



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Wednesday 29 February 2012

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RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE
6th Meeting 2012, Session 4

CONVENER

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

DEPUTY CONVENER

*Annabelle Ewing (Mid Scotland and Fife) (SNP)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)

*Graeme Dey (Angus South) (SNP)

*Jim Hume (South Scotland) (LD)

*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)

*Richard Lyle (Central Scotland) (SNP)

*Margaret McDougall (West Scotland) (Lab)

*Dennis Robertson (Aberdeenshire West) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Andrew Ferguson (Society of Local Authority Lawyers and Administrators in Scotland)

John Gahagan (Aberdeenshire Council)

Bill Miller (City of Edinburgh Council)

Iain Strachan (City of Edinburgh Council)

Andy Wightman

Andy Young (Glasgow City Council)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

Committee Room 4

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 29 February 2012

[The Convener *opened the meeting at 10:00*]

Interests

The Convener (Rob Gibson): I welcome everyone to the sixth meeting in 2012 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off mobile phones and BlackBerrys, as leaving them in flight mode or on silent will affect the broadcasting system.

There are no apologies today.

Agenda item 1 is a declaration of interests. I welcome Dennis Robertson to the committee and ask him to declare any relevant interests that he has.

Dennis Robertson (Aberdeenshire West) (SNP): Thank you for your kind welcome, convener. I have no interests to declare.

The Convener: Thank you. I thank Aileen McLeod, who has been moved to the Infrastructure and Capital Investment Committee, for all her work as a member of this committee.

Decision on Taking Business in Private

10:01

The Convener: Under agenda item 2, I seek the committee's agreement to take in private item 5 and future consideration of evidence on the Long Leases (Scotland) Bill. Are we agreed?

Members *indicated agreement.*

Long Leases (Scotland) Bill: Stage 1

The Convener: Agenda item 3 is our third evidence session on the Long Leases (Scotland) Bill. We will hear from two panels. Following today's meeting, we will conclude our evidence sessions on the bill by hearing from the minister at our meeting on 7 March.

I welcome the first witness, Andy Wightman, who is an independent researcher. Good morning, Mr Wightman.

Andy Wightman: Good morning.

The Convener: I invite members to ask questions.

Annabelle Ewing (Mid Scotland and Fife) (SNP): I suggest that we invite Mr Wightman to make a few introductory remarks on the backdrop to this evidence session and on where we are with the Long Leases (Scotland) Bill in the Parliament.

The Convener: We can easily do that. Mr Wightman is looking at a particular aspect of the bill with regard to the situation in Edinburgh. If he wishes to make a short introductory statement, we would be happy for him to do so.

Andy Wightman: I do not have much to say, other than that I did not submit written evidence to this committee because the invitation was extended, as I understand it, merely to look at changes to the bill as it has been presented this session as opposed to the bill that was introduced in the previous session. My particular interest is in the common good, and no changes have been made in that regard, so I did not submit any written evidence.

I stand by my previous evidence, which I am sure members have read, and I have some observations about the representations that have been made to the committee.

The Convener: Thank you. I will kick off by asking you to tell us why you think that the Waverley market area is part of the common good of Edinburgh.

Andy Wightman: Specifically why I think that the Waverley market is part of the common good of Edinburgh is a long story and perhaps need not detain the committee. I will cite just two sources of evidence, one of which is extensive documentation from the early 1980s, when the deal over the development of the shopping centre that stands there was being negotiated. I have a letter here from the council's director of finance, for example. There is extensive written evidence and there are legal views on the fact that the Waverley market was part of the common good

and that it had long been accepted as common good.

The other straightforward evidence that runs counter to the council's view that Waverley market disappeared in 1938 is section 70 of the Edinburgh Corporation Order Confirmation Act 1950, which states:

"the Corporation may as part of the common good erect and maintain new buildings on the site".

In other words, there was statutory authority that it was common good land in 1950, which runs counter to the council's view that that flew off in 1938. That view is derived from the Edinburgh Corporation Order Confirmation Act 1933, which merely says that the market was losing its market rights and functions. In other words, if a citizen of Edinburgh wished to go there and sell cabbages, they would not have the legal right to do so. That has no bearing at all on the common good status of the land.

On my wider concerns, I think that common good land should be exempted because, in general, such land is held for the common good of the citizens of burghs. In many cases, land has been leased for long periods specifically, in the view of councils, to avoid the necessity of going to court. If a council wanted to dispose of or sell common good land, that would often necessitate its going to court. In fact, if it wants to grant a long lease, that will necessitate its going to court as well, but many councils took the view that that was a route to avoiding the need to seek court approval. I should add that I think that the original deal that was done with respect to Waverley market was *ultra vires*. I do not think that it was legally competent.

The Convener: We will follow up those matters in detail. First, I will look at common good status. On page 228 of your book "The Poor Had No Lawyers", you state:

"It was intriguing to note that, in a survey of common good assets I undertook in 2009, the City of Edinburgh Council provided me with a spreadsheet containing the details of 120 parcels of land and property in the Common Good Fund. Imagine my surprise when there, in line 95, are the words 'Waverley Bridge—1.68 acres—value £1'. So it is part of the Common Good Fund after all! In which case, what's happened to all the money?"

I quote that because the dispute about whether the Waverley market area is in the common good is germane to today's hearing.

Andy Wightman: Yes. The council told me in 2005 and 2009 that it was part of the common good. Waverley market is specifically germane to the committee's considerations, but there is a more general point about the common good. One of my concerns is that, in its work on the Long Leases (Scotland) Bill, the Scottish Law Commission proposed to exclude everything—

there were no exceptions. That is a perfectly understandable way of proceeding. The minute one opens up consideration of any bill to people arguing for exemptions, one does not know where it will end, but I have become keener on an exemption for the common good since the Government minister in the previous session conceded that long leases of commercial properties for which the rent was more than £100 a year should be exempted. If commercial interests can successfully lobby for an exemption in their own private financial interest, I fail to understand why, where land that is held for the common good of the people is concerned, we cannot have an exemption in the public interest. We do not know how many properties would be involved: a number have been identified and although there are almost certainly far more than that, it is probable that there are not a lot.

The Convener: Do members wish to follow up the points that have been made?

Annabelle Ewing: Good morning, Mr Wightman, and thank you for coming to the meeting.

Obviously, we are dealing with a complex matter, and I expect that we will explore the Waverley market issue in detail this morning with our two panels.

I am looking at a City of Edinburgh Council position paper that says that Waverley market does not form part of the common good, which raises a big question. The City of Edinburgh Council told you in 2009 that Waverley market formed part of the common good, but it is now saying that it does not, although the council is still seeking an exemption under a mechanism that is proposed in the bill.

On common good in general, you feel that few areas of land would be affected, but if the motivation is to exclude common good land, how could that be done while factoring legal certainty into the scenario, which is the purpose of any legislation? I am sure that the committee would be interested in your thoughts on that.

Andy Wightman: That is a very good question, and you are correct. The bill suggests that there should be automatic extinguishment of ultra-long leases on an appointed day. It contains provisions to allow leaseholders to be exempted—or is it landlords? Forgive me. There is a procedure in the bill by which people who hold long leases—landlords or tenants—will have to identify that before the appointed day. That will be straightforward in most cases. If a landlord or tenant fails to realise that they are party to a long lease, tough.

With the common good, however, because the law is so complex, because it is of such antiquity,

and because local government records are so appalling, extinction could take place without anyone knowing that the land was common good. If the bill proceeds to become an act that exempts common good, you would need a procedure to make sure that common good is not extinguished in situations in which it was not known that a piece of land that was subject to a long lease was common good land.

In the evidence session that I attended with the previous committee, we explored the idea that, before a lease on a piece of land for which the title was held by a local authority could be subject to conversion, there would have to be a court declarator to the effect that it was not common good. That might be bit onerous—actually, it would not be onerous because local authorities do not have a lot of land under ultra-long leases. Requiring a court declarator would mean putting a little bit of a hurdle before automatic extinction in the way of those qualifying leases when the landlord was a local authority. The hurdle would be a procedure that would require a declaration that the land was not common good before the lease was extinguished.

