

**Local Government and Communities Committee**

**Common Good Property and Funds**

**Submission from Nairn Residents Concern Group**

Dear Sir/Madam

**COMMON GOOD PROPERTY AND FUNDS IN SCOTLAND**

1. In response to your call via the Scottish Parliament website, and an emailed reminder from Andy Wightman MSP, I enclose with this covering letter a written submission of evidence for consideration by the Committee.

2. The submission offers some general observations on the current arrangements for oversight and management of Common Good assets; sets out arguments for reform; illustrates the case for change and improvement by reference to detailed and specific examples from Nairn's Common Good; and responds to the questions posed by the Committee in the call for evidence.

3. We found it interesting that our concerns, comments and criticisms parallel very closely the points made in the submissions published online so far by individual citizens in other parts of the country from Inverness to the Borders – all of whom identified shortcomings and inadequacies in the present arrangements. We also note that the submissions made so far by local Councils take a different view, and in general seem to consider that the present situation is broadly satisfactory and acceptable.

4. This clear divergence is – of itself – very revealing. We hope the Committee will undertake a thorough and comprehensive review. We will be pleased to provide whatever further comments, evidence or clarification we can to assist the Committee in its work.

Yours sincerely,

B E Stewart

for and on behalf of NRCG

## Key messages

1. The ancient historical origins and patchy records of Common Good (CG) throughout Scotland make it difficult to examine – or clarify – the opaque legal and financial status of many CG assets. This has led, over the years, to cases of misappropriation, misuse, and loss. Nairn's CG has not been immune.
2. The 1994 local government reorganisation took responsibility for local CGs away from the communities for whose benefit they were supposed to be held in trust and managed. The administration of Nairn's CG has been marked by neglect, negligence and incompetence. There is insufficient distinction between the separate roles of Highland Council as trustees, and as managers, of CG assets. Inadequate monitoring and scrutiny has been to the detriment both of the Nairn Common Good Fund (NCGF) and the local community. There are no mechanisms for local consultation on CG management, and no safeguards which ensure local accountability.
3. The Community Empowerment Act (and this enquiry) offer an opportunity to clarify responsibilities and to re-localise the oversight and decision-making in respect of CG matters back to the communities to which they belong. This needs to be accompanied by more rigorous and transparent procedures for managing and accounting for Common Good assets.

## Essential facts

4. Nairn's Common Good, valued in 2015 at approx £6.6 million, is the second-largest in Highland region after the CG of the City of Inverness. It consists almost entirely of land and property (with a few historic objects such as paintings in the local Courthouse).
5. As with all similar CGs formerly under the control of local communities, Burghs or District Councils, the 1994 Local Government Reorganisation Act transferred responsibility for CG administration to the regional (Highland) Council. So the 80 elected Highland Councillors are now in effect the trustees of the Nairn CG and of all other CGs in the region.
6. Nairn's CG assets includes areas of civic amenity such as the Links recreational public open spaces adjacent to the beach; land leased under long term or renewable leases to commercial businesses (eg the Parkdean caravan park, the Links tearoom) and to private clubs and local organisations (the Dunbar Golf Club, the Nairn Sports Club, the Allotments Society); and properties, garages and yard space – mainly in the older Fishertown – rented to individuals or local groups (the Arts Society, the ATC, the Welfare Football Association). The Nairn CG also owns a substantial area of open land (the “Sandown Lands”) on the periphery of town as a capital asset which is potentially available for development and is currently under a short-term agricultural lease.
7. The CG income consists principally of rental-payments. These include not only long-term leases but also annual payments for ad hoc or short-term hire of

stances at the Links for the Highland Games “showies”. Historically some interest was earned on bank deposits. Some CG funds are now being invested.

8. CG expenditure is mainly on maintenance of the CG land (mowing etc), and the payment of rates and utility costs on CG buildings (public toilets, CCTV installations etc). The Highland Council also debits the Nairn CGF with other charges – eg for legal fees, administrative services, and a “management fee”. There is also a substantial (and contentious) annual payment – currently almost £10,000 per annum – from the CGF in respect of the Fishing Levy on the River Nairn.

9. In summary, the income generated from Common Good assets is very modest (and rents are mostly fixed), and appears to be barely sufficient to cover outgoings (which are increasing as costs and charges rise).

