 5 the landlord should respond within 30 days of step 1 either giving consent, objecting or indicating that he will undertake the improvement himself. Failure by the landlord to respond within 30 days in relation to an item coming under part 2 may be taken as implied assent, but the tenant should not commence work until 3 months have elapsed from the date of notice (i.e. step 1). Where the landlord objects to a part 2 improvement, an on farm meeting should ensue as for a part 1 improvement above.

Step 3 – On Farm Discussion

Within one month of a request for an on farm discussion this should be convened. While attendance may often be delegated to professional intermediaries, it is important that both the landlord and tenant feel that if necessary the opportunity to discuss matters in person will be made available. The aim of the discussion is to fully resolve any issues raised at step 2, so that a revised written proposal can then be prepared to the satisfaction of both parties.

Step 4 – Revised Written Proposal

Within one month of the on farm discussion having taken place the tenant should send a revised written proposal to the landlord, addressing all points raised during the discussion and amending the original proposal in a manner that seeks to resolve these to the mutual satisfaction of both parties.

Step 5 – Revised Written Response

In most cases the time allowed for steps 1, 2, 3 and 4 should be sufficient for amicable agreement to be eventually reached. In a small number of situations the complexity of issues involved, and/or the nature of interpersonal relations, may require a more prolonged discussion in order for agreement to be reached. This should last no longer than the time required for a second iteration of steps 3 and 4, and it may be helpful to involve in the discussion a third party who is respected by both landlord and tenant.

Step 6 – Professional Mediation

In the rare cases where further discussions fail to produce agreement it is likely that professional mediation will be required, at shared cost. Step 6 should involve further discussion and revision as in steps 3 and 4, but facilitated through a professional mediator with a knowledge of the issues involved. The choice of mediator is crucial to success, and care should be taken to appoint someone in whom both parties have complete confidence. A number of firms of professional intermediaries offer services of this nature.

Step 7 – Resolution

In exceptional circumstances it may not be possible to reach agreement through negotiation. Where an item comes under part 2 of schedule 5 the tenant may, if he wishes, have recourse to the Land Court for a decision.

The cost of this can be extremely high, and the impact on the landlord/tenant relationship may be severe. In most cases it will be far cheaper, quicker and less damaging to submit the dispute to voluntary binding arbitration. The industry bodies, while recognising the right of both parties to have their dispute heard in the Land Court, nonetheless strongly encourage the use of voluntary binding arbitration wherever possible.

Where an item comes under part 1 of schedule 5 the tenant has no recourse to the Land Court. In such cases landlords are strongly encouraged to agree to voluntary arbitration (binding or otherwise) if requested by the tenant rather than sustain a unilateral refusal without reference to an independent and neutral third party.

Maintaining a Record of Procedure

The industry bodies are aware that under the terms of the Land Reform Bill 2015 there may in due course be established a position of Tenant Farming Commissioner with a remit to prepare codes of practice, including a code relating to agreeing and recording improvements by tenants. The industry bodies see their new guidance as potentially providing a basis for such a code, and they are anxious that it operates in an equivalent manner.

All landlords, tenants and professional intermediaries are therefore asked, while working to this guidance, to maintain a concise written note of key dates and associated notes for stages 1 – 7, and to be willing on request and in confidence to make these notes available to the Scottish Government’s Independent Adviser on Tenant Farming so that he is in a position to undertake a risk based compliance audit should the industry bodies collectively ask him to do so. A pro-forma Record of Procedure is given in appendix C.