Annabelle Ewing: Thank you for your interesting response. Would that mean flushing out of the identification of common good land in Scotland that is under a lease? The broader issue is that there is uncertainty around the extent of common good land in Scotland.

Andy Wightman: The procedure would only assist in flushing out common good land that is subject to an ultra-long lease. There are potential problems with the idea. If Parliament exempts common good land, that could cause difficulty. I can only really conceive of a process whereby the legislation would state explicitly that conversion of leases affecting properties that are held by local authorities will not take place until a certain process has been followed. That would mean that, in 100 years, we could still have common good property subject to ultra-long leases that have not converted because the process has not been followed. You would have to find some way of exempting the common good land that has been identified—the common good land that we know about—as well as the unknown common good land, I guess. I do not think that that is a particular problem. The process could be crafted in a relatively straightforward way.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I am slightly concerned that the basis of your evidence and of the discussion so far is that ascertaining what is common good land is a black-and-white affair. Is it not correct to say that, because of the difficulty of ascertaining what is common good land from title documents and other related documents, it is not always

possible for a council—or anyone else, for that matter—to answer that question clearly? Is it not also the case that, through usage and the passage of time, some land that was originally common good can cease to be so?

Do you accept that analysis and that it is not always the fault of councils that they cannot determine what is common good land? Do you accept that they have had difficulties in compiling registers of common good land not because they are simply sloppy, but because it is a difficult legal task?

10:15

Andy Wightman: In many cases, councils have been sloppy, but I accept the point and agree entirely. There is no black-and-white definition of common good land. There is case law, which is relatively clear but, as evidence from throughout the country right now shows, councils can get a range of legal opinions arguing a range of conclusions on whether land is common good. That is partly a reflection of the fact that Parliament—not just this Parliament, but previous Parliaments over the decades and centuries—has failed to keep common good law under review.

At the end of the day, a declaration whether something is common good is a matter for the courts. That is why I agree that the matter is not black and white, that it is not possible simply to look at the title of a property and ascertain automatically whether it is common good, and that there would need to be some judicial process.

John Lamont: Does that not confirm my point? The fact that you argue that one must go to court for the matter to be determined suggests to me that it is not possible for Parliament or anyone else to set out a clear set of rules for ascertaining exactly what the position is. The matter must go to court for the best legal minds in the country to ascertain what the position is.

Andy Wightman: Yes, but that is what I am arguing. I do not suggest that the Long Leases (Scotland) Bill should contain a legal test for what is common good land; I suggest that it should contain a procedure whereby the courts can determine that question. I think that we are in agreement.

The Convener: Does that mean that there is no accepted procedure at present?

Andy Wightman: There are the courts. I am a citizen of Edinburgh and, if I had the money, I would go to the sheriff court and seek a declarator that Waverley market forms part of the common good. To be frank, I wish that the citizens of Edinburgh would dig into their pockets and do that.

If they had done, we might not be in this sorry impasse.

That is the procedure. One must seek a declarator.

The Convener: If we were to put something into the bill about the procedure, we would repeat the current procedure.

Andy Wightman: Well, the specific procedure that you put into the bill would be up to you. I am not legally qualified, but my understanding is that the simple and straightforward way of seeking to determine whether a piece of land is common good is to go to the court and seek a declarator from the sheriff. People who wished to do that would present their evidence as to why it was or was not common good land. They would seek answers from those who had an opposing view and the sheriff would rule.

Annabelle Ewing: I will stick with the issue of the common good but come at it from a slightly different perspective.

We took evidence on 8 February from the Scottish Government bill team. I asked why, given that a specific exemption is now provided for in respect of Peterhead harbour—for the record, I do not think that anybody contests that exemption—other exemptions are not provided for. In response, Mr Stockwell said:

“Unlike the situation with Peterhead, where concerns were raised about the fact that the harbour might not be able to continue to operate, the arguments that were made with regard to common good property and other areas that have not been exempted from the bill did not concern whether the land could continue to be used”—

that was his main point. Rather,

“they were more to do with the benefits to the people of the burgh.”—[*Official Report, Rural Affairs and Climate Change Committee*, 8 February; c 598.]

It seems that the approach has been to consider whether the bill's provisions would impinge upon the use of land for its intended purpose, rather than the monetary benefit that may be derived. Would you care to comment on that apparent rationale for not excluding common good land from the bill?

Andy Wightman: As I understand it, that is a rationale for excluding Peterhead harbour and other harbours, which is fair enough—I agree. The rationale for excluding common good is not based on the ability to put it to beneficial use. However, if one were to extend that to commercial leases, the same argument would apply. There is no argument for exempting commercial leases of more than £100 a year because the land cannot be put to proper use. My understanding is that that was a straightforward lobbying exercise that was successful. I do not know what the rationale for

excluding such leases is, although there might be one.

To be clear, the rationale for my suggestion that we exclude common good land is that it was never intended to pass from the ownership of the burgh or council to private interests; it was let out on a lease because that was a way of getting round the legal obligation to go to court if one wanted to sell it. I argue that, even when property goes on a long lease, the council should still go to court, and there is plenty precedent for that. However, that is why that was done. The reason why I seek an exemption for common good land is to protect the public interest in that land.

Graeme Dey (Angus South) (SNP): I have a more general question. Can we take it from what you say that, although it might be desirable to have a full and accurate common good register compiled throughout Scotland, in reality, it would be impractical if not impossible to achieve that?

Andy Wightman: No—I do not think that that would be impractical or impossible to achieve.

Graeme Dey: How do you suggest that we go about doing it?

Andy Wightman: We would do it by examining the historical records, which are extensive, and identifying all the land that was acquired by burghs over the years that satisfies the common good test.

Graeme Dey: If we were to pursue that, should we leave the process to the local authorities, or should it be centrally driven?

Andy Wightman: That is an existing responsibility of local authorities, because they took over the responsibilities of the former district councils and town councils. Local authorities are under a legal obligation to secure the interests of the common good for the benefit of the residents of the burghs. They have long been under that legal obligation, but they have failed in that legal duty over the years and, as a consequence, tens of millions of pounds that belongs to the people of the burghs has been lost. Indeed, as I understand it, local authorities were meant to have compiled a list by 31 March 2009. I did a survey of that. I am afraid that I have not had time to publish the results, but I will endeavour to do so soon.

Graeme Dey: It would be useful to see the results.

The Convener: Were the remarks from the City of Edinburgh Council part of that survey?

Andy Wightman: Yes, my latest information from the City of Edinburgh Council is that the Waverley market forms part of the common good.

I should add that I have an issue with the City of Edinburgh Council's written evidence on the bill,

which I think is germane. The council seeks to exempt Waverley market, which I welcome, but it has sought to do so by a request to extend the commercial lease exemptions to long lease situations in which a grassum has been paid that, if divided by the unexpired portion of the lease, would be more than £100. As members who have taken a close interest in the Waverley market situation might be aware, it was originally let on a lease to a developer who built the market. It was then sublet to the council as part of a leaseback and the council then did further sublets to the shops. In 1989, a new developer came along and acquired the main lease and the sublease.

Therefore, since 1989, the council has been left with only the head lease, for a penny a year. That means that, since 1989, one party has been in possession of the main lease and the sublease. The council's argument is that, in this case, under section 3(3) of the bill, the qualifying lease will be that sublease for which there was an up-front payment of £6 million. However, I do not think that the council is correct in its legal understanding, because any one party cannot simultaneously be the landlord and tenant of the same piece of land. That leads to the legal doctrine of *confusio*. The esteemed, late, lamented Lord Hope made that very point in a 1997 House of Lords judgment—I have it in my possession and am happy for the committee to see it—on *Clydesdale Bank v Davidson*.

