Local Government and Communities Committee

Common Good Property and Funds

Submission from Fife Council and the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)

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

The rules which define common good property derive from two cases in the main: *Ruthin Castle*, and *Murray v Forfar Magistrates*.

The *Ruthin Castle* case is generally taken to mean that any former burgh property which was not acquired using statutory powers or forms part of a ‘special trust’ is to be treated as common good. That formulation can then be taken to mean that one should assume burgh property is common good, unless one of the two exceptions apply. However, there are some practical problems with this approach:

- It’s not always clear from the original acquisition if a public trust was intended or not; it can depend on the wording of the conveyance in favour of the burgh;

- More commonly, it’s not clear if the property was acquired for ‘statutory purposes.’ The distinction being drawn here by the judges in the *Ruthin Castle* case is between land or buildings either gifted, or acquired using common good funds; and those acquired in pursuit of one of the statutory purposes which, from the 19th century onwards, were granted to burghs, for example the Housing Acts.

The statutory purpose exception can often only be resolved by resorting to local history and/or extensive research of burgh records if available. To give an example: a housing estate built in the 1930s is likely to have been built on land bought for that statutory purpose. However, the titles may not say anything specific about why the land was purchased. Just as commonly, the titles may be a patchwork quilt of land acquired just before the housing estate was built, and land owned previously by the burgh.

In the case of the latter, does its use for a statutory purpose since early last century mean it’s no longer common good? What about the play areas within the estate? The roads, which may not have been adopted under Roads legislation?

When this question has been discussed by Parliamentary committees previously, there has been a reluctance to impose a definition which might end up creating more anomalies than it solves. Communities in former burghs, especially, have expressed concern that land formerly thought to be common good might be excluded by mistake by too prescriptive a definition.

There might, however, be some merit in codifying the Ruthin Castle definition, if only to give greater certainty on some of the issues referred to above.
The second case mentioned above, *Murray v Magistrates of Forfar*, is the main case referred to in defining which common good property is *alienable*, and which *inalienable*. This distinction is important in deciding whether a local authority needs to seek court consent to dispose of common good property or to appropriate it for another use (such as the site of a new school). Only that category of common good property considered inalienable needs court consent.

The usual phrase in *Murray* and other cases to describe when a property should be treated as inalienable is ‘custom, dedication or direct grant;’ in other words, land or property which is part of the common good and which is either:

- Land, which from time immemorial, has been used by the inhabitants of the burgh for recreational purposes (‘custom’);
- Land or buildings dedicated by the burgh to some form of ‘public purpose’ (‘dedication’); or
- Land or buildings conveyed to the burgh under title conditions that make it plain that it’s to be used for the common good of the burgh (‘direct grant’).

Deciding whether land is inalienable or not is far from straightforward. Even if there is wording in the title deed, it can be contradictory, and sometimes even indicate in the direction of a public trust. Even whether property has been ‘dedicated’ by the former burgh to a ‘public purpose’ is open to interpretation. Much depends on facts and circumstances.

Whilst such questions can be very interesting to academic lawyers, they are less so for local authorities and communities wrestling with whether a proposed disposal needs court authority or not: and if the local authority proceeds on the basis of the property being in the alienable category, the community’s ability to challenge that decision is limited to judicial review in the Court of Session, not exactly a cheap option.

Again, codifying the current common law rules in this area may have limited effect. A more radical proposal is set out below.

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

There is little doubt that record keeping of common good property and assets held by local authorities could always be improved. However, the statutory obligation to keep a common good register in the Community Empowerment Act 2015 reflects what for many has been a long journey towards compelling councils to improve the information they have on common good.

Councils have, since 1975, been obliged to account for common good funds. However, the record keeping on common good property inherited from burghs was patchy, to say the least; and subsequent local authorities have taken different approaches to how they have improved that legacy.
The scale of work that will be required to properly construct, and meaningfully consult on, a common good register for some of the larger local authorities in particular, should not be underestimated. Even when a register has been constructed, full synchronicity between, especially, finance and asset management systems, will take time and resources that local authorities may find difficult to find in the current climate.

Given that the new statutory requirement is to be brought in after publication of the Guidance, it is suggested that this question is best reviewed when the new registers are completed in pursuit of the Act.

