Dear Sirs,

I refer to the call for evidence on Common Good property and funds.

Before addressing the five questions set out in the call for evidence, I believe it may assist if I set out the historic evidence to support what I would describe as a systematic abuse of the Nairn Common Good Fund by Highland Council.

There are a number of issues.

1. Fishing Lease

   In 1995 the then Nairn District Council entered into a lease with the Nairn Angling Association. This lease was for a term of 99 years at a minimal rent but crucially also committed the landlords to pay the Fishing Board levy. In 1995 this was a relatively modest sum although still in excess of the rent being received for the fishings, however, the current levy is well over £9,000 per annum.

   When I reviewed the lease and other documentation obtained under the Freedom of Information Act it is very clear that this lease is between the Nairn District Council now the Highland Council as landlords and not the Nairn Common Good Fund which has been charged with paying the Fishing Board levy. On being challenged, the officials who control the Fund, despite the veneer that it is supposed to be the 80 Highland Councillors, were clutching at straws for evidence to support the position that it is a Common Good liability. Despite their assertions, there is no evidence to support that this levy is payable by the Common Good Fund but there is an overwhelming body of evidence that this is a Nairn District Council/Highland Council liability. Where the matter rests at the current date is that the officials have prevailed upon the local area committee which consists of 4 of the 80 Highland Councillors to allow them to obtain Counsel’s opinion. The question that they are seeking Counsel to resolve is very unclear and was not disclosed to the 4 members or the public.

   When the matter was debated at the Area Committee in February 2017, one of the 4 members was more concerned that if the situation was correct and the liability to meet the Fishing Board levy rested with the Highland Council, this would fall on the taxpayers as distinct from the Common Good Fund.
This is clear evidence that the Highland Councillors in their stewardship of the Common Good Fund are in a hopelessly conflicted position. They need to address the balancing of the Council’s books with the stewardship of the Common Good Fund which are two entirely separate matters.

2. Development Land – Sandown

There are two classes of land in the Common Good Fund, the inalienable land which has been in the Common Good control for centuries and investment property.

The investments include a farm which was purchased in the mid 60s which has now acquired significant development value. It is approximately 85 acres and there was a sale agreed in 2007 at about £17 million.

In addressing the sale of this property the Council embarked on what they called a development brief. This is essentially what the Council would like to see on the site as distinct from what the developer would like.

The sale proceeded subject to planning. The purchaser then decided that the development brief was of no relevance to them and they applied to the Council for something entirely different. That then fell foul of the Planning Department and the matter proceeded to a Reporter which upheld the decision to reject the planning application.

The problem lies with the £350,000 of so that the Council spent on the development brief.

I am a professional Trustee, I am a Chartered Accountant and I hold an Insolvency Licence. I regularly sell development land albeit in an insolvency situation.

Whilst I would undoubtedly make enquiries as how best to market this site and I would try to gather evidence of the development potential, I would not seek to dictate to a potential purchaser what they built on the site. I would stick a for sale sign up and thereafter the purchaser would take their chances with what the planners would regard as acceptable.

I cannot imagine circumstances where I would be permitted to spend £350,000 in preparing a development brief. The evidence here is that the Council are completely conflicted in their roles as Trustees of the investment aspect of the Common Good Fund and what they as a local authority would like to build on the site.
It is wholly inappropriate that they should seek to recover the £350,000 they spent on this exercise from the Common Good Fund as it was no part of the investment management of the Common Good Fund.

3. Appropriation of Common Good Assets

In order to recover the £350,000 from the Common Good Fund, given that its assets are primarily invested in the land bank, in 2009 the Council decided that they would acquire a proportion of the Sandown lands. By that time the recession had struck, the bottom had fallen out of the land market as the banks scurried to divest themselves of any sort of exposure to investment land and buildings.

This raises two particular points. How then in the middle of a recession did the Council manage to come up with a value of the site which would allow them to acquire a percentage of it? It can only be a number picked out of thin air. At that particular time as an Insolvency Practitioner I was having great difficulty in finding any market at all for land.

