Local Government and Communities Committee

Common Good Property and Funds

Submission from Neil King

Executive summary

1. The category of inalienable common good should be abolished – because it’s absurdly illogical that some public parks have an additional layer of protection which others don’t just because of accidents of history. But note that this abolition wouldn’t change a property’s status as common good - it would just mean it was no longer necessary to get sanction from the courts for sale/change of use because there are alternative, more democratic, controls in place. (See 5.1 to 5.5 below)

2. Enacting a statutory definition of common good (CG) will not remove the legal obscurities associated with CG. The only thing that can do that is a definitive register of common good (i.e. a register such that, if a property isn’t in it, it isn’t CG, and vice versa, “end of”). This is to avoid in future local authorities having projects ambushed by dubious claims of CG (as with Portobello and Barrhead Schools). (See 2.1 to 2.5).

3. Unless one already exists and is observed universally, a rule that maintenance of common good assets should always be the first charge on the revenue surplus of CG funds is required. (See 3.3)

General points – history and different categories of common good

0.1 I’ll come shortly to the five questions the Committee wanted to see addressed in evidence but first make a couple of general points. First – and I’m sure the Committee will get bored hearing this – but it’s indispensably necessary to understand the historical background to common good: you’ve got to know how we got here in order to decide where we go from here. I’ve included a historical sketch as an appendix but the key facts to take from it are these: in the pre-industrial era (before the 19th century), its common good was the totality of a burgh’s assets and funding sources: its endowment, in other words, to provide the services (minimal by today’s standards) then offered by local government. During the industrial revolution, the assets of burghs grew massively through acquisition under new statutory powers granted to meet the challenges of urbanisation and population growth (education, sanitation, housing etc.) and this all came to be paid for by taxation (rates) rather than from the burgh’s own endowment as hitherto. In consequence, CG became overshadowed by burghs’ new statutory assets and resources and, relatively speaking, dwindled to something of a historical legacy. But the history should not obscure the fact that common good is simply assets of a local authority: it no more (or less) belongs to “the people” than any other LA asset such as a school,
swimming pool, care home etc. or, indeed, the money in the Council's bank account. Statements implying common good is some sort of surviving relic of an aboriginal communal past (which somehow came to be associated with towns) are the product of misunderstanding - for which the very words "common" and "good" may be partly responsible - coupled, perhaps, with a bit of wishful thinking on the part of their authors. It may help to a proper understanding of the subject to recall that many institutions with long histories (e.g. universities) have endowments which are of less significance now than formerly as their source of funding. Scottish burghs' endowments just happen to have a special name: common good.

0.2 Second, it's essential to distinguish two types of common good asset. The first is the revenue producing assets of common good funds. These are portfolios of investments much like private trust or pension funds: they are the legacy of burghs' original endowments from the pre-industrial era. CG funds tend to include a large percentage of real estate (e.g. shops let to generate rent) but also include other investments such as bonds, stocks and shares etc., these being commonly managed by professional fund managers. LAs are at liberty to dispose of all these assets – of whatever nature – without restriction in the course of managing their CG funds to maintain the capital and maximise revenue returns.

0.3 Today, when their activities are mostly funded by taxation, local authorities commonly use the annual revenue surplus of CG funds to fund local "good causes" like a sort of local lottery fund (some CG funds are even registered charities). But LAs are not obliged to do this and would be perfectly entitled to spend the money on something more prosaic like a new link road or social care facility. The only legal requirement is that, in administering a CG fund, the LA must "have regard to the interests of" the burgh the fund belonged to before 19752. Thus, Highland Council, for example, could apply the revenue surplus of the Inverness CG fund to a good cause local to, or a new care facility in, Inverness but not Fort William. And HC could probably not hand over the revenue surplus of the Inverness CG fund to its (HC's) general education budget because that would be unlikely to be having sufficient "regard to the interests of" Inverness as opposed to the rest of Highland as a whole.

