Supplementary Submission from Andy Wightman

INTRODUCTION

Following my oral evidence earlier today, I would like to submit this brief written evidence both in support of what I said this morning and to clarify certain matters.

BACKGROUND

I took an interest in the Long Leases Bill in the last session as a consequence of being concerned that the lease over the Waverley Market in Edinburgh would qualify for conversion. My investigations had concluded that this was common good land and, given that common good land is held for the benefit of the residents of Scotland’s burghs, I took the view that it would be wrong for the City of Edinburgh and other burghs to lose their ownership of such land in this manner without at least appropriate scrutiny of such an implication by Parliament. In particular, the conversion of the Waverley Market lease would, as I have outlined in previous written evidence, be for a consideration of around 40p and this gave me moral offence.

At the time of consideration of the Bill in the last session, I sought an exemption for all land held as part of the common good. Subsequent enquiries by the Scottish Government revealed that there were very few reported cases of ultra-long leases in existence. During the consideration of the Bill, the City of Edinburgh Council submitted evidence that the Waverley Market was not common good, that all long leases of common good land should be exempted and that leases where a grassum had been paid should be exempted on equivalent grounds to the exemption granted to commercial leases of over £100 annual rent. They did not make clear whether this would, in effect, exempt Waverley Market nor whether such was their desired outcome.

I continue to disagree with the case made by the Council in relation to its common good status and stand by my written evidence provided to the previous committee. Nothing in the 1933 Edinburgh Corporation Order Confirmation Act provides any statutory powers to transfer the common good status of the market. In particular, Section 278 merely deals with market rights. Section 280 makes clear that the accounts of the market are to form part of the common good account but, again, say nothing about the legal status of the land. It is this section which I think the Council are (wrongly) relying on as authority for their view that the site is no longer common good. If they are relying on some other facts or evidence, perhaps the Committee might like to inquire as to what they are.

The Council’s reliance on this Act to make the case for the 1938 transfer is undermined by, among other considerations, Section 70 of the 1950 Edinburgh Corporation Order Confirmation Act which makes clear that the Council may “as part...
of the common good erect and maintain new buildings on the site of the Waverley Market.” This section was repealed in the 1958 Confirmation Act in which same Act the site is included in the section relating to “Public Halls”, where it remained in the 1967 Act in which Section 145 removed all markets and slaughterhouses from the common good. As Waverley Market had for some time been a “Public Hall” it was not affected and in the early 1980s voluminous correspondence notes the status of the land as forming part of the common good. In 2005 and 2009, the Council confirmed to me that it formed part of the Common Good.

THE CURRENT BILL

The current bill changes nothing in relation to the common good. The City of Edinburgh Council have, however, changed their view on the question of the Waverley Market and are now seeking a specific exemption for the site from the provisions of the Bill. I welcome their view on this matter.

They propose to secure this by way of their proposals relating to extending the £100 commercial rent provisions to cover leases where grassums have been paid. Failing this, they seek a specific exemption for the Waverley Market.

In their evidence, the Council claim that the grassum amendment would address “our specific concerns over the possible loss of the ownership of Princes Mall” (1). The grassum they refer to, however, is a £6,250,000 payment made by Reeds to Edinburgh District Council in 1989 in consideration of the acquisition of the sub-lease that the Council held. (2) Subsequent to that acquisition, Reeds, the new tenant under the main 1982 head lease, was also the new tenant of the sub-lease (and landlord of that sub-lease). Reeds were therefore simultaneously the landlord and tenant of the same piece of ground.

In the House of Lords case of Clydesdale Bank vs Davidson reported on 16 December 1997, Lord Hope makes clear that for one party to enter into a lease with the self-same party is a “legal impossibility” and that “it is not possible for a person to have two real rights in the same property at the same time. This is because of the principle of confusio, by which the lesser right is absorbed into the greater right and is extinguished.” (3)

Thus, the sub-lease for which a grassum was indeed paid is now extinguished. Had they not been, then Section 3(3) of the Bill would come into play. There is thus now only one leasehold interest - the original 1982 lease for which no grassum was paid and which has a rental payment of one penny per year (if asked).
EXEMPTION OF COMMON GOOD

Were the Committee to be minded to grant an exemption to all common good land or to the Waverley Market there are three main options that I can envisage.

1. Exempt Common Good Land.

This is feasible and it does not require the Bill to define common good (it being a well-recognised legal concept). It would, however, require a process to be developed and incorporated into the Bill to provide for the identification of common good property which would, were such a process not to be in place, convert automatically on the appointed day. This could be along the lines of requiring a court declarator to accompany all conversions to the effect that the land is not common good. Conversion would not take place until such a declarator had been issued. This approach leaves the fate of the Waverley Market uncertain due to the dispute over its common good status.

2. Exempt leases of specified lands  
The Bill could be amended to exempt the known and specified properties held on qualifying leases that have been brought to the attention of the Scottish Government by a specified date. This would be straightforward but would allow other, as yet unidentified, common good leases to convert.

3. Exempt the Waverley Market  
The Waverley Market could be the sole subject of such an exemption given its extraordinary prominence and value in the centre of Scotland’s capital city and its previous history as the subject of statutory provisions in a number of Edinburgh Corporation Acts (it is thus considered a site of sufficient importance that the Council has sought statutory powers to govern its use).

At this stage I am not advocating any particular route given that further thought needs to be given as to the legislative implications. I do, however, remain of the view that the Scottish Parliament should, at the very least, exempt the site of the Waverley Market. Furthermore, the approach suggested by the City of Edinburgh Council appears to me not to succeed in this objective.

(1) Evidence at Annexe A RACCE/S4/12/6/1 Papers for RACCE Committee 29 February 2012.

(2) I should add that the £6.25 million was not paid into the common good account and I am of the view that this should be rectified.

(3) http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd971216/clyd01.htm