Local Government and Communities Committee

Common Good Property and Funds

Submission from Dr Lindsay Neil

This response is given by Dr Lindsay D Neil, a director of and on behalf of the Selkirk Regeneration Company.

The specific Questions

1. Are the laws adequate? No, not at present.
2. Record keeping needing improvement? Yes
3. Enough openness? No
5. Any other issues? Yes. – see below last para.

Before addressing the questions raised in the Call for Evidence, it is necessary to clear up some misunderstandings in the Background Statement. A number of fallacies follow on from the misinterpretation of the law which I will itemise:

1. Burghs – do they exist?

In line 6 the background states “The LG(S)Act 1973 brought an end to the Burghs…”

This is false.

Careful reading of the 1973 Act, Part 1:1, reveals that the act is dealing with administrative areas and says; “Administration of Local Government from May 16th 1975, Scotland shall have local areas in accordance with the provisions of this section”. The act deals with defined local areas and how they will be administered.

In para 5 of the same section, the act goes on to say “On 16th May 1975 all government areas… that is to say all councils, all counties, counties of cities, large burghs, small burghs shall cease to exist”.

Therefore, it is not the burghs etc. but the areas over which they had local government powers that were abolished. The burghs themselves were not abolished. If the burghs were to be abolished, the act would have clearly said so; it didn’t. The 196 listed burghs might have something to say if it had and if they were to be abolished!
2. The transfer of assets:

The background states “The town councils’ assets…were transferred etc…” This is accurate as far as it goes but needs clarification. I am inserting what I wrote in August 2014 in comments on the proposed act:

… “(ref note 276 & 277) it would be unfortunate to miss an opportunity to define and clarify that Local Authorities (LAs) own only the ‘title’ to CGFs, and that burgh inhabitants are the ‘beneficial’ owners as in Trust Law…”

This has been endorsed by two separate QC opinions. The assertion that LAs own Common Good Funds “outright” (stated on page 1 in the only book on Common Good law) is wrong, – they don’t. This is very important in judging what LAs can legally do with Common Good property.

Following this, the derived conclusion that “no new common good property can be created” is simply untrue, is contrary to burgh’s interests and therefore the background statement should be clarified.

As an example, two items have been added to Selkirk Common Good during the last 11 years; the salmon fishing rights on the river Ettrick, mistakenly sequestered by the Crown in 1914 and returned in 2006 and also a wooden table fashioned from wood from the original Parliament building in the Tolbooth bequeathed to the Selkirk CG in 2010.

With those reservations, the remainder of the background statement is otherwise a good resumé of the history of Common Good.

The Call for Evidence

The delay to implementing Sections 102 and 104 has had interesting and not altogether happy effects since the act was given Royal Assent on 24 July 2015 which I will relate:

Ref sub-section 102: Common Good Registers

A three judge Inner House ruling of 2003, endorsing previous judgements, made it clear that all property that belonged to a Burgh Council that was not part of a trust nor created by statute, on 16th May 1975, became the property of the Common Good Fund of that burgh.¹ (the background statement actually endorses this ruling when referring to the mistaken belief that burghs were abolished)

This date and that ruling could be emphasised to enable local authorities to have a better understanding of what constitutes common good property. At present some
councils are confused and waste public money seeking answers to what has already, very clearly, been decided at a high judicial level. (eg Selkirk Library). Sub section 102 could be improved by stressing the Court of Session\textsuperscript{1} ruling and by acceptance that Common Good Funds can still be enhanced by donations and are not ‘closed’ as is suggested in the ‘background’.

As an example, the burgh of Langholm has a number of oil paintings clearly labelled as gifts to the burgh but Dumfries and Galloway council deny they are the property of the Common Good Fund. Sub sections 102 and 104, when implemented would sort that with only minor modifications as above.

A further example is that Selkirk has a number of artifacts (moveable assets) which should be listed as Common Good under 102, but are currently (and very well) looked after and listed by the museum service. A simple paper transaction at virtually no cost would restore these to the Common Good where they belong.

Until sub-section 102 is ‘commenced’ the registers of common Good funds will remain inadequate. It was of considerable benefit to replace the word ‘may’ with the word ‘must’ in passages in the Community Empowerment Act relating to register keeping but as it is not yet law, that benefit is awaited.

