LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

AGENDA

32nd Meeting, 2017 (Session 5)

Wednesday 20 December 2017

The Committee will meet at 9.30 am in the James Clerk Maxwell Room (CR4).

1. **Decision on taking business in private:** The Committee will decide whether consideration of its response to the Finance and Constitution Committee on the draft Budget 2018-19 should be taken in private at future meetings.

2. **Draft Budget Scrutiny 2018-19:** The Committee will take evidence on the Scottish Government’s Draft Budget 2018-19 from—
   
   Derek Mackay, Cabinet Secretary for Finance and the Constitution, Kevin Stewart, Minister for Local Government and Housing, Bill Stitt, Team Leader - Revenue and Capital, Marianne Barker, Non-Domestic Rates Group Secretary, Brad Gilbert, Head of Financial Innovation Unit, and Angus Macleod, Head of Tackling Fuel Poverty Unit, Scottish Government.

3. **Common good property and funds:** The Committee will take evidence from—
   
   Craig Veitch, Aberdeen City Council;

   Andrew Ferguson, Fife Council and the Society of Local Authority Lawyers and Administrators in Scotland;

   Dr Lindsay Neil, Former Chair, Selkirk and District Community Council;

   Paul Nevin.

4. **Draft Budget Scrutiny 2018-19 (in private):** The Committee will consider the evidence heard earlier in the meeting.

5. **Common good property and funds (in private):** The Committee will consider the evidence heard earlier in the meeting.

6. **City region deals (in private):** The Committee will consider a draft report.
The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk  
PRIVATE PAPER  
LGC/S5/17/32/1

Scottish Government Draft Budget 2018-19

**Agenda item 3**

Note by the Clerk  
PRIVATE PAPER  
LGC/S5/17/32/3

**Agenda item 6**

PRIVATE PAPER  
LGC/S5/17/32/5 (P)
Local Government and Communities Committee

32nd Meeting 2017 (Session 5), Wednesday 20 December 2017

Draft Budget Scrutiny 2018-19: Note by the Clerk

Purpose

1. This paper provides background information on the Committee’s scrutiny of the draft Budget 2018-19.

Background

2. On 6 September 2017 the Committee agreed its approach to scrutiny of the Draft Budget 2018-19. As the budget will be published later this year the Committee agreed to undertake pre-budget scrutiny looking back at what has actually been spent in 2016-17 and (to the extent possible) 2017-18.

3. On 14 September 2017 the Committee launched its call for views with a deadline for responses of 23 October 2017. A total of 24 submissions were received.

4. The Scottish Parliament’s Information Centre (SPICe) have provided a summary of the written views received (Local Government), Strategic Housing Investment Plans (SHIPS): Summary of written evidence, Housing Supply Budget: Summary of written evidence, and SPICe briefing on the Scottish Government’s More Homes Budget.

5. In addition the following briefings have been published on Local Government Finances:
   - The social impact of the 2017-18 local government budget (SPICe briefing)
   - Local Government Finance: Fees and Charges 2011-12 to 2015-16 (SPICe Briefing)
   - The 2016/17 audit of the Scottish Government’s Non Domestic Rating Account (Auditor General for Scotland report)

6. The Committee has also received the following correspondence in relation to the 2018/19 Scottish Government budget:
   - Letter from the Accounts Commission dated 4 December 2017 (regarding paragraph 68 and Exhibit 19 of the Local Government Financial Overview Report 2016/17)
   - Letter from COSLA
7. The Scottish Budget: Draft Budget 2018/19 was published by the Scottish Government on Thursday 14 December. Also published was:


Local Government and Communities Committee Consideration

8. The Committee has agreed the witnesses it wishes to hear from. At its meeting on 22 November the Committee heard from Councillor Gail Macgregor, and Vikki Bibby from COSLA and Paul Dowie from the Improvement Service.

Link to Committee Papers for the meeting on 22 November
Link to Official Report for the meeting on 22 November

9. At its meeting on 29 November the Committee took evidence from the Accounts Commission from Ronnie Hinds, Deputy Chair, and Fraser McKinlay, Controller of Audit, Accounts Commission, Tim Bridle, Manager, Local Government (Technical), Audit Scotland.

Link to Committee Papers for the meeting on 29 November
Link to Official Report for the meeting on 29 November

10. At its meeting on 6 December the Committee took evidence from:

    Tony Cain, Policy Manager, Association of Local Authority Chief Housing Officers;
    David Stewart, Policy Lead, Scottish Federation of Housing Associations;
    Douglas Black, Secretary, Local Government Service Group, and Mark Ferguson, Chair, Local Government Committee, UNISON Scotland;
    Robert Emmott, Director of Finance and Corporate Resources, Comhairle nan Eilean Siar;
    Alastair MacArthur, Head of Finance, Renfrewshire Council.