In other words, the qualifying lease for Waverley market is not the sublease, because it has disappeared and merged into the main lease. My contention is that the qualifying lease for Waverley market is the main lease for 1p a year, which, were the provisions of the bill to remain unaltered, would convert, according to the formula, to 40p.

John Lamont: What are your views on the compensation provisions for common good land under the bill? Do you think they are sufficient? How do they fit into your analysis?

Andy Wightman: The compensation provisions appear, in general terms, to be fair. I support the general thrust of the bill, which is to convert long leases. A policy decision has been made that we do not want ultra-long leases of more than 175 years. Indeed, it is now incompetent to grant such a lease.

Although the compensation provisions appear to be fair, it is inevitable that, in some instances, the relevant parties will not regard them as such. I think not only that leases of common good land should not be converted, but that the specific issue of the qualifying lease for Waverley market results in a rather odd situation whereby someone can get their hands on part of one of Scotland's most valuable pieces of land for 40p.

There is no way that a bill's compensation provisions can be deemed fair in relation to every single instance, because we do not know every single instance. That would be impossible. There will be some unfairness, no doubt.

Jim Hume (South Scotland) (LD): Good morning. I understand your point on exempting common good land, but there is a huge amount of confusion about what constitutes common good land. Many people do not know what common good land is. Can the bill progress without a definition?

Andy Wightman: In answer to a previous question, I indicated that it is not for the bill to do that. If one were to amend it and include an exemption for common good, the phrase "common good" would be well understood in legal terms and the parties undertaking any proposed procedure under the bill—councils and leaseholders—would follow the bill's provisions.

The definition does not need to concern the bill, because it has changed entirely over time as a consequence of legal judgments. You will hear evidence later from Andrew Ferguson, who has written a legal textbook that outlines the issue in detail. We have 19th century and 20th century judgments. The latest position was articulated some years ago by a Scottish Government minister, Tom McCabe, who said that common good land was all land that a burgh held that has not been acquired using statutory powers or which it held in a special trust. That followed an opinion of the inner house of the Court of Session by Lord Drummond Young on *Wilson v Inverclyde Council*, which, in turn, upheld an observation made by Lord Wark in *Magistrates of Banff v Ruthin Castle*. That is the current accepted broad definition of common good—it is everything a burgh owned until 1975 that was not acquired using statutory powers or held under special trust. Any declaration in a sheriff court and any judgment in a higher court as to whether something is or is not common good turns on, or should turn on, those cases.

The Convener: As there are no more questions, I thank you for coming along and for your helpful evidence. You have opened up areas of the bill that we must scrutinise carefully.

10:30

Meeting suspended.

10:32

On resuming—

The Convener: I welcome our second panel. Will you introduce yourselves, for the benefit of the committee?

Andrew Ferguson (Society of Local Authority Lawyers and Administrators in Scotland): Thanks, convener. My day job is committee manager with Fife Council; I am also president of the Society of Local Authority Lawyers and Administrators in Scotland.

Bill Miller (City of Edinburgh Council): I am property management and development manager for the City of Edinburgh Council.

Iain Strachan (City of Edinburgh Council): I am principal solicitor at City of Edinburgh Council. I head up the property and commercial law teams at the council.

Andy Young (Glasgow City Council): I am head of asset management for Glasgow City Council.

John Gahagan (Aberdeenshire Council): I am estates manager at Aberdeenshire Council.

The Convener: Thank you. We will ask general questions in a minute but, first, the situation with regard to the Princes mall shopping centre is intriguing. It is contended that a sublease and lease, which appear to have been amalgamated, are central to the City of Edinburgh Council's interpretation of the status of the land. Will Mr Strachan or Mr Miller explain the situation as the council understands it?

Iain Strachan: That is probably a question for me. Mr Wightman might have raised a particular issue to do with the legal status of the interests of the Premier Property Group, the current owner or tenant of Princes mall; there is also a separate question about the alleged common good status. Perhaps I may take the latter issue first. We gave evidence to the Justice Committee on 1 February 2011, so to some extent I will refer to that. However, the make-up of the committees has changed since then, so it might help if I explain the council's position again.

Waverley market was initially used as the city's fruit and vegetable market and, as such, was held on the common good account. Acts of council in 1937 and 1938, being resolutions approved at council meetings, dealt with the transfer of the fruit and vegetable market at Waverley market to a covered-in marketplace that was to be constructed at the corner of Cranston Street and East Market Street—a site that is now held on the common good account.

As has been reported in the press and mentioned in previous responses in connection with the Long Leases (Scotland) Bill, and as the council reported to its finance and resources committee in January 2008, the council's opinion is that the transfer of the fruit and vegetable market in 1938 included the transfer of the common good status that the site held.

The transfer of the location of the market in 1938 was envisaged in the Edinburgh Corporation Order Confirmation Act 1933, which allowed the corporation to alter places at which markets were held and to establish and hold new markets. The act also allowed the corporation to alter and reconstruct Waverley market and to use it for any purpose that the corporation saw fit. If and when the market was moved to a new location, Waverley market would be freed and discharged of all market rights. Those statutory provisions were specifically referred to in the 1937 and 1938 acts of council.

As I understand it, there are even more historical byelaws of the city that enabled the corporation to regulate the operation of markets and even to transfer them to alternative sites.

Taken together, those things demonstrate the special significance that market sites had in the city at the time, and that the status of those sites was subject to the power of the then corporation to move the market sites and to use them for alternative purposes. All that happened in 1937 and 1938 was that that power was exercised. The council at the time substituted the East Market Street site for the Waverley market site and, with that, the special legal status of the market moved to the alternative site. The council's view is that the special status that it transferred included the market's common good status, as the market should at that time have been part of the common good. As such, Waverley market ceased to be part of the common good at the time of its transfer to East Market Street.

The correspondence to which Mr Wightman referred shows that certain council officials felt that Waverley market had common good status, but I think that that was probably just an unfortunate and confusing mistake. As Mr Wightman and others have acknowledged, common good is an obscure area of law that is not well known. There is little statutory guidance and little judicial guidance, most of which is quite old, which makes the identification of common good assets extremely difficult for lawyers, let alone non-lawyers. Awareness of the issue among the public is much less than it perhaps should be, although it is fair to say that it was a lot less a few years ago. Although one would expect that council officials in the past should have known whether an asset such as the Waverley market was held on the common good account, they may not, regrettably, have been sufficiently aware of all the facts and issues.

Section 75 of the Local Government (Scotland) Act 1973 envisages the possibility that common good land can be substituted into the common good account if another property that was held on the account comes out. In essence, that is the

council's position. Mr Wightman referred to other acts that appeared to show that Waverley market still held common good status post-1938. Although that might be the case, I cannot recollect those particular things myself.

The Edinburgh Corporation Order Confirmation Act 1958 and the Edinburgh Corporation Order Confirmation Act 1964 specifically refer to Waverley market as a public hall that is capable of being let out and used for any purposes that the corporation sanctions, which is generally recognised as being inconsistent with common good status. Those acts make no reference to Waverley market having common good status.

Further, section 145 of the Edinburgh Corporation Order Confirmation Act 1967 provides that all the markets of Edinburgh cease to form part of the common good. It is clear that, following practical changes, the need for such markets had dramatically reduced since the 1930s. Parliament evidently felt by the late 1960s that such markets no longer merited common good status, and so removed it in 1967.

If we are incorrect, and Waverley market retained its common good status post-1938, it would seem odd that that status should remain post-1967 when all the remaining markets lost their common good status, especially given that the site in question had long since ceased to be a market.

Even if we are wrong in that, and Waverley market still had common good status post-1967, that common good status would not continue because the public has not had use of the site. As I understand it, the market closed in the late 1930s or early 1940s. The roof-level gardens were closed in the 1950s and the market was demolished in the 1970s, following which it was used as a car park until redevelopment took place. As Mr Wightman acknowledged in his evidence to the Justice Committee of 18 January last year, the loss of common good status through such non-use is also legally possible. For a number of reasons, the council does not believe that it is common good land.