### **The asset records/register**

10. Despite the fact that most Nairn CG assets are fixed property, there is no current, accurate and publicly available record of what they comprise. A 2008 Audit Scotland report on Highland Council noted that *“....there is no single comprehensive record of assets for each common good fund. Responsibilities for maintaining records for common good assets are not formally defined... Some of the local administrative arrangements to collect common good income are still in the process of being defined following the recent reorganisation of the operational Areas.... Internal audit’s action plan contains nine recommendations with most scheduled for completion by December 2008.”*

11. Nine years later, there is still no register. In 2010 the asset register was described in an official report as “too big” to submit to the Council! Reports to the Nairn Area Committee in March 2015 and April 2016 repeat the statement that, *“Work is ongoing on the Asset Register for the NCGF. As previously advised this will be presented in due course....”*.

12. The task is not difficult. There are question-marks (see below) about past transactions involving CG. But even though most CG assets are identifiable properties subject to leases and rental agreements recorded on files and in Council accounts, the Council's performance has been abject. Reliable and accurate records are fundamental to good and effective management of the CG assets, and to any process of scrutiny and accountability. Astonishingly, having failed to manage, administer and keep reliable records, Highland Council recently decided (after some debate) to recruit a new, designated official with specific responsibility for CG administration. The sting in the tail, however, is that the costs of this employee - whose sole task is to make up for the administrative failures of the Council itself – are going to be charged to the CG Funds!

### **The trustee function, and accountability**

13. The 2008 Audit Scotland report also noted that Highland Council had *“.....no overarching policy that provides guidance on the governance, stewardship and administration of common good funds....”*. In 2009-11 Councillors agreed a policy

document prepared by Council officials. This was not subject to public, or local, consultation. Submissions and comments from local residents were ignored. When the subject was raised at a public (Ward Forum) meeting, officials' response was that FOI enquiries would be refused and if local residents had concerns or wanted information, they should seek legal advice and look to the courts!

14. Among points of concern – both prior to, and after adoption of, the Council's policy – were

- failure to distinguish clearly between the Council's role as trustee/custodian of CG assets on behalf of the local community, and their responsibility to administer and manage the assets;
- the absence of any criteria for assessing how any CG assets or revenue might be used to deliver outcomes “*for the benefit of the community*” and which “*have regard for the interests of the inhabitants*”<sup>(1note\*)</sup>, coupled with the assertion that the Council had “*wide discretion*” in deciding on CG expenditure;

15. The absence of a clear separation (and publicly agreed guidance) between the role of Councillors as trustees, and the interests of the Council as local authority, raises the issue of potential conflict of interest – for example, where a (trustee) objective of preserving and enhancing the CG's capital is weighed against the Council's (administrative) desire to realise or dispose of assets in order to fund public services.

16. The reassignment of responsibility from the local (Burgh or District) community to the 80-member Highland Council creates a situation where decisions about use or disposal of (say) Nairn's CG assets could be taken by majority-vote in Council, or indeed a smaller number in Resources sub-committee, none of whom were representatives of the inhabitants of Nairn. The opportunity – however unthinkable – would theoretically exist for Councillors from elsewhere in the Highlands to vote on the spending of Nairn CG revenue, or use of CG assets/capital for purposes deemed to be “for the benefit of the community”, without any consultation with that community.

17. Current Highland Council policy makes no provision for consultation over the use or disposal of CG assets. It delegates decisions on any and all expenditure up to £10,000 (per application, not per annum) to officials – who may have no direct role or links with the local area or community. A study in 2008 by the SIS<sup>2</sup> showed that Highland was the only authority of the eight surveyed which delegated any powers of CG oversight and approval to unelected officials.

18. The policy asserts that “*the Council has the power to dispose of CG assets....*”, and only contains a requirement that “*...all disposals are to be reported to*

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1 : There was concern, for example, that capital raised from the sale of CG land might be 'redeployed' to regional infrastructure projects elsewhere (airport access road?) on the basis that such works would benefit the local residents!

