COMMON GOOD AND THE LAW

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What is Common Good?

The common good is a fund of money or assets administered by a Scottish local authority in respect of each former burgh within the area of the local authority.

Common good is owned by the local authority although it is administered separately from other local authority funds for accounting purposes. Ownership is absolute in the strict sense that the authority holds legal title to it. However what the authority can do with the property is subject to a system of statutory control. This control has the potential to limit the extent to which the authority can dispose of or deal with the property and on what terms.

Some notion of common good has existed since at least the middle ages. Most common good is in the form of land although some common good property could be in the form of assets other than land. In one old case a set of books by a local historian was said to be part of the common good. However for the purposes of today, land is what we are about as it is by far the most common form of common good property.

Identifying what is and what is not part of the common good is not always easy and has been the subject of much litigation.

Common good is not owned by the community nor is it held in trust for the community. It is not owned by the Community Council nor does the Community Council enjoy any special legal status in relation to decisions made in relation to common good land.

Ownership and trust are legal concepts and there is no doubt that common good land is owned by the local authority albeit that ownership is subject to legal restriction. Common good land can be sold even if at some point in the dim and distant past the donor of the land declared that it could never be sold. We will look at more of this later.

Broadly speaking common good is a fund of money and assets, formerly owned by the burgh, and now owned by the relevant Scottish unitary local authority. The fund is in turn administered under rules both in relation to the interests of the people who live in the former burgh and in relation to the disposal of the common good.

Common good can include former burgh buildings, common land, gifts and essentially any property which is administered as part of the common good.

Statutory Framework

There has been some form of statutory control of the common good since at least the end of the 15th century. The first piece of legislation was the Common Good Act 1491. More modern controls came in the 19th century under the then prevailing local government legislation and many of the leading cases on common good were decided under the 19th century statutory frame work.

The modern statutory frame work is contained in the Local Government (Scotland) Act 1973. This abolished the old burgh system, county councils, and district councils and so on. A two tier system of government was set up consisting of district and regional councils. Of course as a result of further reforms under the Local Government etc (Scotland) Act 1994 the regional councils have been abolished and local authorities are now entirely unitary.

Under section 222 (2) of the 1973 Act the Secretary of State had power to transfer property held as part of the common good to islands or district councils. Separate provision was made for the cities of Aberdeen, Dundee, Edinburgh and Glasgow. The detail of the transfer is contained in the Local Authorities (Property Etc) (Scotland) (Order) 1975.

There may be properties that could be said to form part of the common good which did not transfer to district councils under section 222 (2) and the Order such as former reservoirs of burghs transferred to the Water Boards or Harbours. The former are now in the hand of Scottish Water and the latter were the responsibility of regional councils. In the event of dispute the wording of the Order would need close interpretation.

Note also section 15(4) of the 1994 Act which provides that "in administering the funds the Council must have regard to the interests of the inhabitants of the area to which the common good formerly relates." Have regard to is not the same as "obliged to follow".

Disposal of Common Good Land

The main problem that arose as a result of the 1973 legislation was what to do with the disposal of common good land. Very few cases had been decided between 1947 (when local government law had last been reformed in Scotland) and 1973.

The current law is found in section 75 of the 1973 Act. This provides:

s 75 Disposal, etc., of land forming part of the common good.

(1) The provisions of this Part of this Act with respect to the ***appropriation*** *or* ***disposal*** *of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which land no question arises as to the right of the authority to* ***alienate****.*

(2) Where a local authority desire to dispose of land forming part of

the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.

(3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used for the same purpose for which the former land was used.

The effect of section 75 (1) is to enable a local authority to appropriate land into the common good but not to acquire it for a common good purpose. It is therefore at least possible for a local authority to increase the common good land holding even although the old burgh system under which common good developed no longer exists.

Equally the provisions of section 74 regarding disposal of land apply to common good land where no question arises as to the right of the local authority to alienate that land. It provides:

s 74 Disposal of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.