I do not know whether the committee wants to reflect on that or to ask any questions but, in essence, that is the council's position. Any common good status that the site had was transferred to East Market Street, so it is no longer part of the common good account.

The Convener: The first thing that we want to establish is whether it is your understanding that the purpose for which land is used is the reason for its being deemed common good land or whether, if land is common good land, it does not matter whether it is used for a particular purpose—in other words, markets can be transferred from

one place to another, but that does not alter the status of the land from which they are removed.

Iain Strachan: As I understand it, such transfers can alter the status of the land, but I would defer to Andrew Ferguson's legal analysis of common good law.

The Convener: I am interested in your analysis of it, first.

Iain Strachan: As I understand it, if a function that could be said to give land common good status is transferred elsewhere, there should be no reason why the land where that function was originally carried out should continue to have common good status. In addition, if land is used by the public for a particular function and then it is no longer used by the public for a long period of time, there is no legal reason for it to retain common good status. In practical terms, why should it? We cannot have land that is sterilised and which cannot be used for anything else when its original purpose no longer applies. I believe that there is case law to that effect.

The Convener: You are telling me that you think that the use of land that is deemed to be common good land could change—

Iain Strachan: Yes.

The Convener: You are suggesting that, because of such a change, the land's common good status could be removed and that the council would not have an interest in ensuring that it was still a part of the common good of Edinburgh.

Iain Strachan: As I understand it, for a site—of a market, say—to lose its common good status through non-use, there would have to be a fairly long period of time over which it was not put to that use. It is not something that would happen overnight. It is probably fair to say that, for the most part, such instances are quite historical. When that happened, people were probably a lot less aware of the issues.

You are right that the council is a custodian of the common good, so we should have a good handle on our common good assets and be aware of all the issues, but one of the difficulties of common good law is that the status of a site can change over time, which means that what is common good land at any given moment is almost like a snapshot. There are some black-and-white cases. The Meadows and Princes Street gardens clearly have common good status. I am sure that there are plenty of other examples around the country but, unfortunately, we operate in large shades of grey the majority of the time, which means that things are not so cut and dried.

The Convener: You say that you operate in "shades of grey", but it should be fundamental that

land that belongs to the city remains part of the city's assets.

Iain Strachan: Yes. Bill Miller might comment further on this, but I think that we have a good handle on what our register of common good assets is.

The Convener: Thank you.

Jim Hume: Good morning. Andy Wightman said that if he had the resources, or if the people of Edinburgh could get the resources together, he would like a declarator to be obtained. You said that you thought that the site was no longer common good land, but you also said, "If we are incorrect", and talked about "shades of grey". Given that, would it be good governance for the council to find out the legal position through the court and to get a declarator? You could then draw a line under the matter.

10:45

Iain Strachan: The issue was looked into in some detail before I came to the council. I have given the legal opinion that we reached. It is not for me to decide, but I am not sure whether spending additional time, resources and public money on seeking a declarator from the court on the alleged common good status would be the most appropriate use of council time and money, when we have already reached a view. That is my thinking.

Jim Hume: You will wait for someone else to make a legal challenge and then react.

Iain Strachan: Our position is that we have looked at the question. Officers have spent time, effort and money and we do not think that the land is common good. We hear Mr Wightman's considered views. If we genuinely felt that the land was common good, it would be on the common good register.

Bill Miller: As part of his research, Mr Wightman wrote to ask all councils in Scotland for details of all their common good properties. The City of Edinburgh Council replied, but I admit that we replied with very poor information on what we had in the common good. Mr Wightman replied to us and said, "But what about" and listed a number of properties that he felt should be common good and which were not on our register. At that point, we carried out a major exercise to look at those properties and at common good status. We agreed that a number of the properties that he suggested should be common good, and they were added to the register. We did not agree that other properties that he suggested were common good, so they were not added.

We have a fairly good register of all the common good properties in Edinburgh, but there is a

"however". As the committee has heard this morning, the subject is extremely difficult. The statutory law and case law are very limited. We took a long time to look at the properties and we did a lot of research. For properties in the old town, we had to go back to the 12th century and work our way forward to see why properties were in what ownership when and to see what their uses had been over the years. That took an inordinate time and cost. We took senior counsel's opinion on all the properties before we made up our mind.

As the committee sees today, the result is that the council thinks that Waverley market is not common good. We may have said that it was common good in various pieces of correspondence over the years, as Mr Wightman suggested, but that was probably through ignorance more than anything, because the situation is complicated. Unless the research that I described is done, it cannot be said definitively that everything has been captured. That goes for every council in Scotland.

Through its finance and resources committee, the City of Edinburgh Council agreed that, when we were approached by somebody who wished to lease or buy land that we thought had a common good interest, we would investigate. However, investigating every council record would take for ever and be extremely costly, as the council has approximately 4,000 legal property interests. We did not feel that that would have any benefit, but we agreed to look at each site as it came along and to add it to the register at that time, if we felt that it was common good.

The Convener: Before we turn to Andrew Ferguson and others, Graeme Dey wishes to ask a supplementary question.

Graeme Dey: Thank you, convener, and good morning, gentlemen. I want to develop this point, so I would ask the other witnesses whether their local authorities are confident in the accuracy of their common good registers.

Andy Young: Our council has a common good register that contains a number of property assets. Like Bill Miller, I could not guarantee that the register is 100 per cent accurate. However, just as in Edinburgh, Glasgow City Council will carry out an investigation of any piece of land for which sale or lease is being proposed, and we will decide whether it should be designated as common good and be on the register. If there were still a requirement to sell or lease the piece of land, we would then have to go through the normal procedure to have it removed from the register or have a judgment made on whether we could remove it.

The council in Glasgow has similar property portfolios to Edinburgh, if not larger. It might not be completely impractical, but it would be extremely costly to deal with it all, and it would take a long time. However, most of the significant common good properties in Glasgow are on the common good register. Issues arise only when the use of land is to be changed. That is what triggers interest, and that is when action is required.

Andrew Ferguson: In Fife Council, we are pretty confident that our common good register is now perhaps 95 per cent accurate. We are at the stage of zeroing in on properties that are particularly difficult. I will give a brief example. A bit of links in a fishing village in Fife was acquired by the burgh in the 1930s. It was held on the leisure and recreation account, not on the common good account. We had some doubts about it but, when we did a sift, nothing in the title for the land gave a clue as to whether it was common good. In the 1930s, there were statutory powers to acquire for recreational purposes, so the land may have been acquired under such powers. At some point since then, the land became a caravan park—although none of us has a long enough memory to know exactly when. Some income went into the common good fund, and some went into the general fund. We then sent somebody off to St Andrews, where we hold the minutes for this particular burgh, and had her spend time—I think that it has been two mornings so far—looking through the minutes to find out why the burgh bought the piece of links. There are all sorts of interesting historical documents—for example, concerning disputes with a farmer grazing animals. We are not yet able to say definitively why the land was acquired, whether it was to be on the common good account, and, if so, whether we can treat it as common good.

Such processes take a long time. However, in Fife we are now down to the very few anomalies. For the most part, we are fairly confident about the register. However, that is not to say that, in a few years' time, we will not receive queries about properties that we had never thought were common good, or about properties that we had thought were common good but which a successor of mine may think are not common good. That would be all in the nature of these things. Community councils were consulted when we carried out the initial sift, but we still receive queries from those community councils—whose personnel may have changed, or which may have suddenly taken an interest in a particular property—about things that we thought we had sorted out. However, to give an answer to help the committee's investigation into the bill, I do not know that we will ever reach a stage at which we can all say, "Yes—we know absolutely and

definitely what is common good throughout Scotland."