2 The Management of Common Good Assets and Funds: Report of Sample Survey of Council Practice Colin Mair, Chief Executive, Improvement Service, June 2008

*the [Council's] Resources subcommittee...".* Only reported? After the event? This appears to suggest that intended disposals are not considered by, or submitted for the prior approval of, Councillors as trustees. Even more surprising, the policy does not stipulate that disposals be subject to public discussion and/or the endorsement of the community whose CG assets are up for disposal. The local community which is the ultimate owner and beneficiary of the asset should participate in the decision as to its fate.

19. As part of the implementation of the 2016 Community Empowerment Act, the re-established Nairnshire Area Committee (consisting of the four elected Councillors for the Ward, with no Community Councillors or other local representatives) receives quarterly summary reports on the management of Nairn CG, but without any accounting detail. It also considers matters relating to the rental or – in theory – the disposal of CG assets. But it does so in closed session. There is no local public consultation about options or proposals. Reports and recommendations on specific transactions are not publicly available.

### **Management, administration and income/expenditure: Case studies**

20. In principle, rental of CG land, property or other assets could, and should, provide a revenue stream which not only covers all maintenance costs but generates a surplus which can then be deployed for the benefit of the community. Rents need not always be set at commercial/market levels, although for commercial tenants this ought to be the presumption. For local community/voluntary/charitable tenants there is a case for setting rents at below market levels.

21. In the case of Nairn there are some lease agreements – evidently signed many years ago – which bear no relation to reality. The rental figures for CG tenancies show some startling inconsistencies. The most stark example is perhaps **the Nairn Dunbar Golf Club**, a private members' club (which also caters to guests and visitors) which has membership fees of approx £600 and an annual turnover of over £600,000, and leases a substantial area of CG land for an 18-hole golf course. For this it pays the Nairn CG a rent of...precisely £12.00 per year!

22. The arrangements for administering the River Nairn fishings are a scandal and a major – and in many people's view unjustifiable – burden on the CG (see details below).

23. There have been several notorious cases of incompetence, negligence and maladministration which have adversely affected the position of Nairn's Common Good. These illustrate the need for reform and more rigorous mechanisms for oversight. Some cases are still being researched. But of those already known, the following are the most egregious examples:

- **The Sandown Lease:** *costs of Council incompetence charged to CG, and Council also appropriates part of the CG land.*

25. In the 2000 Local Plan the Council zoned CG land at Sandown (some 90 acres, then reckoned to be worth up to £12-15 million), for development. After

abortive efforts to set up a Joint Venture, a decision was made in 2004 to offer the land for sale. No evidence has been identified that the Council – in their role as CG trustees – considered alternative options or proposals. It then emerged that Council officials' negligence over the administration/renewal of the grazing lease which was in place on the land had given the farmer some rights to tenure. He had to be 'bought out'. The cost of this 'compensation' and the legal purification of title, totalling some £390,000 were charged as a debt to the Nairn CG. This was later described as the "*fees paid to acquire vacant possession*". The other costs of marketing the land for sale totalled some further £340,000. The cumulative charges put the Nairn CG into deficit.

26. Council officials appeared to have led the successful bidder (whose offer in excess of £14million was accepted in 2007) to believe that consent would be granted for development of housing well in excess of the Local Plan (and they so recommended). This was turned down by Ministers in 2010, following strong local opposition and a planning appeal. The developer walked away. The Council had taken no deposit (normal practice would be a 10% deposit on acceptance of the bid) and had made no provision in the missives or heads of agreement for recovery of costs in the event of the bidder's refusal to complete the deal.

27. After considerable public protest and outrage, the Council agreed in 2013 (without admitting any failure of judgement) to write off the £390,000 "fees" which had been charged to the NCGF. But at the same time the Council (acting as the Council) claimed a pro-rata share of the CG land equivalent in value to the (approx) £340,000 of other marketing costs abortively incurred; and the Council (acting as CG trustees?) evidently acquiesced!