Section 74 allows a local authority to dispose of land held by it in any manner it wishes except that without the consent of the Scottish Ministers, it cannot dispose of land for a consideration which is less than the best consideration that could be reasonably obtained. Accordingly where no question arises as to the right of an authority to alienate common good land it is disposed of under section 74.

Inalienable Common Good Land

The most commonly questions asked in a common good case is whether the land in question is indeed common good and if it is whether it can be alienated-that is disposed of. Not all common good land has the legal quality of "inalienability". If it does then a

question will arise as to whether and on what terms it can be disposed of. It is not always clear if the property has this quality and it has not been unknown for a local authority to go to court to have this point clarified and then if needs be to try to get court authority for disposal. Often the issue will turn on the origin of the fund or land in question and whether there was any restriction placed on the future disposal of the land. Sometimes this will be clear e.g. from a clear declaration by the donating party e.g. "Shall in all time coming be used as a park and place of recreation…." -but that is not always so.

In legal terms this means either does the land form part of the common good of the burgh or is it subject to some kind of prohibition or restriction on alienation as a result of being part of the common good?

The starting point might be thought to be simple. In the case of Ruthin Castle (**Magistrates of Banff v Ruthin Castle Ltd** 1944 SLT 373), the Inner House of the Court of Session stated that all land classed as burgh land was part of the common good subject to defined exceptions.

These exceptions were special trusts or gifts with specific anti-common good purposes and property acquired under statute for statutory purposes. There is also a third possible exception that is land dedicated to statutory purposes since the time of original acquisition. That is a fairly rare situation and I will not dwell on it today.

Let us look at the other two exceptions in more detail.

The first exclusion is property which the burghs held as trustees for "any charity, foundation or mortification" as defined by section 97 of the Town Councils (Scotland) Act 1900. Where such trusts do exist they will be fairly well defined and established as separate entities administered by the council as trusts.

The next exception might be called the statutory powers or purposes exemption.

All of the judges in the **Ruthin Castle** case seem to have been of the view that such land was not part of the common good. The problem is of course that nowadays really all land is held by local authorities under statutory powers- and in general under section 74 of the 1973 Act- although there are other statutes.

Throughout the 19th century with the advent of the industrial revolution the burghs took on increasing power to regulate all sorts of matters which hitherto would not have been for them for example cleansing, markets, slaughter houses, fire stations, pleasure grounds, public baths and so on.

Prima facie land acquired for purposes under 19th century legislation will be an exception to common good.

The position is not always as straightforward as that though. There could be a type of statutory purpose which could be said also to be a common good purpose such as the

provision of public recreation spaces and there the issue might be whether the property had fallen into that public use rather than having been specifically acquired under a statutory of power for that purpose.

The title deed for the property itself will not always make it clear what the position is and much digging might have to be done through other old records.

What does all of this come to mean?

Broadly speaking the case law is to the effect that all burgh property forms part of the common good subject to certain exceptions. Land held in special trust is something of a rarity, but the exception relating to land acquired for statutory purposes will often in fact take quite a lot of burgh land out of the picture as far as common good is concerned particularly land acquired from the middle of the 19th century onwards.

Appropriate, Alienation and Disposal of Common Good Land

Let us look at section 75 again. You will see that the three words in bold type relate to what a local authority might want to do with land.

Although they seem to be used interchangeably they mean different things and the words must be understood.

Alienation does not necessarily mean outright disposal. It could for example mean a 10 year lease (**Murray v Magistrates of Forfar** (1893) 1 SLT 109).

Appropriation on the other hand has its own section in the 1973 Act. Under section 73 the local authority may appropriate for the purpose of any function whether statutory or otherwise land vested in it for the purpose of any other such function. Broadly speaking appropriation means that a local authority can use common good for another function where this does not involve a transfer out of its ownership.

Disposal is covered under section 74 and a local authority can dispose of land held by it in any manner it wishes subject to the best consideration requirements.