I think that I speak for my colleagues as well when I say that we would be happy enough with an exemption for common good in the bill. That was our previous position, and we are generally pretty happy with it. Questions over what is common good will remain up for conjecture. We are getting much closer to answering such questions, but we will never reach the end of discussions and learned debates with our community representatives and campaigners.

John Gahagan: I would mirror the responses that have been made. We have a common good register. Aberdeenshire Council is the successor to a number of previous councils, and the records kept by those councils varied. Some were extremely good but others were not so good. We are developing our register as we go along. When something comes up for a possible transfer, we investigate at that stage whether it is common good.

Claudia Beamish (South Scotland) (Lab): Good morning. I am certainly not a lawyer and the issue is extremely complex. I stay near the burgh of Lanark, which has its own common good fund, with its own complexities. There are many reasons why common good land might not be in public use at a particular point in time. Can Iain Strachan or any of the other witnesses comment on that? My understanding of what Mr Strachan said is that, over time, that might cause the land to cease to be common good, but perhaps I misunderstood that remark.

Iain Strachan: That is my understanding of the situation. For example, if council officials used a building for administrative purposes some time ago and then, for whatever reason, that use ceased, it would be arguable that, although it might originally have been on the common good account, after a period of time it was no longer so. As such, the council would be entitled to sell it without reference to the court, because its common good status had been lost.

Claudia Beamish: Is there not an understanding that common good land should be protected by those who hold it in trust—"in trust" is perhaps the wrong legal term—or have an obligation to look after it for the people of the burgh? Do you or other witnesses want to comment on that?

Iain Strachan: That is right. As I said, instances of use changing over time probably tend to be historical, although it is difficult to generalise about an entire country. There is now a greater awareness of common good. The officers who report to me and Bill Miller's team are all aware that common good is an issue that we should

always be alive to when we deal with council assets. That is certainly the case now, but I cannot comment on what happened in the past. As a legal concept, what you suggest is right and it is something that could happen, so we need to be alive to these things.

Andrew Ferguson: In response to Ms Beamish's initial question, I stress that disuse of a common good asset for public use does not always mean that it falls out of the common good altogether. When it is disposed of, the usual convention is that the proceeds of the sale go into common good. Common good assets cover a multitude of sins. The one that we have looked at most during the meeting is Waverley market, which clearly had a public use. There are other public buildings such as town halls and so on. If a common good asset is sold on, it does not necessarily mean that there is not a return to the common good.

Bill Miller: The City of Edinburgh Council is going through a number of cases at the sheriff court for the leasing out of common good assets. I can give you an example that you will know about.

James Craig house, which is at the top of Calton hill, was lying empty for a long time. The council is trying to improve the whole of Calton hill, so we upgraded the house and it is now a holiday let. It was done up, but we have not sold it and have instead leased it. We are waiting for the sheriff court to decide whether we can give a long lease. There is an organisation in there and money has been spent, but the idea is that it is a commercial let and that the council will get money back, which will go into the common good account eventually, once all the costs have been recovered. We are going through the sheriff court when there is a common good issue and, for good reason, we want to lease out land or property.

Another recent example was Inch park in Edinburgh, where a community sports facility is part of the park. The community group has agreed to take on a longer lease. We have had permission from the sheriff court for that one, and it is a case in point. We are looking at our cases very carefully and following the letter of law as much as we can.

11:00

Andy Young: I echo what Bill Miller said. The fact that assets are listed as common good does not necessarily mean that they are set in aspic. What happens to them and what is the best management for them for the common good might be to, for example, lease out a building that has a history of neglect or has become uninhabitable or unusable in its current form. The best way of

preserving that building might be to lease it to a community or to a commercial organisation.

It is often easy to lose focus. I am from the other side of the country and, although the Waverley market case is of interest, it is not directly reflected in Glasgow. We have issues to do with the potential use of parks and so on. We have to think about what is most important in terms of the use of common good for the community. We in Glasgow think that significant buildings or parks have to be available for public use and they have to be managed.

The properties that we have on the common good register in Glasgow include two shops in Byres Road. Why they are there or how they got there is lost in the mists of time. What happens to that kind of property is of less interest to the public as long as the income from them goes back into the common good fund. That is more important than identifying every common good asset and keeping it in its current form.

Annabelle Ewing: Good morning, gentlemen. I have two questions. One is specifically about the position of the Waverley market, but I am sure that we will get back to that. On the more general issue, I have listened with interest to the discussion about the definition of "common good" and the suggestion that it is a bit of a moveable feast because it is not fixed at any given point in time and is quite difficult to identify. It is costly in man-hours for a council to conduct a full audit of what it owns and how it owns it, particularly in times of tight budgets.

It is suggested that common good land should be exempt. In light of the discussion and given that it seems to be difficult to come up with a general definition of "common good", if the suggestion is that the committee should consider proposing an exemption, how do you propose that the exemption should be framed?

Andrew Ferguson: You are right. Probably we have told you all about the complications of common good rather than its simplicities, if there are any. Andy Wightman said, quite fairly, that common good is a recognised legal concept in Scotland. The fact that three lawyers in a room will argue from three different points of view about whether a property is common good does not alter that fact. Existing legislation, particularly the Local Government (Scotland) Act 1973, talks about land forming part of the common good. Therefore, an exemption would use the same phraseology and leave the difficult cases—and I stress that there are difficult cases as well as pretty straightforward ones—to be argued out.

Richard Lyle (Central Scotland) (SNP): Good morning, gentlemen. Since the 1930s, we have had several changes in councils. In my area there

were six district councils; we have had the regions; we went from burghs to districts; and now we have unitary authorities. Have we lost quite a lot of the knowledge about what is common good in that time?

Common good land itself that was gifted to burghs, areas or individuals has been lost because, with the greatest respect to some of our witnesses, you sold them—and knowingly so, because you put them to the council to sell. Do you agree with that comment?

We are coming to the issue of Princes mall shopping centre. Would it not be better to agree that that area is common good land and that it should not be included in the bill?

Bill Miller: That would be an easy way out but, after carrying out all the investigations and receiving advice, we in the council have quite clearly deemed it not to be common good. I do not see how we can go back on that decision.

Richard Lyle: So in 1937 you sold it, moved it on or whatever. Basically, you are asking the committee to use the bill to dig you out of a hole because under its provisions the area would be sold off or given away to the person leasing it. After all, according to evidence that we heard earlier, it is worth only 40p, 60p or whatever—in other words, a penny a year.

Bill Miller: I should clarify that the council still owns the ground on which the shopping centre sits. We are talking about a long ground lease; the shopping centre itself was built by a developer. If the bill as it stands were to be passed, the council would lose ownership of the ground, which would mean that we would have to look at the bill's provisions to find out whether this particular case would be covered and what compensation, if any, would be paid.

As it has transpired, the council leased out the ground but took what is called a grassum—a lump-sum capital payment—in advance of taking annual rental. That commonly happens, but for different reasons. Given that the rental is peanuts and that the compensation mentioned in the bill would be based on that, the money side of things is not so relevant.

Richard Lyle: I want to return to the issue of common good land. Such land is supposed to be held for the good of the people of the surrounding areas, districts, burghs or whatever but, even if it is held on a central register, it can be sold off at any time unless someone objects. I know from my 30-odd years' experience in councils what can happen to land gifted to a local area. Land in New Stevenston was gifted to the people but the council decided to extend the curtilage of the local school into it and the people in the area were no

longer allowed even to walk on it. Do you agree that councils can make such rulings?

Andrew Ferguson: Perhaps I can answer that question. You are right that the council has to make an initial judgment on the matter. As you say, land might have been gifted for a particular purpose or dedicated for recreational or whatever use; indeed, it might have had that use for centuries. Initially, the council has to make the sometimes difficult decision whether some or any of that land should retain that use because, for example, the land itself might have fallen into disuse or it might be put to better use that will bring in money. I stress again that money from disposals of common good land and property goes into the common good fund to be used for common good purposes. After the council makes that initial decision, if there is any suggestion that the common good land is what is called inalienable—in other words, it is not meant to be sold—the courts have to decide what is in the best interests of the people of the burgh.