0.4 The second type of CG is called inalienable common good. Always corporeal property, it's usually land and buildings but can include moveables (chattels), typically civic regalia or art. (From hereon, I'm going to assume inalienable CG is land or buildings.) These are the legacy today of properties used in the management of the burgh and the provision of the (relatively minimalist) services of yesteryear to the inhabitants: tolbooths, gaols, churches etc. Also included are the public open

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1 Johnstone, Renfrew, Paisley, Stirling, Oban and all the former burghs in Scottish Borders.
2 Local Government (Scotland) Act 1994, s.15(4). The "have regard" rule doesn't apply to Glasgow, Edinburgh, Aberdeen, or Dundee City Councils because they are substantially co-extensive with these four old royal burghs. Additional legal requirements (for both types of CG asset in all Councils) in Part 8 (Common Good Property) of the Community Empowerment (Scotland) Act 2015 are not in force yet – for these, see further paras. 3.1, 5.4 & 5.6 below.
spaces (of which, in former times, recreational use was often subsidiary to some
historic function such as bleaching green, market stance or grazing for the burghers’
animals) which are the most high profile facet of common good today: Glasgow
Green and Edinburgh’s Meadows are both inalienable CG (although it’s worth
emphasising here that not every urban public park is CG). Note that, far from being
revenue generating assets, inalienable CG is almost invariably a liability to LAs as
requiring running costs and maintenance etc.

0.5 This type of CG was called inalienable because, having been made available
for use by the public, the burgh council couldn’t deprive the public of it by disposal
(or change of use) as it could with land held merely as an investment in the CG fund.
Simply banning disposal was the solution of an earlier, pre-industrial era when there
were fewer democratic controls. Nowadays, however, “inalienable” is something of a
misnomer: LA’s can dispose of inalienable CG if it has ceased to be used by the
public. And even when still in use, the courts can authorise disposal or change of
use of inalienable CG on application by the LA.3 Authorisation will usually be granted
when a credible scheme is presented, typically involving provision of a suitable
alternative facility.

The five questions

1. Are the common law rules which define common good property adequate?

1.1 It may not be contained in a statute but the legal definition of common good
(assets of CG funds and inalienable) is admirably succinct: “all property of a burgh
not acquired under statutory powers or held under special trusts”. The problem lies
in determining whether any particular piece of LA owned land or buildings falls within
the definition in the commonly occurring case that its title deeds give no clue. An
investigation into the circumstances of its acquisition becomes necessary, typically
involving consulting burgh archives, which may not be conclusive. The legal
definitions of inalienable common good (i.e. the rules which distinguish it from the
freely disposable assets of CG funds) are less succinct and more difficult to apply.
There are clear cut cases at either end of the spectrum – the let garage which is
manifestly just held by an LA as an investment at one end and Glasgow Green at the
other – but there can be shades of grey in between.

1.2 These difficulties in applying the law cause LAs two problems. First, an LA may
not know if, after having sold a property, it will be able to apply the proceeds to the
use it intends or whether, if the assets turns out to be CG, the proceeds will, in effect,
be hypothecated to use in the burgh the relevant CG fund belonged to by application
of the “have regard to” rule (para. 0.3). Second, and far more serious, an LA may not

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3 Local Government (Scotland) Act 1973, s.75(2) & (3) as amended by Land Reform (Scotland) Act 2016, s.77 to
allow, in the wake of the Portobello Park case, for changes of use of inalienable CG.
know if it can sell a property at all (or change its use) in case it turns out to be inalienable CG and the courts refuse to sanction the sale (or change).

1.3 As a lawyer (retired), I can’t emphasise strongly enough that merely codifying the common law rules in statute won’t make these uncertainties go away. No matter how carefully worded any restatement were, it couldn’t cover every case with certainty and grey areas would remain. (This is a very commonly occurring legal syndrome, BTW, not by any means confined to common good: there would be little need for lawyers and courts if it were otherwise!) The only way to make these problems go away is to have a definitive register of CG. (See Q2 below).

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

2.1 Record keeping should improve when s.102 of the Community Empowerment (Scotland) Act 2015 requiring LAs to maintain registers of CG property comes into force but these registers will suffer from a critical defect: they won’t be legally definitive. What that means is that the fact that a property is not included in the register is not conclusive that it’s not CG (and vice versa). In other words, nobody will be able to consult the registers and get a definite answer whether a particular piece of property is or is not CG. The second main defect of the s.102 registers is that they won’t distinguish between the freely disposable assets held in common good funds and inalienable CG.

2.2 Therefore, I would suggest s.102 be amended before it comes into force so that the registers become (i) legally conclusive as to CG status; and (ii) identify which properties are inalienable with the registers also being conclusive as to that. I’d also suggest that, so far as they relate to CG land and buildings, the registers be integrated with the Land Register in order to advance the LR’s role as a “one stop shop” for all land rights and responsibilities. Definitive registers of CG integrated with the Land Register was an aspiration of the Land Reform Review Group.