- **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?**

From a local authority perspective, there has been an improvement in the way in which community engagement on common good matters has played out in recent years. The creation of the common good register should be an opportunity to build trust between communities and councils. However, that will require openness and willingness to negotiate on both sides.

Engagement on common good needs to be seen in the context of the overall community empowerment agenda. The desire for local solutions and local governance of assets has often sprung from a sense of disempowerment, particularly in former burghs around common good land and property which the inhabitants see as ‘theirs,’ whatever the name on the title deed.

The 2015 Act should deliver a greater sense of community empowerment and entitlement, which should lead to a greater openness where that hasn’t happened previously. However, one should not lose sight of the many examples of good, open engagement that has occurred well in advance of the current legislation.

In the context of common good property, there has sometimes in the past been a sense of local authorities treating it as being in the ‘too hard’ pile. Uncertainty about the legal position, and knowledge of a strong body of opposition to almost any changes to the way common good property is dealt with, has led to a defensive attitude by councils on occasion. There does need to be an open, honest dialogue about buildings on the common good account in particular, to ensure that they put to the best use possible, whether by the community or otherwise.

Similarly, there needs to be a recognition that the first call on a common good fund is maintenance of its property. If a building is at the end of its useful life, should it be maintained nevertheless, or is that the best use of the fund, whatever the history of its maintenance?

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

Again, there is no reason why this area should not be transparent. Councils are obliged, as with other council property, to obtain best value for its common good
assets: often, the issue appears to be a lack of explanation as to why a property has been disposed of in the way it has. It is appreciated that the question is probably more intended for community groups than those representing local authorities.

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

In the era of community empowerment, some of the rules relating to disposal of common good property seem somewhat outdated. Even a property which the community itself wants to acquire under the asset transfer part of the 2015 Act could, if common good, be subject to the need to go to court under s.75 of the 1973 Act to gain authority for the disposal.

Similarly, the *Portobello* case showed up a lacuna in the 1973 Act which meant that local authorities were unable to appropriate some common good land (that which is considered ‘inalienable’) to another statutory purpose, such as an educational facility. The specific legal loophole was subsequently fixed. However, in both this and the case of a community asset transfer, councils are often faced with extra expense and delay - and communities can be disadvantaged as a result.

The current legislation allows a local authority to seek court consent for disposal or appropriation in either the sheriff court or the Court of Session. Sometimes the Court of Session is preferred as an option because it is seen as the repository of expertise on common good matters; sheriff courts may have handled very few such specialised cases.

However, the Court of Session is an expensive option for the local authority, and even if an objector obtains a Protected Expenses Order, that still may mean he or she has to contribute a considerable sum of money towards potential expenses. Anecdotal evidence suggests that most applications currently go to sheriff courts, rather than the Court of Session.

It should be stressed that many disposals of common good property are not particularly contentious. However, to remove any risk of subsequent legal challenge, local authorities may act on legal advice that a court application is necessary. Even in the sheriff court context this introduces delay and expense.

A more radical approach, it is suggested, is needed moving forward. Where local authorities intend to dispose of common good property, it would be straightforward enough to draft legislation requiring them to consult the community first: guidance could set out minimum levels of consultation. If no objections were received within a specified timescale, then the local authority would be free to dispose of the property as intended.

The difficulties of defining ‘alienable’ and ‘inalienable’ property have been discussed above. It could be considered that the traditional definitions have run their course. Instead, legislation could require local authorities to consult on all proposed disposals, with the only exception being property which has previously been leased to a third party. That exception would allow local authorities to deal more freely with
common good properties which have already been used for a commercial purpose, without excusing them from the requirement to receive best value for them.

In the event of the community objecting to a proposed disposal, it is suggested that the current common law rule – that disposal is generally allowed by a court weighing up the benefits and disbenefits of disposal against retention for the community – is not so legally complex that it needs to be determined by a sheriff, or Court of Session judge.

Instead, there are a number of possible options for a procedure which would be open to community participation. One of these could be the Lands Tribunal. This would allow a relatively quick, cost-effective, and legally sound decision which could be relied on by parties. There would remain the option of allowing a statutory appeal to the Court of Session in very limited circumstances, in the same way that exists under, for example, planning legislation.

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