The council must balance the benefits that a proposed development would bring, which could be just a financial benefit from the sale price, and the benefit that the locals get from the area at present. It could be a park, for example. There is fairly recent case law on that subject, from the 1980s, when land was being sold for a supermarket car park. The development was to bring a good amount of money for the common good, but a bit of the park would be lost. Ultimately, the court had to make a judgment.

However, you are quite right. Initially, the council has to decide what it wants to do. Does that help?

Richard Lyle: Yes, but I will press the point. We have witnesses from the councils in Edinburgh, Glasgow and other areas. My local government experience is that, although land has been gifted to local areas with the intention that it should be used by people and therefore any money that is raised from the sale of the land should be used for the benefit of those areas, most of the money goes into the central fund or pot and is used for other things. Do you agree?

Andrew Ferguson: I am not aware of that having happened in Fife—of common good land having been sold and the money having been used outwith the burgh. I am not saying that it has not happened.

Mr Wightman touched on the point that it is left to locals to campaign and so on, so that what happens might well depend on how organised and articulate the community is. That might determine how much of a battle the council has in doing what it wants to do. That is a fair point.

Richard Lyle: Just to finish, convener, if you will allow me—

The Convener: I will.

Richard Lyle: As Mr Wightman rightly says, he needs money, or people to give him money, to fund legal challenges. At the end of the day, councils hope that people will not come back to them with such challenges. You only really wait for people to come to your door. You do not go out and ask them.

Andrew Ferguson: The practice in Fife is that, where there is a proposal, there is consultation with the local community and the matter is considered by the local area committee first, before it is taken to the policy, finance and asset management committee. However, practices might vary.

John Lamont: This morning's discussions have highlighted the general difficulties with how we define common good land and the problems therefrom. I want to bring us back to the bill. When the previous bill was before the Parliament in the previous session, the minister who was responsible said that there are probably five parcels of common good land that could be affected by the bill because they are subject to ultra-long leases. I think he said that there are two in Glasgow, one in Edinburgh, one in Fife and one in Aberdeenshire.

We have discussed Princes mall this morning, but otherwise we have discussed things in the abstract. Will you give us a brief summary of the pieces of land in each of those areas so that we can understand what we are talking about? What common good land do you have that would be affected by the bill if it is enacted?

Andy Young: Peculiarly, both of our long leases are for areas that are outwith the city boundary. The two long ground leases on common good land are on Rouken Glen park, which we lease to East Renfrewshire Council, and Balloch country park, which we lease to West Dunbartonshire Council.

We support the proposal but, from the point of view of the citizens of Glasgow, it is likely to be fairly irrelevant, irrespective of what happens. We believe that common good land should be excluded as a general principle, but the bill's impact on Glasgow City Council is likely to be minimal. It might be of advantage to East Renfrewshire Council and West Dunbartonshire Council, who would inherit the title to those parks.

John Lamont: Thank you.

11:15

John Gahagan: The case in Aberdeenshire is an area of recreation ground in Stonehaven, which was let on a 999-year lease to a trust that was set up by Parliament to manage the ground. The

consequences for the area of transferring the land to the trust are not financial. A term of the lease is that the land should always be used for recreational purposes and the lease gives that protection. If there was an intention to use the land for another purpose, the landlord's consent would be needed. Of course if the ownership transfers, that consent will no longer be required. There might be other protections—the act that set up the trust might require that the land be protected for recreational use, for example. However, Aberdeenshire Council is not the trustee, so we are not certain about that. The requirement in the lease that the land be used only for recreational purposes adds a level of protection.

Bill Miller: There is one case in Edinburgh; it is a very small area of ground on Stevenlaw's Close, off the High Street. A long lease was granted, which runs until 2191. A corner of an office block has been built on the land and eats into the close. The land is still held on the common good account, but it is really part of a building. That is the only case that we have that falls within the terms of the bill.

The Convener: I understand that the Fife example is no longer an example.

Andrew Ferguson: The Fife example is no longer an example, not because we do not think that it is common good land but because we do not think that there is an ultra-long lease.

John Lamont: Notwithstanding the discussion about Princes mall, is it fair to say that we are talking about a very academic point? Given the limited amount of property that would potentially be affected by the bill, are the financial implications for councils minimal?

Bill Miller: Yes, in relation to the cases that have been mentioned. However, we do not know what cases other authorities have. I understand that a number of authorities have not provided information—they might not necessarily know about cases. The issue is not a big one for the City of Edinburgh Council. It would be a different matter if Waverley market were included, but it is not.

Andy Young: We have been talking about the identification of common good land. We think that such land should be exempt in principle, because it is held for the people. There might be examples out there that we have not captured, some of which might be more significant than the ones that we have talked about. It is unlikely that that is the case, but there might be cases that we have yet to discover. There should be a safety net, in case something significant comes up as the process rolls forward. However, from Glasgow City Council's point of view, the ultra-long leases are such that the issue is relatively insignificant.

John Gahagan: The lease in Stonehaven was entered into in 1932—I was not around then and did not negotiate it. The purpose of doing the transaction by way of lease rather than sale is not entirely clear, but one reason might have been to include the protection on the use of the land. The consequences of doing away with long leases are not only financial.

Dennis Robertson: I acknowledge that other members might have a greater grasp of some of the issues than I do at the moment. At the time of the transfer of the Waverley market to the East Market Street site, was the East Market Street site deemed to be common good land, or was it given common good status at the transfer?

Bill Miller: It was not deemed to be common good at the time. That is why the status was moved from the Princes mall site to East Market Street.

Dennis Robertson: I thought that that was the case. That meant that, in the act, everything was transferred from the Waverley market site to the East Market Street site. Is that your understanding?

Bill Miller: My understanding is that the common good status—indeed, the whole market—was transferred to that site.

Iain Strachan: Yes, and the common good status went to the then new site at Cranston Street.

Dennis Robertson: So, one area became common good and one stopped being common good.

Iain Strachan: Yes.

Dennis Robertson: Okay. Thank you.

I will continue with questions to Mr Gahagan. Thank you for your explanation about the common good land in Stonehaven. Are there any other common good areas under dispute in Aberdeenshire, or are there any issues before the council at the moment?

John Gahagan: That is a difficult question for me to answer. We are continually looking at whether land in some areas forms part of the common good. There are areas where we believe that the land is common good and we are considering going to court to have the common good status removed. However, none of those areas involves an ultra-long lease.

Dennis Robertson: Is the council going to court to have the common good status removed so that the ground can be sold on?

John Gahagan: The reason varies, but that is one possibility.

Jim Hume: I think that my question is for the City of Edinburgh Council, but it may be relevant to all our witnesses. It has been pointed out that no allowance is being made for a grassum having been paid—a large, up-front payment with peppercorn rent being paid thereafter. Do you see many circumstances in which that might occur within your local authorities? Does the situation relate only to common good, or could it relate to some commercial properties that local authorities own?

Iain Strachan: My understanding—Bill Miller will correct me if I am wrong—is that only two properties in Edinburgh would potentially come under the scope of the bill.

Bill Miller *indicated agreement.*

Iain Strachan: Those are Stevenlaw's Close and Princes mall, and the grassum issue probably applies only to Princes mall. There may be instances of ultra-long leases elsewhere around the country.

We make the point in our most recent written submission—we also raised the matter previously—and it seems to me from other evidence that the committee has been given that there does not appear to be a consensus that the £100 per annum rental threshold and the 175-year cut-off period are the best way to achieve an appropriate exemption for commercial leases. Professor Gretton said that the cut-off might as well be 225 years. Professor Rennie felt that £100 was probably not the best figure and that the figure should perhaps be linked to a capital value.