- **The Parkdean Caravan site:** *Twice between 1999 and 2013 the Highland Council in its role as administrators of the Nairn CG, negligently overlooked rent-reviews as specified under terms of lease. NCGF lost some £190,000 as a result. In 2013 Highland Council reimbursed the NCGF – using its own – ie local ratepayers' money. The lease has since been extended to include more CG land, on unknown terms, and without local consultation. There is no evidence that the HC as Trustees took a view on the arrangements.*

28. The original 1976 lease on the NCGF-owned site was for 21 years with annual rent reviews. The 1985 lease negotiated with Parkdean was for 60 years and included provision for RPI rent reviews (for reasons that are unclear) only every 7 years. In 1992 the Council did a review and increased the rent. But they failed to do so in 1999 and 2006 (even though they negotiated an 99-year extension of the lease in 1994!).

29. This oversight resulted in a total net loss to the NCGF up to 2013 of rental and interest of £187,060. The Council's legal advice was that this loss (or rental shortfall) could not be recovered from Parkdean. So in 2013, when the error was revealed, the Council reimbursed the NCGF the full amount..... using, of course, local Highland ratepayers' money! An investigation was carried out, but no-one was held accountable. Subsequently the Council negotiated an additional or supplementary lease agreement with Parkdean for an adjacent area of CG land including public

toilets: the duration, terms, rental, and review provisions of this agreement are not publicly known, and there is already confusion, or a dispute, about this new lease.

- **the Fishing Levy:** *The Highland Council (in succession to the Burgh/District Council) leases out the River Nairn fishing rights to the local angling club. The fixed token rent (£50pa) is credited to the CG. The revenue from tickets and permits is retained by the angling association. But the Fishing Levy (currently £9100pa and increasing) is charged to the CG. The rationale for this heavy burden on the CG Fund is in debate, since it is far from certain that the fishings are a CG asset. There is no evidence of public consultation about the current (1995) lease. Trustees appear not to have been consulted or to have examined the matter.*

30. In 1923 and 1933 the titles to the two stretches of fishing on the River Nairn were disposed by the then private owners to the Burgh Council (later the District Council) which leased them (and passed the responsibility for administering and issuing fishing permits) to the local Angling Association. The current lease (1995) is for 99 years, renewable for a further 99 years at a non-reviewable annual rent of £50 + VAT.

31. There are two issues of fishing-rights management: title, and finances. Debate is currently being pursued as to the title. It has been argued locally that the fishings are not a CG asset, but Council property, and so the responsibility for letting the rights and for paying the levy falls to the Highland Council (in succession to the Burgh/District Council). The available evidence largely supports this view. Highland Council officials have however sought to offer advice which casts doubt on this, have argued that the evidence of title is “inconclusive”, and have recommended seeking independent legal advice. If title does rest with the Council, a substantial reimbursement will be due to the NCGF. Highland Councillors, in their role as Trustees, appear to be ignorant of, and to have made no examination of, the subject.

32. Meanwhile the financial implications for the CGF of the existing arrangements are dramatic and onerous. The fixed rent of £50 pa paid by the Angling Association is credited into the CGF. The Association retains the revenue from season-ticket (£140 per member) and permit sales (total income not publicly stated). The annual Levy charged by the Fisheries Board is paid out of the CGF. This currently amounts to £9,100 pa (2016-17), and is reviewed annually (and normally increased). The arithmetic is self-evident. The cumulative cost to the CGF over 99 years is crippling. In essence the CGF is paying out a subsidy of (currently) almost £10k pa and likely to increase, to the few dozen members of the Angling Association and the small number of visitors who fish on the river.

- **The Sundancer Restaurant:** *lack of consultation, and no transparency about legal and financial arrangements.*

33. The Nairn CG owns a site (which had a derelict cafe building) on the seafront. In 2015 the Highland Council offered it for lease, with consent to demolish and replace the building. An agreement was reached with a local business, which has constructed a new restaurant and (by securing an expansion of the leased plot)

added car parking.

34. Local concerns focus on the secrecy of the letting process; the lack of information about alternative options; and the absence of transparency about the terms and duration of the lease, the income to the CG, the terms of rental of the additional land, and the conditions and obligations (on tenant and CG).