The second issue which is potentially more serious. As an Insolvency Practitioner there is a statutory provision which prevents a Trustee acquiring any part of the assets which he is charged with protecting. Beyond the statutory provision, I believe it is a common law principle and when I am acting as a Judicial Factor there is no way I would report to the Court that I have acquired any part of the Wards property.

The reasons for this are very obvious, the Trustee is a very powerful position, it is very difficult perhaps impossible to provide adequate justification to defend the accusation that the Trustee has used his power and influence to benefit himself personally to the detriment of the Ward.

Just because the Trustees is a local authority, it does not provide them with immunity to that accusation.

This is an ongoing issue. At present the matter is latent. It will however resurrect itself when the local authority decides to sell the asset and claim their percentage. As far as I am aware, although it is difficult to tell, this is a percentage of the whole site as distinct from a specific area. At present therefore there is nothing specific to challenge.

There is also I believe a principal of common law that Trustees are not permitted to have their property intermixed with the Trust estate. How does that reconcile with claiming a percentage of the assets?
4. Agricultural Tenancy

The fourth issue is the recovery of the Sandown land. The land was purchased as a working farm as it is adjacent to the built up area in Nairn it had obvious long term housing potential. In the interim the strategy for dealing with the management of the land was the District Council at that time entered into a grazing lease. However, the terms of the lease were not enforced and the tenant was not required to leave the property as obligated to do under the terms of the lease and this converted it into an agricultural tenancy. As a rule of thumb I believe an agricultural tenancy just about halves the value of the land.

In considering the development brief the Council discovered that the tenant farmer was refusing to leave and they consequently needed to enter into a negotiation to recover the property. They were very fortunate to be able to recover the property for approximately £350,000. It would not have been unrealistic to move the decimal point further to the right.

Apart from the evidence of incompetence, the principal point here is that the Council initially sought to recover the £350,000 from the Common Good Fund and as the Common Good Fund did not have adequate cash resources they simply charged interest. 16 years or so I complained to the Audit Commission who gave me a fairly curt response, however subsequently I understand that there was pressure put on the Council to cancel the accrued interest. I suspect that may again be a general function of common law which applies to Trusts. When acting as a Judicial Factor and I am funding outlays I am not allowed to charge interest.

Subsequently under further pressure the Highland Council as Trustees voted, narrowly, to cancel the charge on the Common Good Fund. The fact that it was a narrow vote shows how conflicted the Trustees are. Carving funds out of tight budget to rectify consequences of what the evidence supports is simply negligence by the controlling officials, places them in a serious conflict.

Thankfully that aspect is now resolved, however it does have bearing on issue 3 in that in the work around for the recovery for the aborted development brief costs, acquiring a percentage of the fund, at a dubious valuation, avoids the needs to charge interest. I would hope I would not need to explain what is wrong with that.
5. Allotments

I have no problem with allotments but I believe that is a statutory obligation which falls on the Council not a Common Good Fund. The difficulty is that out of the investment land which is represented by Sandown the Council have carved out approximately 4 acres as allotment ground which is let to the Allotment Society. On being challenged as to why the Council thought that was a good idea, they stated that the lease allows them to recover the allotments. One would have to be terminally naïve to believe that a local authority having granted an area of land to an Allotment is going to be able to recover it to enable its housing development potential to be realised. It is not spare scrub land it is investment land which the officials who truly administered the Fund completely ignore. The Councillors are clearly not motivated to take an interest in the matter and there is no one to complain to. I suspect that by the time the development potential of the land is to be realised that the matter will again be a live issue. When it becomes apparent that the Council cannot or will not recover the development land then they should purchase it from the Common Good Fund at the then market value. At that time we would then have evidence of what the actual market value is and it would be difficult to resist applying that to the acres which have been let to the allotments. I can almost guarantee that the Councillors will not be at all enamoured at the prospect of having to lay out some millions of pounds to purchase the allotment land. The essential point here is that they should never have got themselves into this hole in the first place and it again represents a conflict between the role as Councillors and Trustees of a Fund which has an investment asset.