Disposal is not defined in the Act but it is freely used in other statutes and really means a transfer out of the hands of the local authority whether by means of sale, lease or something that gives a third party rights of occupation.

It is clear from the case of **East Lothian District Council v National Coal Board** 1982 SLT 460 that disposal includes lease as well as sale and accordingly if a local authority wishes to sell a common good property or to lease it for any substantial period then sections 75 (1) and (2) come into effect.

Demolition?

Is demolition disposal?

In **Crawford v Magistrates of Paisley** (1870) 8M 693 the Court of Session held that the demolition of a steeple belonging to the burgh for the purpose of road widening was alienation. Mr Crawford obtained an interdict preventing the burgh from carrying out the demolition but because there was evidence that the building was a danger to life and property that interdict was lifted by the Court of Session. This old case was quoted with approval in **Waddell v Stewartry District Council** 1977 SLT (Notes) 35. So it seems that a demolition is alienation at least.

It is less clear whether it is a disposal which would of course bring into effect the issue of whether the property, once demolished, could be disposed of. In most cases the authority may well wish to dispose of what is left of the property and accordingly a question might arise as to whether the authority was entitled to do so.

Appropriations/Alienations Falling Short of Disposal

Can a local authority do something in relation to common good property which is neither an appropriation nor alienation and is not disposal either? Arguably yes.

There was some authority from the 19th century (**Grahame v Magistrates of Kirkcaldy** 1879 6R 1066) and **Paterson v Magistrates of St Andrews** (1881 8R (HL) 117) which supports the view that in some circumstances this situation could arise.

The issue has arisen again in a modern context as a result of Public/Private Partnership arrangements.

There is not yet much authority in this point but the case of **South Lanarkshire Council Petitioners** (11 August 2004) from the Inner House of the Court of Session suggests that a PPP arrangement may not be a disposal. In that case proposal was to use part of a public park in Hamilton gifted by the Duke of Hamilton to the then burgh as a new secondary school. A PPP mechanism was to be used.

The Inner House considered that as the land would be leased to a private sector partner but would then be sub-leased back to the council; the land would remain in community use albeit in a different use other than the then use of recreation; that there was no commercial purpose involved; no land was in fact being sold off and that section 75 had been drafted long before PPP had existed, so no disposal arose and accordingly the provisions of section 75 did not come in to play. There is at least one other case to similar effect **North Lanarkshire Council, Petitioners,** (7 October 2005) (Lord Drummond Young).

In such a situation the council might also want to consider section 20 (1) of the Local Government in Scotland Act 2003 which gives power to a local authority to do anything which it considers will be likely to promote the well-being of its area or persons within that area or either of those purposes. Although this does not cut across the control on

disposal of common good land it may help a local authority in a situation where it is not clear if land is truly part of the common good.

When Does a Question Arise under section 75(2)?

The types of land and property which could give rise to a question as to the right of the local authority to alienate or dispose of them falls into certain broad categories although these categories are not closed. Where there has already been judicial consideration of the land in question the court will give weight to any previous interpretation on whether the land forms part of the common good which could not be alienated without the consent of the court. Even so as Lord Maxwell pointed out in the **East Lothian Coal Board** case the modern court still has a clear discretion to determine matters even if previous case law seems to have put the matter beyond question.

Where the burgh's title to land contains words of a grant which appear to give it a character of common good a question is likely to arise as to the right of the authority to alienate the land. So for example words such as "a gift to be used for the general purposes of the town" could give rise to a question as in **Fife Council, Petitioners,** (Kirkcaldy Sheriff Court 25 July 2001).

Where there has been a public building or area of land which has a public purpose then the question is likely to arise even if a replacement can be found. That was the situation in **Cockenzie and Port Seton Community Council v East Lothian District Council,** 1997 SLT 81. Another example is where there has been use from time immemorial by the public.