The exclusion that we are talking about is extremely important. When parties have chosen voluntarily to have their contractual connection to land governed by the law of landlord and tenant, there will be implications if that is then taken away by retrospective legislation. Although the bill enables a tenant to opt out and not acquire the ownership, the landlord is unable to opt out and the transfer is forced upon them. If the bill seeks to exclude those properties where the landlord, through their heritable interest, retains a significant interest in the site but focuses on a purely monetary test—and if it does not take account of where grassums have been paid—the question is whether that gives a fully rounded picture.

Andrew Ferguson: In the excellent briefing on the bill from the Scottish Parliament information centre, mention is made of Brodies LLP having previously given evidence on variable rents, whereby the base rent is very low and the real rent is linked to, for example, how well a shopping centre is doing and the incomes of the individual shops. It is not really for me to comment, but I imagine that that may be an area for the bill's draftspersons to look at.

Bill Miller: It is common for grassums to be paid for leases for particular reasons—for example, when a landlord sees fit to take a large lump sum of money at a certain time and grant a longer lease at £1 per annum or for a peppercorn rent. In such circumstances, they take a lump sum of money equivalent to the rent over the period of the lease. That is quite common in commercial leases. It means that the landlord still has control over the land or property. They have not sold the land so they do not lose control and can still influence what happens during the period of the lease and thereafter. That is what the City of Edinburgh Council did with Waverley market: it did not want to lose ownership of the site for many reasons, including its location. Perhaps Mr Strachan can comment further, but that is the commercial position.

Iain Strachan: I will make some comments by way of background to Princes mall. As my colleague has said, the council would never have knowingly sold the site and completely given up all interest in it. It is a unique site of special significance to the capital city, located as it is beside Princes Street gardens and adjacent to Waverley station, which is itself a landmark destination. It is close to the transport hub at St Andrew Square and is in a United Nations Educational, Scientific and Cultural Organization world heritage site. We all know the vision of the city that gets beamed around the world at hogmanay. Given the site's significance, the council, as guardian of the city, should have an involvement in it and so should retain its heritable interest going forward.

Yes, the bill entitles landlords to a level of compensation; however, as has been commented on, in the case of Princes mall such compensation would be minimal. If the bill's intention is to exclude leases where the landlord has a significant interest, I am not sure that a purely monetary test does that in the case of Princes mall, the site of which, because of its special significance to the council, the council feels should be preserved for future generations. In recognition of that, earlier this month a full meeting of the council passed a motion seeking a specific exemption for Princes mall from the scope of the bill, and that is one of the reasons why we are here today. Although we recognise that it is not wise to legislate by exception, we feel that there are good reasons why Princes mall should be exempted, leaving aside the common good issue.

Annabelle Ewing: I have a question on that point. It seems that your failsafe position for Princes mall at this stage—notwithstanding that the bill was around in the previous session of Parliament—is to include a specific exemption for it. Do you feel that the Princes mall scenario is unique and that, therefore, an exemption for

Princes mall would not impinge in any way on circumstances that may pertain elsewhere? As Mr Strachan said, statute by exemption is not how things are normally done, but it can be done for specific cogent reasons. Having considered the issue, does the City of Edinburgh Council believe that the case has been made for such a specific exemption?

Iain Strachan: I am not aware of any other such case. We have talked about common good in the abstract, but when it comes down to the nuts and bolts, there are maybe only a handful of cases that would, in practice, be affected by the bill.

Annabelle Ewing: With respect, you are now saying that the land is not common good, so we are into a completely different set of arguments.

Iain Strachan: Yes, but—equally—I am not aware of evidence that there are other properties throughout the country that have special significance and might also be caught. Elected members in the City of Edinburgh Council clearly feel that a case can be made that the property in question should be exempted, given its location and the comments that I made earlier.

11:30

Annabelle Ewing: I appreciate that it is not necessarily for you to know the situation throughout Scotland, but it is for the legislators to have an idea of the concrete impact of providing for one specific exemption along the failsafe lines that you suggest.

Your other proposal for a possible way to deal with the scenario relates to the grassum. However, your written submission makes the point that, in the light of the structure of very long leases and peppercorn rents, grassums might have been agreed at a lower rate than the total value of the rental. How do you propose that that be taken into account?

Iain Strachan: I admit that our suggestion is in some respects rather simplistic but, in essence, the grassum is the rental income capitalised on a day 1 basis. The amount of money might be lower, but that is because the landlord has decided that because they get all that money up front, they are prepared to take a slightly lower amount than they would get from rental that was spread over the lifetime of the lease. However, given that the bill seeks to exclude commercial leases on the basis of a monetary test, if we accept that a grassum is akin to the rental over the lifetime of the lease and then treat it as rental income and bring it into the calculation of the annual rent, we might get a truer reflection of the monetary value of the property. That is where I was coming from on that point.

Annabelle Ewing: Do you feel that, if we were starting again today, some councils might structure their property dealings differently? You talked about the council being the guardian of the land that it owns, whether or not it is under common good. Might it now be felt that the way in which some deals were structured was perhaps not in the best interests of the citizens?

Iain Strachan: If we had known at the time that we might lose Princes mall through the bill, which was not at that time under consideration, we might have thought that we should take a certain level of grassum but retain the £100 rent to ensure that we had on-going involvement in the property. With a landlord-tenant relationship, there is an on-going contract. Title conditions are notoriously difficult to enforce, so from a landlord's perspective, if we seek to have involvement in or control over use, potential development and the like, it is often easier to have a landlord-tenant relationship than a relationship that is based purely on title conditions. Therefore, the answer to your question is, "Possibly."

Margaret McDougall (West Scotland) (Lab): From listening to the evidence, there seems to be agreement that there is uncertainty around the accuracy of the common good register, but you all seem to be positive that what you know of long leases is accurate and correct. That is certainly what has come across to me.

Bill Miller: From an Edinburgh point of view, it is easier to identify leases, because there is legal documentation, whereas the title for a common good property does not actually say that it is common good land.

Margaret McDougall: I see that the other witnesses are of the same mind—they are nodding.

How should we legislate to deal retrospectively with the discovery of more long leases or common good properties that are not on the register?

Andy Young: That relates to the point that I made earlier. The justification for excluding common good property from the bill is to cover exactly that point as transactions occur, and as we investigate the land or buildings whose purpose will change when they are sold, leased or transferred to community ownership. Although it is unlikely that there is anything significant of which we are not aware, if the bill can provide a failsafe, Glasgow City Council would encourage the committee to consider that.

Bill Miller: From an Edinburgh point of view, I am 100 per cent certain that only two long leases come under the bill. We have a good property register of what we own, but whether land is common good land is a grey area: we think we know what we have in the common good account.

There may be odd ones out, but they are not on leases. We know what long leases we have: the only two are for Waverley market and Stevenlaw's Close, which have been mentioned. I would be amazed if anything else were to come out; our records, which have been gathered over many years, do not show anything else.

Andrew Ferguson: The SPICe briefing says that eight councils have not yet reported back, so there are some known unknowns about how many ultra-long leases there are. As my colleagues have said, knowing what is covered by an ultra-long lease is a lot easier than knowing what is covered by common good. If I may be mischievous, perhaps the easiest way for the bill to cover the matter would be to exclude all local authority ultra-long leases. That would cover Waverley market, but perhaps the committee would not like to go that far.

The Convener: For the record, today is the final day for submissions from the eight councils. We have received responses from four of them, so we will know after today what they have to say about their common good registers.

Richard Lyle: I will return to Princes mall. I say again that if we took Mr Wightman's advice, the property would be put in a common good fund. I have experience over the years of sitting on property committees—Mr Young used to work for my authority many years ago—so I know how many leases, solums and other things you guys have had to deal with since the 1980s. Basically, you were forced into that because of costs and trying to bring money in to councils.

I could go through all the situations that you faced in order to get money for Princes mall. I can see why the council went into the deal. What would be the final plea to this committee in relation to Princes mall? Would I be right in saying that you went into the deal because, in those days, every council was trying to be innovative in trying to get money, and that had you known what was going to happen—which no one did—you would not have entered into that long lease?