6. Caravan Site Lease

Nairn District Council the predecessors of the Highland Council entered into a lease of what was a municipal caravan park located on Common Good land. This lease was for 99 years, however it did provide for regular rent reviews that required to be notified to the tenants. The Highland Council repeatedly failed to apply the rent reviews and the taxpayer had to compensate the Common Good Fund for the lost revenue plus interest. It is therefore largely resolved, however I believe the essential point here is that the Trustees which are the 80 Highland Councillors are in no way motivated to protect the Common Good Fund and I believe the evidence may also suggest that they are not being invited to by the officials. I believe the evidence supports the officials have an arrogance that they can do no wrong and it is only when the information can be extracted under the Freedom of Information Act and their incompetence is exposed, they are forced to act. It is not an appropriate way to run a Common Good Fund or any other Trust for that matter.
It is important to note that they do not carry professional indemnity insurance so the burden falls on the taxpayer and it is virtually impossible to find someone to accept any responsibility for the successive failures.

7. Bad Attitude

I am now in my second term as a Community Councillor. My reason for seeking election was that so I could have some formal input into the administration of the Common Good Fund. The Council’s attitude is that there is no place what so ever for seeking opinions from a Community Council which covers the area of a former Burgh and they refuse to consult on any sort of basis, even informal. I believe if they did consult that may allow some of the sting to be taken out of the allegation that the Trustees are hopelessly conflicted. There may be some relief on the way if the form of the Community Empowerment (Scotland) Act 2015 Sec 22, I fully anticipate to be able to convince my fellow Community Councillors and those of the other Community Councils which represents the former Burgh of Nairn to seek a participation request which would allow us to have some say into the management of the Common Good Fund.

My immediate concern is why is that legislation not yet in force?

8. Legislation

On the question of legislation, Common Good Funds have been in existence for centuries. To prevent plunder by errant Trustees there was statutory protection afforded to the Common Good Funds and the last incarnation was Section 74 and 75 of the 1973 Local Government Scotland Act. This prevents Trustees disposing of a Common Good Fund asset at a value less than that that could be reasonably achieved. I accept it is a question of semantics as to what the Act actually means, however some of the transactions here are arguably predatory and I believe those Sections if they have not been repealed may have provided protection to the Common Good Fund. Would it not be worth reinstating these provisions so that there is some statutory protection of Funds so that we are not left in the dark with conflicted Trustees?

For the avoidance of doubt I do not believe there is any evidence to support that any of the Councillors have used their position for personal gain. The conflict is using their position to assist them discharge their roles as Councillors as distinct from Trustees.

Returning to the questions posed:-
1. I do not believe the current common law rules are anyway adequate to administer Common Good Funds.

   The evidence reported above shows that there is a clear conflict of interest and no adequate mechanism for resolving that.

2. The evidence I have is that the record keeping to review procedures is woefully inadequate and fall far short of that which would be expected in a commercial environment.

3. The evidence would again suggest that there is absolutely no interface between Councillors who are nominally the Trustees, officials who have control of the Common Good Fund and either individuals are more importantly elected representatives in their capacity as a Community Council.

4. There is absolutely no transparency in the administration of the Common Good assets and most of the information I have been able to glean as a result of FOI requests. The response to the complaints which have been lodged clearly show that the officials do not like having their comfort zones pricked.

   I would suggest that there is a need to remove the conflict of interest which exists between the Council and the Common Good Fund. They should appoint professional Trustees who have the required expertise and will carry out professional indemnity insurance. They should be charged with seeking the views of the Highland Council and the relevant Community Councils so that it is seen to be consistent with Section 22 of the Community Empowerment Act.

I hope this will be of assistance to the Committee. I appreciate that some of representations I am making here are fairly serious, however I believe I do have the documentation to be able to support the representations which I will present if required.

Yours faithfully

W L Young