Link to Committee papers for the meeting on 6 December
Link to Official Report for the meeting on 6 December

11. On 14 December 2017, the Cabinet Secretary for Finance and the Constitution wrote to the Committee in relation to funding that the Scottish Government provides to local authorities. The Cabinet Secretary’s letter is attached at Annexe A.
12. At its meeting on 20 December 2017 the Committee will take evidence from the Cabinet Secretary for Finance and the Constitution and the Minister for Local Government and Housing.

Next Steps

13. The Committee will consider its response to the Finance and Constitution Committee at its meeting on 10 January 2018.
Correspondence from the Cabinet Secretary for Finance and the Constitution
to the Convener of 14 December 2017

Dear Bob,

Last year, during my appearance before the Local Government and Communities Committee on 21 December on the scrutiny of the 2017-18 Draft Budget, I was asked to provide a list of all funding that the Scottish Government provides to Scotland’s local authorities, including funding streams for other portfolios that are in addition to the core settlement. This information was then sent out on 9 January 2017.

This year, in order to assist the Committee in its Draft Budget scrutiny, all the information relating to the other funding streams contained in other portfolio budget chapters is also detailed and summarised within the Draft Budget chapter 10 on Communities, Social Security and Equalities. This information is intended to provide a clear and comprehensive understanding of the total amount of funding provided by the Scottish Government to local government during the financial year 2018-19.

Details of the total Scottish Government support is summarised in table 10.12 and full details are set out in:

Table 10.13 – Draft Budget Core Local Government Allocations:

Table 10.19 – Revenue funding (with other portfolios) – Further funding streams currently held by other portfolios that will be transferred during the course of 2018-19 to the core local government settlement. These sums have been added to the Draft Budget local government finance settlement and are included in the local government finance circular which has been issued today for circulation.

Table 10.20 – Local government funding outwith the core settlement – Over and above the money which will be included within the Local Government Finance settlement there are a number of funding streams attached to particular portfolio policy initiatives.

As you will appreciate some of my Cabinet colleagues are still finalising their funding allocations for next year so further changes may be confirmed.

I hope that this information is helpful and will assist the Committee in its Draft Budget scrutiny.

Derek Mackay
Cabinet Secretary for Finance and the Constitution
Local Government and Communities Committee

32nd Meeting 2017 (Session 5), Wednesday 20 December 2017

Common Good Property and Funds: Note by the Clerk

Purpose

1. This paper provides background information on the Committee’s scrutiny of Common Good Property and Funds.

Background

2. On 1 February 2017 the Committee agreed to seek written evidence and hold an oral evidence session on common good property and funds. On 8 February 2017 the Committee launched its call for views with a deadline of Wednesday 22 March. A total of 29 submissions were received.

3. The Community Empowerment (Scotland) Act 2015 (2015 Act) introduced new duties on local authorities to:
   - Establish registers of common good property (section 102);
   - Consult with community councils and community bodies.


Local Government and Communities Committee Consideration

5. The Committee has agreed the witnesses it wishes to hear from. At its meeting on 20 December 2017 the Committee will hear from:
   - Craig Veitch, Aberdeen City Council;
   - Andrew Ferguson, Fife Council and the Society of Local Authority Lawyers and Administrators in Scotland;
   - Dr Lindsay Neil, Former Chair, Selkirk and District Community Council;
   - Paul Nevin (appearing on behalf of Alasdair McEachan).

6. Their submissions can be found in Annexe A.

Next Steps

7. The Committee will consider, in private, the evidence heard at the meeting on 20 December 2017 and any further action it wishes to take in relation to this matter.
Annexe A

Written Submission from Aberdeen City Council

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

   **Answer** – The common law rules defining common good can create elements of uncertainty for local authorities when attempting to manage their property portfolios. Whether a property is or is not common good can only be determined by researching the particular facts and circumstances of each and every acquisition and its subsequent use. Reference would have to be made to common good account records, title deeds, statutes, Council Minutes and Archives, other historical records and case law.

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

   **Answer** – Yes. However due to the inadequacy of the rules relating to the definition of common good (as stated above), it can be difficult to keep a separate/bespoke record or register of assets which can be classified as common good property.

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?**

   **Answer** –

   3.1 **Common Good Property** - The Community Empowerment (Scotland) Act 2015, in section 104 (not yet in force), introduces the requirement to consult with community councils or a community body that is known to have an interest in the property, when proposing to disposing of common good land or changing the use of common good property. The local authority must have regard to any representations made.