2.3 Whether the s.102 registers should be definitive was touched on in the policy memorandum for the CE Bill:-

*Given the complexity of the subject, there is a high risk that [making the registers definitive] might not cover all existing assets which are considered to be common good, and might cover things which are currently excluded. Rather, the intention is to provide an opportunity for community councils, other community bodies and individuals to see what the local authority considers to be common good property, and to highlight any items they believe should be included (or omitted). It is not intended that local authorities will be expected to legally verify the status*

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of every item on the register or proposed during the consultation; this will normally only be necessary if there is significant dispute.

2.4 But I think the Scotgov answered its own concern there: the registers would be prepared by LAs in draft according to their understanding of their CG holdings. Then they would be put out for consultation so that community councils, bodies and individuals could propose amendments. Any disputed cases could be determined by the Lands Tribunal. After a long enough period for amendments to come forward and be determined – say 10 years? (cf. timescales for completion of the Land Register) – the registers would become final and there would be closure. It would be not unlike the process of developing a local plan in the planning context.

2.5 If definitive registers of all CG are nevertheless considered to be impractical, then give consideration to the definitive registers applying only to inalienable CG. The reasoning there is two-fold: first, inalienable CG ought to be easier to identify (the public parks, the old townhouses etc.). Second, inalienability has the potential to block a transaction altogether so it's more important that the properties affected are definitively identified as such. With "alienable" LA assets, on the other hand, they can still be sold even if they later turn out to have been CG: the sale does not prevent the proceeds being later credited to the CG fund if the result of a subsequent investigation so requires.

2.6 Another point on the s.102 registers as currently proposed (it’s a prime example of inattention to the distinctions between the freely disposable assets of CG funds and inalienable CG): a literal reading of s.102 means that even the incorporeal assets of CG funds (their stocks, shares and other “paper” investments) have to be included in the registers. Do they also have to be “de-registered” each time a stock is sold in the ordinary course of fund management? This is an excessive burden on the funds. A lighter touch disclosure of investment policies would be appropriate (see 3.2 below) and s.102 should be amended to apply only to corporeal property (chattels, land and buildings).

2.7 Recognising that less than 1% by value of LA property is common good, a helpful interim measure pending the definitive registers becoming final (or permanent measure in the event the concept of definitive registers doesn’t find favour) would be a statutory presumption that LA property is not CG. Reflecting the history (see Appendix), this could apply only to property acquired after, say, 1850.

3. 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?

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5 Land Reform Review Group Report, para. 14.3
3.1. To an extent, this question appears to prejudge s.104 of the Community Empowerment (Scotland) Act 2015 mandating consultation with local communities before disposal or change of use of CG assets before it has been brought into force. I suspect a ministerial response to this question would be to allow s.104 to bed in before any further action is proposed. I come back to s.104 in para. 5.6 below.

3.2. Aside from disposal and change of use, there could be a case for requiring LAs to produce - in accordance with ministerial guidelines to achieve consistency and after public consultation - medium/long term forward plans for their common good funds (portfolios of income generating investments, not public parks etc.) covering investment strategies and policies for spending revenue surpluses. S.104 would need to be amended to cover this.

3.3 There’s another point I’d like to raise here, not as “evidence” from my own knowledge but rather a question which, if I were a member of the committee, I would want to ask of those qualified to answer it: I gather many CG funds rent assets (typically buildings) to their own LAs. That’s fair as the residents of the rest of the LA area are paying the burgh the CG fund “belongs to” a rent for the use of “their” (the burgh’s) property. But what about the converse – does it ever happen that unremunerative CG assets (typically inalienable CG such as public parks) are run at the expense of the LA’s general fund as opposed to the CG fund? If so, is this legal? I believe there used to be a maxim that the common good could subsidise the rates but not the other way round. I presume that must since have been varied by statute or else the point would surely have come up at audit before now but even if it’s legal, is it fair? If the general fund is paying for it, should the asset not be the “property” of all the residents of the LA area, not just the former burgh in which it happens to be situated? In the course of preparing this evidence, I did a not very scientific survey of how about two thirds of LAs had accounted for CG in their annual accounts for 2015-16. In one or two, it appeared that the general fund (“the rates”) running CG assets might be being effected by “finance leases” by the CG fund to the general fund at a peppercorn rent but in only one of the sets of accounts I looked at – Highland Council – did I see a clear statement of how I believe it ought to work:

*All funds are held for the benefit of the residents of those former burghs and must be used in the first instance to maintain the assets of the Common Good. Thereafter funds can be used for purposes which are in the interests of the community for which the Common Good Fund was established.* [Emphasis added.]