Bill Miller: Yes—that is right. If we, as a council, had known that there was a chance that the lease would be removed without our being able to do anything about it, we would not have entered into a lease of such length, but would probably have gone for a lease of lesser length. It is also right to say that, over the years, councils have leased out property and taken grassums because they needed capital for capital investment programmes.

If we are finishing now, I will say that what is causing us a problem is the bill's suggestion that every commercial lease should be exempt and that it has set a cut-off point of £100 per annum. There may be good reason for rent being less than

that; there may, for example, be a turnover rent. For example, as has been suggested, the rent may be £1 per annum, but the rental may be based on further income coming in from the property. In the case of Princes mall, there is a peppercorn rent of less than £100 per annum.

We should consider what—based on the knowledge that we have—the rent would be if the property were leased at this point in time. If what was paid was spread over 200-odd years, it would amount to about £30,000 per annum, although the rent would actually be a lot more than that; that is just how it works out doing an easy division of what we sold it for back in 1989 and the number of years of the lease. We sold the centre, not the ground. One of our main arguments is that we have been caught because we took money up front; we never wanted to lose ownership.

Richard Lyle: I suggest that you were encouraged by various Governments over the years to do that.

I am not a lawyer. If the committee or Parliament decides to make an exception for Princes mall, and the person who owns it now makes millions of pounds out of it, what will the legal position be if we are taken to court? Mr Ferguson, could you answer that? You look like you do not want to answer.

Andrew Ferguson: I do not. You are going into the area of human rights and rights to property and so on. The Government's legal advisers will advise on that, but I do not see a huge risk of legal action against the Scottish Parliament or Scottish Government for making such an exception. Don't quote me.

Annabelle Ewing: We are pleased that you were all able to come today. Your information has been helpful.

On Princes mall, Mr Strachan referred to the fact that the site is, or is near, or is relevant to a UNESCO heritage site. An interesting argument could be made along those lines by leaving the technical issues aside and considering from all different perspectives the situation that makes the scenario unique in Scotland. It might be interesting to explore that further as a matter of overriding public interest. Do either of you have any comment to make on that? You might want to reflect on that further. I am sure that the clerks can still receive further written submissions. They are nodding.

Iain Strachan: Yes.

The Convener: I want to talk about the Edinburgh case again. Mr Miller remarked that the extension of the Waverley market site's lease from 125 to 206 years was made at a particular time so that a new arrangement could be made with the

lessees. That underlines Mr Wightman's point that the arrangement was made for commercial reasons by a commercial group so that it could extend its interests in the site, which suited the council at the time. The extension of the lease is an interesting area.

Bill Miller: The original lease that was commenced in 1982, if I remember rightly, was a ground lease to the developer who built the shopping centre. In 1989, the council was approached by the developer, who wanted to sell on his interest, but the 1982 agreement was such that the ground lease had a rental attached to it because the property was sub-leased back to the council. The rent was quite high at that time.

11:45

Iain Strachan: The rent was greater than £940,000 and 76 per cent of the rental income.

Bill Miller: A substantial rent was being brought in at that time, because although the council paid the rent, it sublet, or sub-sublet, all the shop units. So, when we were approached by the centre's owner to extend the lease, there was a good income. For various reasons, including monetary ones and perhaps the one that Mr Lyle suggested, the council negotiated the extension of the lease and stepped back from being party to the tenancies. I think that the lease became a straight ground lease—am I right? I just cannot get my mind back there.

Iain Strachan: It was a ground lease originally, but the council and the developer sold their respective interests together, because the marriage value made greater financial sense. The council could have bought the developer out, and probably considered doing so but did not have the capital resources. The whole thing was sold for £23.5 million, of which the council received £6.25 million at the time.

Bill Miller: The answer is that we still wanted to hold on to the lease agreement, even though the rental was up. We took a lump sum in lieu of rental.

There was a question earlier on legislation; Waverley market is specifically mentioned in the City of Edinburgh District Council Order Confirmation Act 1991, which places height restrictions on the property, which is why we can look right out over the castle and the old town. By retaining ownership of the whole site, the council can maintain any conditions it wishes, either through a lease or ownership, but if it loses sight of both the lease and the ownership it loses control over the future use of the site.

Future Parliaments might decide to do away with the 1991 act, and planning legislation might

change to allow a future owner to do something totally different with the site. However, while the council remains the owner—or as a landlord—it is in control of the site, no matter what the planners or an act of Parliament say.

The Convener: It is useful to have this on the record, for our next meeting and beyond.

Section 50 of the bill is on claiming additional payments. You suggest that if the bill were passed the peppercorn rent would lead to your losing a lot of money ultimately, because of the ownership question. What is your view of that section?

Iain Strachan: There are two points to make. We accept that under the current compensation provisions the compensation for the loss would be minimal. As you correctly say, landlords can claim additional payments, based on the loss of residual heritable interest and potential development value, but I think it is fair to say that given that you are talking about a lease that expires in a significant period of time, its value, as assessed by the Royal Institution of Chartered Surveyors in Scotland, would be minimal. We should look at this not purely on the basis of the asset's monetary value, but its non-monetary value to the city. Does that answer your question?

The Convener: That is useful, as we gather evidence before considering it. Does anyone else have final points to make?

Bill Miller: At the end of the lease, the whole site would revert to the council. Although the council took a grassum, as was said earlier that does not necessarily mean it took the full, open-market price for the property in a market where there is a willing buyer and seller. However, the whole site will revert back in couple of hundred years or whatever is left of the lease. There might be a requirement for something other than a shopping centre or mall, but we do not know. There might also be a value beyond that period, but we cannot tell at this time what it will be, because it is too far away. As Mr Strachan said, the RICS looks at the valuation of a reversion. We cannot look ahead 200 years, and the amount would be peanuts, really. Under the compensation provision in the bill, the council would get no monetary compensation.

Rob Gibson: Thank you.

John Gahagan: You might think that there is no connection between Waverley market and the recreation grounds in Stonehaven, but the connection is that there is more to a lease than rent. The main concern that I pick up from Edinburgh is that, as part of a leasing arrangement rather than a sale, they are looking to have some control over the asset in the future. In respect of many ultra-long leases it is possible that the terms of the lease, other than the rent, are of more

concern. Once a grassum is accepted, the owner will get only a peppercorn rent, but it is not the peppercorn that the owner is interested in, but what the other terms of the lease give. That is the connection between the two cases that I referred to and, probably, others, including cases that may not have been picked up yet.

The Convener: Thank you, gentlemen. We have been talking about peanuts and peppercorn and irritating common good matters, which probably needed to be stirred up so that we can consider in more detail what has been proposed. I thank you for your evidence. If there are additional matters on which you wish to write to us, please feel free to do so.

11:51

Meeting suspended.

11:53

On resuming—

Subordinate Legislation

Potatoes Originating in Egypt (Scotland) Amendment Regulations 2012 (SSI 2012/37)

The Convener: Agenda item 4 is consideration of an instrument that is subject to negative procedure. No motion to annul the instrument has been lodged. I refer members to the paper on it. Do members wish to ask any questions or make any statements?

Jim Hume: I have just a brief comment. I am not a potato farmer, so I have no interest to declare with regard to the regulations. However, potatoes are obviously important to large areas of Scotland—including Graeme Dey's area—and seed-potato production is particularly important in Scotland. It is more than likely that Egypt gets most of its high-quality disease-free seed potatoes from Scotland, so, the regulations are important.

The Convener: Yes, indeed. Potato brown rot disease is of considerable concern to us. I hope that the regulations will ensure its control and that we do not get an infestation in this country.

Do members agree that we do not wish to make any recommendations in relation to the instrument?

Members *indicated agreement.*

The Convener: I thank the public for their attendance at the meeting, although I think that they have already left.

11:54

Meeting continued in private until 12:20.

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