   It is anticipated that section 104 will increase transparency in respect of the use to which common good property is put. Whilst it is recognised that direct engagement with communities is important, ultimately the local authority is responsible for the management of common good property and the requirement is only to “have regard” to representations made. It would be useful if the guidance published under section 105 of the 2015 Act explains how local authorities may demonstrate that they have had sufficient regard to representations made.

   3.2 **Common Good Funds** - At present, the use to which common good funds are put is transparent because expenditure of common good funds is published in Council or committee minutes.
4. Are details of common good property and assets and income generated by their sale clear and transparent?

**Answer** – The provisions introduced by s.104 of the Community Empowerment (Scotland) Act 2015 will increase transparency regarding the sale of common good property, subject to the requirements of commercial confidentiality, with the introduction of the requirement to consult with community councils and any community body that is known by the authority to have an interest in the property.

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

**Answer** – A legislative definition of the purposes for which common good funds may be used should assist local authorities in administering the common good fund.
Written 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.

Andrew Ferguson
Manager (Committee Services)
Fife Council
Written Submission from Dr Lindsay Neil

Note: Dr Neil responded to the Committee’s call for views in a personal capacity. He was nominated by Selkirk and District Community Council to give evidence on their behalf on 20 December 2017 and his submission also reflects their views.

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 Session¹ 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.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 15\textsuperscript{th} 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 AO CB 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

³ Page 1 of 2
Version 1 of 1
Common Good Act 1491
1491 c.19

Of the commoun gud of all burrowis.
Annotations:
Modifications etc. (not altering text)

Cl Short title "The Common Good Act 1491" given by Statute Law Revision (Scotland) Act 1964 (c. 80), Sch. 2
C2 This Act is listed in 12mo edition as 1491 c. 36

Item it is statut and ordinit that the commoun gud of all our souerane lordis burrowis within the realme be obseruit and kepit to the commoun gude of the toune and to be spendit in cornmoune And necessare thingis of the burght be the avise of the console of the toune for the tyrne and dekkynnis of ctafts quhare thai ar ... Fl
Written Submission from Alasdair McEachan

Note: Alasdair McEachan was invited to give evidence on 20 December 2017 but could not attend. Paul Nevin is attending in his place – before he responded to the Committee’s call for views, Mr McEachan’s response was discussed with Mr Nevin and he is confident that Mr Nevin’s views reflect his.

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

No. It can be very time consuming to check the title deeds of properties. The task of looking through every title, to assess if common good or not, is a huge one. Even then there are lots of grey areas. Often we are looking for evidence of previous use which involves looking through old newspaper articles. Common good is a lawyer’s delight. Getting involved in the detail keeps us in work. But we really have bigger issues to be focusing our attention on.

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

Yes but it would cost. For the reasons stated above, it’s very hard to keep a definitive list. We have inherited imperfect records from former burgh councils. We inherited lists of common good assets at re-organisation in 1973 and 96 but these are changed as new evidence comes to light. We simply don’t have resources to trawl through all our titles to produce a definitive list. So we have to settle for a list based on best available evidence. There is a tricky issue of whether the professional time in checking all titles, to see which are common good, can be charged to common good.

- 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?

This could probably be better. We tend to report the general picture annually to committee. But more engagement means more asset management costs. Is the common good fund (if one exists) able to meet these costs?

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

We publish accounts annually which show sales of common good assets going to common good accounts. The big issue is where properties are sold and are either not recognised as being common good or a disputed view is taken that they are not common good. This can lead to friction between the council and community bodies.
• Any other issues relating to common good property, assets and funds which you wish to bring to the attention of the Committee

I think we need to have a fundamental rethink on the need to have common good at all. The concept is throw-back to the dark ages. We have chosen to provide and fund local services through the route of elected local authorities. The idea of having “nice to have” pots of money for some of our communities and not others doesn’t make sense to me. Some elected members love common good. It gives them local spend which helps them win votes. Other elected members, who don’t have any common good areas within their ward boundaries, are indifferent towards it.

The cost of administering common good assets is far greater than assets on our general services account. We tend not to recharge the full amount of this administration cost. With decreasing resources in local government it is harder to justify professional time on “nice to haves” when we are over stretched in trying to cover the essentials.

Possible solutions?

• Transfer common good assets into community trusts- the issue would be trying to correctly identify all assets. And some communities would benefit where others wouldn’t. Let the trustees determine who administers the assets on their behalf.
• Remove common good status so assets become vested in local authorities without special dedication.
• Accept common good assets stay with LA’s but properly account for the administration and upkeep costs. This seems reasonable. Why should Council resources contributed to by all taxpayers subsidise those areas with common good.

Alasdair McEachan