- **The housing developments at Lochloy and the Maggot:** *complex history of land transactions involving various landowners/developers and the Council, local concerns about the possibility that the CG was deprived of proper or relevant gain.*

35. A substantial area of land at Lochloy – originally several plots of farmland – has over the last 10-15 years been developed into a housing estate of some 600 or more units (with some land also being passed to the Dunbar Golf Club). Questions have arisen (and records are still being investigated) as to the terms under which the land passed from the original owners; whether any of the land was (or was intended to be) assigned to Nairn's Common Good, and if so whether the full value of any such asset accrued to the CG; what role the Council played not only as planning authority but in the transactions by which the land was transferred to and from various developers; and what agreements or understandings were made, by whom, and when to secure the delivery of the obligatory affordable housing associated with the various phases of the development. Work continues to obtain accurate information and records.

- **Harbour redevelopment:** *mystery persists regarding the extent of CG land around the harbour, its disposal, and whether the full value was credited to the Nairn CGF.*

36. In the 1990s the land surrounding the harbour was redeveloped. Sheds, yards, stores and warehouses were cleared and housing built. It is believed that some of the land was owned by the Nairn CG. It is unclear how decisions were made on disposal, what value was placed on the land, and whether the proceeds accrued to the CGF. The fact that the sailing club continues to pay rent to the CG in respect of their clubhouse and yard provides collateral evidence of a past and continuing CG interest.

- **Viewfield:** *a large property and grounds believed to have been acquired for the benefit of the people of Nairn, but regarded by Highland Council as Council property.*

37. The legal status and title of this large park and listed building (now the Museum) in the centre of Nairn is not entirely clear. Am Baile<sup>3</sup> records that the house was “acquired” by the local Council in 1948. Highland Council asserts ownership of the building (and appears to have appropriated the whole site). Detailed records of the date and terms of the disposition of the property are not available. It appears that there may be three or more separate plots of land within

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3 <http://www.ambaile.org.uk/detail/en/15177/1/EN15177-viewfield-house.htm>



what is called the Viewfield site. The ownership of the area (now a public park) is unclear, but at least some of it was, or is, CG land. One area (the “MacLaren Gardens”) was reportedly “gifted to the people of Nairn” (which implies that it should be CG land). Another area, formerly allotments, is now occupied by the police station, community centre, and Nairn Sports Club. The fact that the Sports Club continues to pay rent to the CGF for facilities located on the site is circumstantial evidence that at least part of the land was – or should be – considered part of Nairn's CG.

## Conclusion

38. The Committee posed five questions. The submission above outlines the evidence which leads us to the following answers:

- *Are the common law rules which define common good property adequate?*

We have no expertise in the legal field. But the law seems insufficiently clear on how the “interests” or “benefits” of the local community concerned are defined and protected, leaving scope for ambiguity and abuse.

- *Do you think the record keeping of common good property and assets held by local authorities could be improved?*

Yes. In our experience record keeping by local authorities has been dismal, and action to progress and publish asset-registers has (despite repeated instructions from Auditors and legislators) been snail-like.

- *Is there enough openness and direct engagement with local communities on common good property and funds and the use to which common good property and assets are put?*

No. The 1994 local government reorganisation broke the link with local communities and removed decision-making from the owners/beneficiaries. As a result trustee oversight has been absent or remote, consultation has been minimal, decisions have been secretive, often taken by unelected officials and on occasions incompetent or negligent, and CG assets have been exploited or not effectively used.

- *Are details of common good property and assets and income generated by their sale clear and transparent?*

No. Details are not routinely made public. Decisions (eg on leases, rent levels, income and sales) have usually been made behind closed doors. Periodic reports (eg to local area committee) are summaries only.

- *Any other issues relating to common good property, assets and funds which you wish to bring to the attention of the Committee?*

Yes. Because each local Common Good is unique with its own history, and because every CG transaction or decision is shaped by specific local circumstances, each issue tends to be *sui generis*. The cases cited in this submission are examples of

past and current problems afflicting the Nairn CG. Some are warnings of what can and does go wrong. Others still await investigation and resolution. But they all illustrate systemic failures of governance, scrutiny, management and administration. They underline the critical need for three reforms: the re-localisation of decision-making on CGs (in line with the policy approach in the CEA and the conclusions of the Parliament's Land Reform Review Group) coupled with greater clarity over the role and responsibility of CG trustees as custodians; the establishment of a framework which enables effective consultation with the communities for whose benefit the CG exists; and the establishment of much more transparent, rigorous mechanisms for scrutiny and accountability.

**Brian Stewart**

*for and on behalf of NRCG*