When Does a Question Not Arise?

There are a number of categories of cases.

The first is where land has no public use whatsoever as was held by **North East Fife District Council, Petitioners,** (Cupar Sheriff Court 1 March 1991). The area of land there was a pond in which newts lived and local objectors did not wish the newts to be disturbed. The sheriff was not satisfied that the land was held for a public purpose such that it was inalienable.

Another category is where there is a proposed disposal of land which has already been the subject of case law and the facts and circumstances remain the same. A previous judicial decision is likely to determine whether the land is or is not capable of being alienated without a court order.

Where the original purpose of the land or buildings has disappeared then a question may not arise or where the land and buildings have existed but public use has been interrupted for a substantial period of time a question may not arise.

Factors in Allowing Disposal

If a question does arise as to whether the local authority can alienate a piece of ground or dispose of it what factors will the court look at in deciding whether to grant or refuse such a request?

Again there are a number of cases which flag up possible considerations.

The first one is neglect. Broadly speaking where it can be shown that land has been neglected because of the failure of the local authority to maintain it and then the authority seeks to dispose of the land because of the state it is in the court may well look with disfavour on such a proposal. So for example in the **Grahame** case the failure of the local authority to maintain a drying green in a situation where they wished to build stables for police horses was held to be a situation where the authority were not entitled to rely on their own neglect.

More recently in **Stirling District Council, Petitioners**, (19 May 2000) a museum hall in Bridge of Allan which had originally been in the hands of a trust but later came into local authority ownership in 1950 was the subject of consideration. The court found there had been a consistent failure to maintain the building during that time. In that case however neglect had not solely been due to the actions of the local authority. Had the neglect been only due to the failures of the local authority then the implication of the case is that the petition for disposal of the property would have been refused.

Slightly different was the situation where a local authority prioritises funding. The case of **Motherwell District Council, Petitioners,** 1988 GWD 15-666 suggests that where a local authority prioritises funding to the extent that common good land becomes derelict because funds which could be used to maintain it are diverted elsewhere then that will not necessarily mean that the local authority can be accused of benefiting from its own neglect. The approach in the **Stirling** case seems to be more about apportioning blame but in the **Motherwell** case the court seems to have been more concerned with establishing what was in the interests of the community as a whole.

Balance of Convenience to the Burgh Residents

In **Kirkcaldy District Council v Burntisland Community Council**, 1993 SLT 753 the council wished to dispose of a caravan park which had been bought as part of a estate of land in 1907 by the then burgh. It was to be used for recreation grounds and other municipal purposes. Basically the site was used less and less and ultimately the local authority wished to get authority to dispose of the land to British Alcan, then the largest employer in Burntisland. In that case the court seemed to take the view that there was a clear benefit to the community from the disposal and this suggests that where such an

obvious benefit exists the court is likely to be minded to authorise disposal subject of course to the financial benefit being translated into the common good fund to the area.

This is to be contrasted with cases where there is no clear benefit. This arose in **West Dunbartonshire Council v Harvie,** 1997 SLT 979.

This concerned an area of ground in the centre of Dumbarton known as Dumbarton Common which had been used for public recreation for many years. A sports centre had been built on the common as well as a children's playground and there was a public footpath across it.

In 1995 the council entered into missives with the Secretary of State for Scotland to build a new Sheriff Court to replace the existing courthouse which was no longer fit for purpose. The site extended to 1.44 acres out of a total of 12.84 acres. Local residents opposed the petition to dispose of this common good land.

The Court of Session judge who heard the case held that the consent should not be given and his decision was confirmed on appeal. Broadly the court was not convinced that there was any clear benefit to locating the Sheriff Court on the site in question although it was accepted that Dumbarton should have a Sheriff Court. That was a question of location. Of importance to common good activists was the view that the existing recreational purposes were not of a minor nature or value. Even although all existing facilities could be reallocated or realigned the argument which impressed the court was that this was the only public park in Dumbarton town centre and was a "green lung" for the centre of the town.