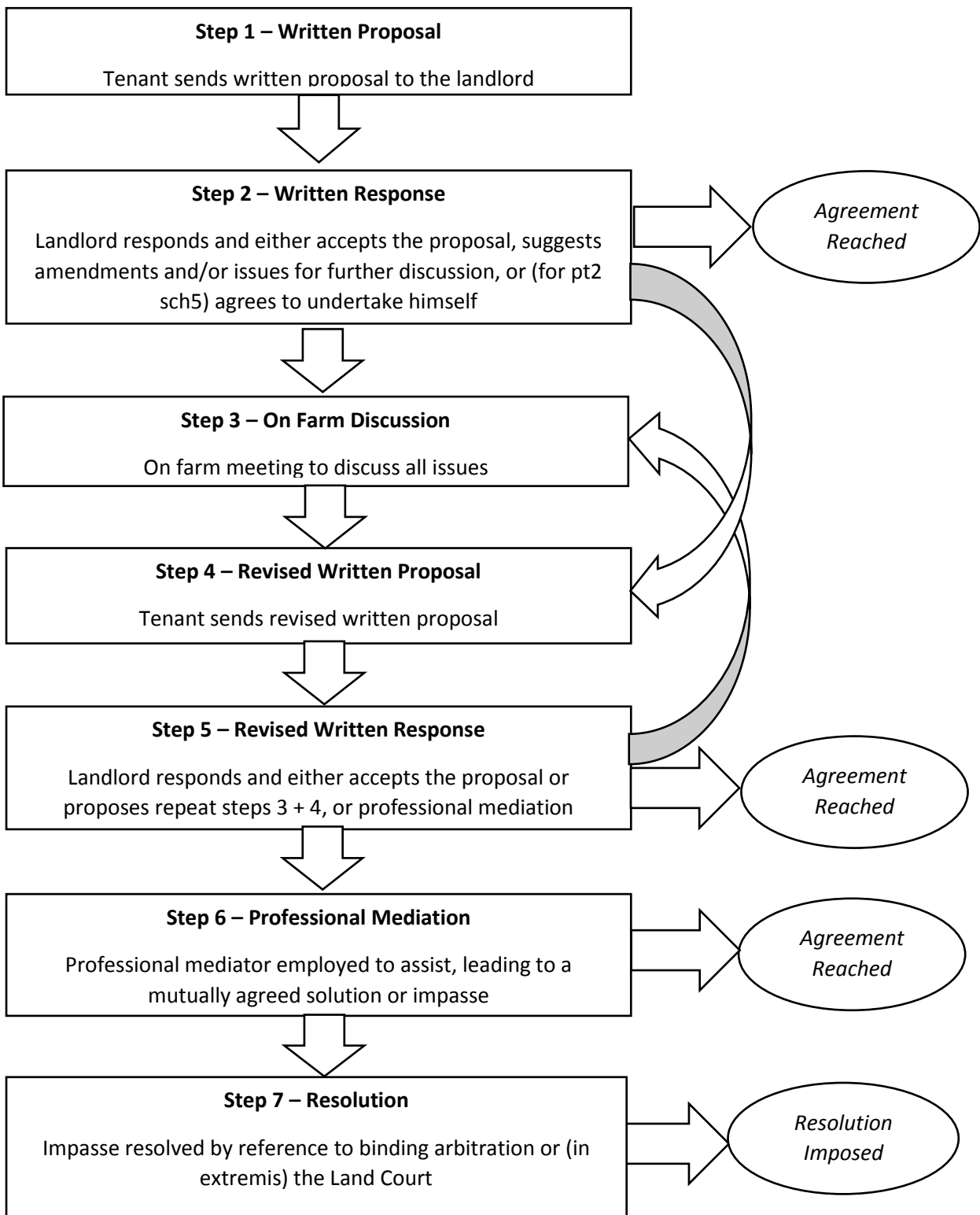
In Summary

NFUS, SLE and STFA are concerned about the lack of an agreed and up to date record of tenant’s improvements for a significant number of tenanted farms around Scotland. This in turn can lead to increased unpredictability and disagreement in relation to rent reviews, and it may also inhibit investment by tenants and discourage some tenants from retiring.

