



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

Common Good Land

Scotland's Common Good Funds are worth hundreds of millions of pounds – the vast majority of which is accounted for by land and buildings. Many of these assets are of significant local importance and heritage, and valued by residents – buildings like town halls, tolbooths, and former burgh chambers, as well as parks, gardens, links, and woodland – and the annual income generated by these funds is often distributed to local causes.

But for many people there are questions about how the Common Good is managed, whether it could be put to better use, and what its purpose is in the 21st century. The Scottish Government has asked the Land Commission to look at how greater benefit could be delivered for communities through the Common Good, and more detail on the content of this Land Focus paper can be found on our [website](#).

What is Common Good?

Common Good property can be seen as the original form of urban community ownership. Granted to, and acquired by, former Burghs over time, Common Good land was intended to provide the burgh with space to construct civic buildings and hold markets, as well as areas for recreation, the grazing of livestock, collection of fuelwood, and other activities.

So important were these Common Good lands that maladministration in the late medieval period led to the Common Good Act 1491, which provides legal status to Common Good and an obligation that it is managed for the benefit of the citizens of the burgh – and is still in force today.

Despite this early legislation, over the intervening centuries many of these assets have been sold, appropriated, or simply lost

from records. The original Burgh Councils that had close connections to these assets and managed them on a day-to-day basis are also gone, and the status of 'Burgh' has been abolished. Various local government reforms through the 20th century further weakened the connection between assets and local management.

At present Scotland's Local Authorities are responsible for managing the Common Good of former burghs; every council area contains at least one former burgh, and in theory its attached portfolio of Common Good assets. A few council areas contain more than ten former burghs, and Fife has more than twenty within its boundaries.¹

¹ www.gov.scot/publications/land-reform-review-group-final-report-land-scotland-common-good/pages/36/

What are the issues?

Broadly, there are three main issues when looking at the current status of the Common Good:

- When is an asset Common Good and when is it not
- Legal imprecision, specifically the statutory duties of Local Authorities, and alienability
- What the purpose of Common Good is, and how it should be recorded and managed.

Alienability

All Common Good property falls into one of two categories – alienable or inalienable.

Alienable property can be sold, leased or otherwise disposed of in a permanent or semi-permanent way that reduces public use. Inalienable property cannot without a court order.

Inalienable property includes town halls, market squares, parks or greens, and churches – although the status of each asset needs to be individually determined, it cannot be assumed. All other Common Good property would be alienable.

Is it Common Good?

Determining what is and what is not Common Good can be challenging. Broadly, Common Good assets are those owned by the former Burgh Councils at the point of dissolution that had not been acquired for a statutory purpose. For example, land bought to build a school would not form part of the Common Good as it was acquired for that specific purpose.

Although that sounds relatively simple, poor record keeping and several phases of local government reform means that it is not always clear how or why property was acquired, and therefore what is actually Common Good. The Scottish Government's guidance to local authorities states that *"due to the time which has passed since property was first acquired by a burgh, it can be difficult to establish whether property is common good."*²

Similarly, the Land Reform Review Group report³ shows that, of the 197 former Burghs, there are only 143 Common Good Funds: there is a lack of clarity as to how, or why, over the intervening centuries 54 Burghs have lost all their Common Good assets.

² www.gov.scot/publications/community-empowerment-common-good-property-guidance-local-authorities/

³ www.gov.scot/publications/land-reform-review-group-final-report-land-scotland-common-good/pages/36/

Legal Imprecision

Although Local Authorities are the custodians of the Common Good, there's not a lot of detail on what that actually means, and what their rights and responsibilities are regarding Common Good. The Community Empowerment Act 2015 adds duties to create a register of Common Good assets, and to consult with relevant communities and other groups when considering disposal, but otherwise the basic duty remains a rather vague *"in administering such property, any authority shall ... have regard to the interests of the inhabitants of the area to which the common good related"*.⁴

This is also where 'alienability' causes problems. As demonstrated by the Portobello High School case, inalienability can act as a hard block on development. This leads, in many cases, to the avoidance of the inclusion of Common Good assets in development planning, which can reduce the benefits of development to residents, the local economy and environment.

Indeed, such is the tangle of legal issues surrounding the use of Common Good assets that many lie dormant.

However, these assets are of significant heritage value, and there's good reason for protecting and preserving Common Good assets for future generations, so inalienability can be a force for good – and ultimately reaffirming that the local authority is the custodian of the Common Good, not the owner.

Portobello High School⁵

In 2012, the City of Edinburgh Council proposed to use Portobello Park as the site for the new Portobello High School. This decision was challenged by a local residents' association, ultimately making its way to the Court of Session who found that *"not only did local authorities have no power to appropriate inalienable Common Good land"*, but that the Courts also had no power to authorise appropriation.

However, after a Private Bill was introduced in the Scottish Parliament by City of Edinburgh Council, which allowed them to appropriate the land for educational purposes, Portobello High School was built.

Although a private act of parliament was an effective tool to overcome issues of inalienability, it was an inefficient and resource-intensive route to take, and highlights why Common Good governance requires modernisation.

⁴ www.legislation.gov.uk/ukpga/1994/39/section/15 From the Local Government etc. (Scotland) Act 1994, which replaced Regional Authorities with the current Unitary Local Authorities.

⁵ CLES Report

What about places without Common Good?

As the last Royal Burgh Charter was granted in 1700, there are a number of large Scottish towns with no Common Good assets: settlements that developed during the industrial revolution, and the five post-war New Towns, have no Common Good despite being some of the largest population centres in the country.

However, they do all have property that could, or would, be considered Common Good if they had been burghs – town halls, council chambers or other civic buildings, parks and greenspace. But creating new Common Good – and enabling former burghs to rebuild and expand their Common Good portfolios – would require new legislation. It would also need to be much clearer what the modern purpose and benefits of Common Good assets are.

Next Steps

The Scottish Land Commission has commissioned initial research exploring options to achieve greater benefit from the Common Good (see [CLEES Report](#)). Building on that work we will be investigating three areas over the coming months:

- The purpose of Common Good, and whether the concept could or should be applied beyond historic burghs
- Whether there is a need for new legislation, and if so what other opportunities this option presents
- The development of a protocol to help promote understanding of, and good practice in, Common Good management.

We will continue to engage closely with local authorities and stakeholders as this work develops.



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