Ref Sub-section 104, Disposal and use of Common Good

As the provisions of the Community Empowerment Act are not yet law, the original LG(S)Act 1973 along with the 1491 King James IV Act and subsequent modifications are therefore the extant foundation acts governing Common Good. The definition of alienable and non-alienable assets remains relevant. The best definition of what they are is that of the ‘1835 Commission appointed to enquire into the state of Municipal Corporations in Scotland.’ The commission divided burgh property into two classes; ‘alienable’, consisting of houses, mills, fishings, feu-duties and other descriptions of heritage. Property, ‘not usually alienable’ consisted of “public buildings such as churches, town halls, market places and common greens or ground set apart for the general use or enjoyment of the inhabitants”. The purpose of the 1835 definition was to help safeguard predation on Common Good property by other bodies.\textsuperscript{2}

Besides that definition, the LG(S)Act (section 75) included another important safeguard afforded by the mandatory referral to a sheriff or the Court of Session of any disputed disposal of inalienable property and that now needs emphasis. It gave Common Good asset disposal an enhanced legal status. For example, Selkirk lost a very valuable asset in 1995 (land valued at c £100,000 - a football field, part of it subsequently sold for £60,000) by the failure of approval being sought from a court. The land was sold for £17,500 in 1995 and the money immediately given by prior arrangement to a private club. Thus Selkirk Common Good had a valuable asset one day and next day had nothing. This safeguard present in the LG(S)A of 1973 is not
reiterated in the 2015 Community Empowerment Act and will not be necessary once 104 is implemented. The law in 1995 was simply ignored. It took until FOISA in 2002 for us to find out and understand what had been done.

Furthermore, it is an important safeguard for local communities if they are allowed to be aware of, take care of and participate in Common Good administration. 104 would permit that. The implementation of section 104 would allow the abandonment of the vexatious and routinely misapplied definitions of alienability or non-alienability and is the most sensible way forward. It must however go hand in hand with a wider participation of local people to act in the interests of the burgh inhabitants and control any misunderstanding or misapplication of the law.

Until subsection 104 is implemented, experience tells us CG assets will remain at risk.

The overarching principle in trying to streamline Common Good Law must be to restore to the beneficial owners much greater control and greater powers over their own Common Good Fund.

The 1491 Act in mentioning burgh councils also mentions the deacons of craft guilds who, along with the council, were the appropriate participants in Common Good administration. The modern equivalent would be the inclusion of burgh inhabitants who represent a wide cross-section of townspeople as the new act says, and would be one of the best measures to restore local interest, local care and local input into management

The best guardians of any property are the people who own it.

One further result has emerged owing to an LA misunderstanding of the law and could have been prevented if 104 had been in force. The administration of several CG assets in the Borders has recently been surrendered to a private company called “Live Borders” by Scottish Borders Council (SBC). What they have done is sensible enough and will hopefully result in competent management of certain Common Good Assets. However SBC have acted illegally.

The 1491 Act defines those who should advise on Common Good for burghs. The act clearly identifies that councillors and Deacons of a burgh are those who should advise on Common Good administration “quair thay ar”. Not any burgh, but the burgh to which they belong.

The trustees of ‘Live Borders’, while not criticising their competence, have no councillor from Selkirk nor many of the other Border burghs. While not impugning their motives, a private company has no legal standing with regard to to
administration of Common Good assets they have been tasked to administer by the LA. That is simply illegal.

Ref 5 above:

As the representative of the Selkirk Regeneration Company in accordance with 102;5(b), my letter identifying myself was duly acknowledged. Until 102 and 104 are implemented I have not been able to participate in CG administration and while my exclusion is consistent with the existent regulations, it is not consistent with the intentions of the act. I attended the Selkirk Common Good Fund Working Group meeting on 15th February at St Boswells in order to inform Scottish Borders Council that they were acting at variance with the law. The chairman refused to let me speak under AOCB or participate in any way other than as an observer, so I left.

Scottish Borders Council is therefore unaware that they are contravening the regulations.

I hope these comments are helpful,

Dr L D Neil

(See references overpage)
References:

¹ Wilson and Others v Inverclyde Council, Case No A2312/99, dated 20 February 2003:
Extra Division, Inner House, Court of Session
[Lord Osborne at paras 24 & 33; Lord Drummond Young at p 5 & Lord Coulsfield at p.4]
All relevant in defining who owns Common Good

² Legal position: Scottish local authorities cannot grant a valid disposition or lease of land or buildings that (1) form part of the common good and (2) which are considered to be 'inalienable', unless authority has been obtained from a court under section 75 of the Local Government (Scotland) Act 1973.

(Quoted from the Scots Law Times, 1937, 'Reports' page 576)