As a result, and recognising provisions in the Land Reform Bill 2015 designed to address this, the three organisations have decided to issue interim industry led guidance to help resolve of the problem. This asks all landlords and tenants to follow a simple step by step procedure before any new improvement is undertaken by the tenant to ensure that it is properly agreed and recorded in advance of implementation.

Statutory arrangements for determining tenant’s improvements continue to apply. Landlords’ and tenants’ statutory rights are unaffected. The guidance seeks simply to provide robust encouragement and an effective framework in order to encourage all landlords and tenants to agree and record tenant’s improvements timeously and on the basis of reasoned discussion between the two parties.

Appendix A – Flow Chart Illustrating the Guidance in Practice



Appendix B – Example Notifications of Intention to Carry Out Improvements

Example 1

Stonebridge Farm, Nosburgh Estate

Date of Notification - 15th October 2015

Expected date of work commencing – 15th January 2016

Notice of intention to carry out an improvement covered by part 2 of schedule 5.

Description of the proposed improvement –

- Please refer to attached location plan and elevation drawings.
- Installation of 24m x 13m steel portal framed building at 6m centres, for manure storage and multipurpose use. 5m to eaves, roof pitched at 15 degrees.
- Walling on three elevations of the building, North, East and West (rear and sides) consisting of 100mm concrete panelling at height of 2m, overlapping with 3.5m of green profile tin sheeting to the eaves.
- South elevation (entrance) is open fronted, with cladding from eaves height to roof pitch. Exterior apron of concrete fronting the building entrance, measuring 13m x 3m.
- Roof clad in the same box profile tin cladding as the elevations. 8no 2m x 1m corrugated plastic roof lights, 1 per bay each side.
- Tamped concrete floor throughout building.
- Building is divided in two, with full length central division made from the same 100mm concrete panelling as above, to a height of 2m.
- Manure effluent and runoff drained to newly installed 15,000 litre covered storage tank.
- 100mm plastic guttering along eaves with 80mm plastic downpipes at each end, on either side elevation, with water piped to soakaway.
- No electricity or water services to the building.

Example 2

Woodend Farm, Fintranter Estate

Date of Notification – 3rd June 2015

Consent sought by – 3rd July 2015

Expected date of work commencing – 3rd September 2016

Application for consent to carry out an improvement covered by part 1 of schedule 5.

Description of the proposed improvement –

- Please refer to attached location plan and planting layout diagram.
- Planting of 4 hectares of orchard comprising 2 hectares mixed apple varieties (30% Discovery, 30% Fiesta), 20% Bramley, 20% Newton Wonder) and 1 hectare each of plum (Victoria) and damson (Merryweather).
- Planting of 7 hectares of soft fruit comprising 2 hectares main crop raspberries, 2 hectares autumn raspberries, 1 hectare brambles (Merton Thornless), 1 hectares black currants (Ben Coman) and 1 hectare red currants (Laxton No 1).
- All orchard trees supported by 1.3m tree stakes.
- Raspberries supported with 2 x parallel two strand wire support fences with posts at 3m intervals.
- Associated hardcore pick-your-own car parking area as shown on attached plan.

Appendix C – Pro-Forma Record of Procedure

Step 1 – Written Proposal

- Date sent/received?
- Copy of written proposal attached or on file?

Step 2 – Written Response

- Date sent/received?
- Copy of written response attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to ensure constructive further discussion?

Step 3 – On Farm Discussion

- Date of meeting on farm?
- Who attended?
- Key points discussed?
- Any points of significant disagreement?

Step 4 – Revised Written Proposal

- Date sent/received?
- Copy of written proposal attached or on file?

Step 5 – Revised Written Response

- Date sent/received?
- Copy of written response attached or on file?
- Agreement reached and procedure completed?
- If not what action taken to repeat steps 4 and 5 or arrange professional mediation?

Step 6 – Professional Mediation

- Date and details of mediator agreed?
- Agreement reached and procedure completed?

Step 7 – Resolution

- Date of resolution by binding arbitration or Land Court?
- Copy of resolution attached or on file?