There are some lessons from this case for all sides.

One weakness in the case for the council was that the Scottish Secretary was not served with the court papers and so did not enter the action to make his views known. There was a lack of information before the court on the question of justification.

The issue of benefit was also less clear cut in this case than in the **Burntisland** case. There was no suggestion in the **Dumbarton** case that there would be a major loss of jobs if the Sheriff Court house could not be located at the site.

What is clear is that for parties arguing one of these cases it is necessary to present the court with as much information as possible when it is asked to examine the benefits or otherwise of a particular proposal.

Going to Court in a Common Good Case

Section 75 of the 1973 Act allows the local authority to petition either the Court of Session of the Sheriff Court to get authority to dispose of common good land.

The local authority has a choice. Court of Session proceedings are expensive compared to Sheriff Court proceedings as a general rule. If the case is of particular importance the local authority may wish to go to the Court of Session. A hearing in the local Sheriff Court might at least carry the advantage in that the sheriff may well be someone who knows the area and may live locally. On the other hand common good law is complicated and very few sheriffs will know much about it and there may be an argument for going to the Court of Session. Court of Session proceedings are slow though.

Cases concerning common good may come up other than under a section 75 petition. For example if there is doubt as to whether what is proposed is a disposal the council may wish to raise an action known as a declarator to establish whether the land is common good at all and/or whether the authority of the court is required to dispose of it.

Objectors have sometimes tried different procedures. For example in the **Waddell** case an objector obtained an interdict to prevent disposal of land and in the **Cockenzie and Port Seton Community Council** case judicial review in the Court of Session was used by the Community Council to try to argue that the disposal of land was unreasonable and unlawful because no section 75 petition had been raised. There are however real procedural and other difficulties with going down that route. The court is not likely to hold that a local authority has acted unlawfully or unreasonably in judicial review proceedings because of the wide discretion afforded to a local authority in this type of court procedure and the choice as to whether to go down the section 75 route or to forge ahead and risk challenge.

On the assumption that the matter comes to court through a section 75 petition it is likely that the local authority will advertise it in a local newspaper and this will give at least members of the community a chance to know of the proposed disposal. There is however no obligation on the part of the local authority to consult with the community before considering disposal of common good land. There might be an exception where the authority is given an express promise of consultation.

Even if there is no obligation to consult there may be an advantage to a local authority in doing this as it will make it easier for it to persuade the court that it has at least listened to all relevant sections of the community before proceeding.

If a common good petition is to be opposed then objectors must bear a number of things in mind.

First, the Scottish courts generally do not allow actions to be run in name of pressure groups. Accordingly it will not in general be competent for a group of activists to defend a common good petition in the name of that group. Any defence would have to be in the name of individual parties. The problem here is that that this may expose individual persons to liability for expenses if their opposition is unsuccessful.

An exception exists in relation to community councils. A community council would probably have the right to defend a petition and the liability for expenses would fall on the community council rather than on individual members.

Accordingly it can be difficult to find someone who is prepared to put their "head on the block". Legal aid is in general not available for common good matters because the Scottish Legal Aid Board takes the view that an individual citizen defending a petition is doing so in the interests of all persons in the community and accordingly it is reasonable to expect them to seek funding from the community.

Assuming someone who wants to defend the petition can be found the next stage is for written answers to be lodged with the court and thereafter the court usually appoints a lawyer known as a "reporter" to investigate the facts and circumstances surrounding the petition. It is usually hoped that this procedure will help reduce the costs of the proceedings and will avoid the need for a long and complicated hearing at which witnesses are led and examined.

If this procedure is followed parties will be given an opportunity to make submissions on the report and on the case generally before the court makes a decision.

Any decision made by the sheriff is capable of appeal to the Court of Session and any decision made by one judge in the Court of Session is capable of being appealed to three other judges in the Inner House of the Court of Session.

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