I wonder if that doesn’t need to be made a statutory requirement for all LAs? If it doesn’t, then, because the question was even asked, it perhaps resolves into one of transparency of accounting and reporting as to which see Q4 below.
4. Are details of common good property and assets and income generated by their sale clear and transparent?

4.1 As I understand it, LAs are required to prepare accounts in accordance with the CIPFA/LASAAC Code of Practice for Local Authority Accounting which requires that CG funds be accounted for separately and in accordance with certain standards. No doubt LAs comply with this but these accounts are not easy for lay people to interpret. I would therefore suggest that more user-friendly “Ladybird Book” accounts be required (as well as, not instead of, the “official” accounts). These could perhaps be included in a sort of annual report and be in accordance with ministerial guidelines to ensure consistency of format across all LAs to include a simple statement of money in (where it came from), money out (where it went) and how any surplus was disbursed or retained. There would also be a statement of the composition of the capital (land & buildings, categories of other investments, cash, loans etc.) and capital transactions (gains/losses on disposal and “paper” transactions such as revaluation and depreciation).

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

5.1 The category of inalienable common good should be abolished.

5.2 I can’t emphasise strongly enough that I’m not suggesting common good be abolished altogether, only that inalienable CG assets be placed on the same footing as the disposable assets of CG funds. They will still form part of the common good and all the change would mean in practice is that an LA would no longer have to obtain permission from the courts to dispose (or change the use) of an asset presently classified as inalienable CG. But the proceeds of sale would still go into the CG fund for reinvestment or disbursement according to the fund’s set priorities.

5.3 Why would one propose this dilution of protection for CG assets? Well, for a start, it’s highly illogical that some, but not all, public parks (to use the classic example of inalienable CG) have the extra layer of protection by the courts. Your average person in the street is likely to find it very hard to understand why accidents of history can lead to a much needed new school being blocked on one public park while another identical one across the road can be sold off for executive housing just because it doesn’t happen to be CG. It’s an absurdity which brings common good – indeed Scots law as a whole – into disrepute. Protections for inalienable CG were loosened without a murmur of dissent in the wake of the Portobello Park fiasco so it

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6 In which Edinburgh Council was prevented from building a new high school on Portobello Park, which the Council conceded to be inalienable common good, after the Court of Session ruled that, while it had power under s.75 of the Local Government (Scotland) Act 1973 to authorise the park to be sold, it had no power to authorise the Council to keep it but change its use. EC had to get a private Act of Parliament to build the school on the park and soon after s.75 was amended (by the Land Reform (Scotland) Act 2016, s.77) to allow the Courts to authorise change of use of inalienable CG as well as sale.
may be advisable to be proactively radical now before another Portobello type situation comes along and puts common good on the defensive again.

5.4 Secondly, are the unelected judiciary the best people to decide the fate of CG properties? Should the matter not be decided at the bar of public opinion? The inalienability rule dates from centuries ago and was the law of the time’s blunt edged sword to protect the public’s access to facilities provided for their use in an era when the pace of change was slower than today and before there were democratic fora to debate such matters. The ability of the courts to authorise disposal was introduced in 19477 in an era when there wasn’t the consultation of the public by LAs there is today. But now we have s.104 of the Community Empowerment (Scotland) Act 2015 (not in force yet) statutorily requiring publication and local consultation before disposal or change of use of CG and LAs to have regard to views made known, do we really need court sanction as well?

5.5 If there’s no appetite to abolish inalienability, then at least the inconsistency of treatment ought to be removed by requiring court sanction for the disposal or change of use of all (i.e. not just CG) LA property made available for public use (i.e. schools, parks, libraries etc. but not LA offices, depots etc.). Or only s.104 consultation before disposal/change of use of any publicly used LA asset, not just CG.

5.6 Finally, even if none of these suggestions commends itself, s.104 still needs to be amended before it comes in to force such that it only applies to inalienable CG and not the freely disposable assets held in CG funds. You can’t manage a fund properly if public consultation is required before every disposal: an urgent reaction to sudden market changes may be required. (S.104 consultation should be retained for the sorts of medium/long term forward plan for CG funds I suggested in para. 3.2 above, however.)

Appendix – Historical sketch

Medieval Origins

Nowadays, government finances its expenditure by tax. But in the Middle Ages, the authorities were supposed to “live off their own”, that is finance their official functions from their own property. Burghs were a sort of medieval equivalent of today’s Enterprise Zones or Freeports. When they were established in Scotland from the 12th century onwards by the Crown (“royal burgh”) or a lay or ecclesiastical magnate (“burgh of barony”), burghs were given by their patron an endowment, the income from which was meant to finance their activities.

7 Local Government (Scotland) Act 1947, s.171(3). From 1947 to 1973, it was the Secretary of State rather than the courts who could authorize inalienable CG town halls and offices etc. used for burgh business.
Today, if you wanted to endow something, you’d give a sum of money to fund managers to invest in a portfolio of stocks, shares and other investments. But in the Middle Ages, the stock market didn’t exist and the only thing which yielded an annual return was land in the shape of the rent paid by its tenants. Thus, the endowment of medieval burghs was land and this land is a burgh’s “common good”. The rent the common good land yielded funded the services the town provided although, in a pre-industrial era, these were pretty minimalist and dated by today’s standards: they did not, for example, include housing. Many burghs provided a school although they were not obliged to and not all did: many considered provision of a burgh kirk of greater importance. Beyond that, the services provided often amounted to little more than a bit of rudimentary street sweeping if there was anything left over after repairing the mercat cross and the tolbooth.

There was a sub-set of common good: property used by the town or its citizens. These included things like the tolbooth (town hall & gaol) and such medieval arcana as public bleaching greens and market stances. These were inalienable in the sense that the magistrates couldn’t sell them on a whim and so deprive the citizens of their use. But the rest of the common good – the majority of it which was just the assets in the portfolio of the burgh’s endowment, so to speak – was freely alienable by the council. Thus, if Blackburgh Town Council happened to own the lands of Whitmire, it could sell them and invest the proceeds in the lands of Greenriggs instead just as the trustees of a modern endowment might sell shares in Company A to reinvest in Company B. But it couldn’t sell the market stance if it happened to become marketable.

Another feature of burgh life in times gone by was the “special trust”. Nowadays, if you want to donate money for a purpose not catered for by one of the numerous established charities, you would nominate your own trustees. But in previous centuries (when there were few charities as we now understand them), donors tended to nominate their local burgh council as trustee: such trusts were often known as “mortifications”. Again, the principal investment was usually land but the magistrates had to apply the rents to the particular local purpose directed by the donor – typically educational or care of orphans or the elderly or else maintenance of a particular facility such as a ferry or bridge.

**Industrial Revolution – statutory powers and rates**

The arrangements described above were barely adequate in the pre-industrial era but cracked fatally under the strain of the onset of the Industrial Revolution in the second half of the 18th century. The meagre resources of the common good supplemented by trusts (i.e. charity) proved totally inadequate to finance the new challenges faced by rapidly growing towns such as improved water supplies, sanitation, street lighting etc.
At first, individual burghs responded by obtaining private Acts of Parliament authorising specific projects paid for by levying a tax – a “rate” – on the citizens. There was also the problem of towns which were not burghs (royal or baronial) and so had no resources to fund improvements at all: some of these (Airdrie is an example) responded by seeking an Act to incorporate themselves as a burgh, conferring statutory powers of management and to levy rates to pay for them. These statutory developments continued and grew until they reached a culmination in the Burgh Police (Scotland) Act 1892 (the word “police” used there in its original sense of civic government generally rather than just law enforcement). This Act gave the local sheriff power to declare any town with a population over 700 a burgh and gave all burghs – existing and new, royal or baronial – a vast range of powers of management ranging down to minutiae such as bathing machines, shoeblack stands and abuse of steam whistles and trumpets. In a parallel development, general Acts of Parliament were passed on subjects of more general import – e.g. education and housing – giving burghs the power – and, increasingly in the 20th century, the duty – to provide these services. And all of this legislation was underpinned by powers to pay for everything through rates imposed on the citizens.

So far as burghs’ property portfolios were concerned, therefore, by the 20th century, the common good (and land held by trusts administered by burghs) had become a historical legacy dwarfed by the vast extent of the schools, reservoirs, sewage works, council house estates etc. etc. acquired as a result of these statutory developments. Hence the generally recognised legal definition of common good in a dictum by Lord Wark in the 1944 Court of Session case Magistrates of Banff v Ruthin Castle Ltd: “all property of a [burgh] not acquired under statutory powers or held under special trusts forms part of the common good”.