



SCOTTISH LAND COMMISSION
COIMISEAN FEARAINN NA H-ALBA

DELIVERING GREATER BENEFIT FROM COMMON GOOD LAND AND BUILDINGS

A report to the Scottish Land Commission
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Contents

1	Introduction	4
1.1	About this report.....	4
1.2	Approach.....	4
2	Literature Review	6
2.1	Context and background.....	6
2.2	Issues	8
3	Practice Review	12
3.1	Context	12
3.2	Establishing a Common Good register	12
3.3	Community Consultation	13
3.4	Defining Common Good.....	15
4	Opportunities.....	17
4.1	Discussion	17
4.2	Option 1 – Abolish the Common Good.	18
4.3	Option 2 – ‘Community Empowerment approach’	19
4.4	Option 3 – A new Common Good (Scotland) Act	20
4.5	Options	22
4.6	Conclusion	22
5	Bibliography	24

1 Introduction

1.1 About this report

This research was conducted by the Centre for Local Economic Strategies (CLES) on behalf of the Scottish Land Commission (SLC) to investigate the potential for Common Good land and buildings in Scotland to deliver greater public benefit.

The SLC was established in April 2017 to provide direction, leadership and strategic thought to land reform in Scotland. The purpose of this report is to aid the SLC in developing strategic policy on how best to advance the diversity, accountability, and productivity of Common Good land and property assets. Within this, the overarching aims of this paper are to:

- provide a basis for informed public debate on the key issues; and
- inform the SLC's longer term research priorities in this area.

This report is written for citizens, policymakers, and activists who are interesting in making sure that Common Good assets are better utilised to help achieve social, economic, and environmental justice in Scotland.

1.2 Approach

The approach to this research included a number of key steps.

Firstly, a Research Framework was established in order to scope out the key questions necessary to drive strategic policy interventions:

- Context: What is the historical basis for the maturation of the legal, social, and cultural approaches taken by local and national government to Common Good land and buildings in Scotland?
- Issues: With the context in mind, what are the main issues facing local authorities in managing and governing Common Good assets today?
- Definitions: What are the major barriers to providing a clear statutory definition of Common Good land and buildings, with specific regard to the legal debate on the differentiation between alienable and inalienable rights?
- Ownership: What are the current ownership structures of individual assets of Common Good land and buildings, and how do different models of ownership across Scotland impact the social and environmental value of the asset?
- Opportunities: What is the potential social and economic value of Common Good land and buildings for communities across Scotland? How can local authorities develop a comprehensive ownership and management structure for these assets in ways that will maximise the productivity, diversity, and accountability of these assets for all citizens?

These questions were applied to in two stages. First, a literature review was conducted to analyse the key academic and 'grey' literature on the state of Common Good land in Scotland. Second, a practice review was conducted. This involved conducting desk-based research on how Scottish local authorities are managing Common Good land and buildings on the ground, for example by surveying Written Submissions to the Scottish Government's Local Government and Communities Committee in February 2017. Phone interviews were also held with a range of stakeholders from the Scottish Parliament and local authorities, as well as community representatives.

Finally, the two reviews were brought together to shape a series of strategic policy directions for the SLC to consider. These have also drawn on CLES' decades of experience in place-based economic development, offering a series of 'first steps' that could help unlock the social, economic, and environmental potential of Common Good land and buildings.

2 Literature Review

2.1 Context and background

This section briefly describes the historic background of Common Good ownership and management, covering key definitions, and paying particular regard to the changes occurring between the implementation of the Local Government (Scotland) Act 1973 to the present. The review then moves on to a discussion of the issues surrounding Common Good assets, including management issues, legal imprecision and financial mismanagement.

In recent years, the Scottish Government has recognised that the people of Scotland are ‘not getting the best from our land’.¹ The report of the Land Reform Review Group (2014, 74) notes that this particularly applies to Common Good land and assets, and suggests that there has been a steady erosion in the social, cultural, and economic status of the common good in recent years. Since before the Common Good Act of 1491, Common Good assets have played an important role in the civic and cultural life of local communities, however, over subsequent centuries their status has been degraded and many Common Good assets have been lost.

The ‘Common Good’ is an ancient concept with a very long tradition in Scotland, stretching back to the creation of **burghs** by Medieval Kings (Ferguson, 2013: 3). Common Good Funds represent a ‘substantial portfolio of land, property and investments and by law continue to exist for the common good of the inhabitants of the former burghs’ (Wightman and Perman, 2005: 4). The Common Good Act 1491 remains in force in Scots law as part of the current legislation governing these common lands, however subsequent legislation has impacted upon management and usage of Common Good land and funds.

Definition: burghs

Ferguson (2013, 3-4) defines **burghs** as ‘an attempt to stimulate trade in a particular area by granting a settlement certain powers so that economic activity was channelled and focused on that area.’ Customs and duties which flowed into the burgh would become part of a central general fund, known as the Common Good, which was ‘held on behalf of the inhabitants of the burgh’ alongside any land held in the Burgh Charter. Some original examples of their use were for municipal buildings, and other land was set aside for recreational use, ‘the most common being links which were left as open space for the playing of golf.’

¹ ‘Getting the best from our land – A land use strategy for Scotland’ (SG, 2011) Op. cit pg.8

During the 18th and 19th centuries, many burgh councils were insolvent or heavily in debt and thus began to permanently dispose of burgh land in order to raise revenue (Bartos, 2012: 1). The General Report of the Commissioners Appointed to Inquire into the State of Municipal Corporations in Scotland (published in 1835) revealed 'the sorry state into which municipal administration within Scotland had fallen and in particular the diminution of Common Good land as a result (Bartos, 2012: 2).

Indeed, it was these financial concerns of a burgh which triggered what still 'represents the leading case on Common Good': *Sanderson v Lees* (1859) which made a clear distinction between **alienable** and **inalienable** Common Good. This case was brought after Musselburgh Burgh Council allowed private building work on common good land (Bartos, 2012: 2).

Definitions

Ferguson (2013, 7) suggests that while **alienation** is 'a slightly more difficult concept to pin down', in a Common Good context 'it means that the local authority propose to cede control of a piece of land, on a permanent or semi-permanent basis, in such a way that its public use will be lost or at least temporarily disrupted.' **Inalienable** common good land cannot be disposed of or appropriated by the local authority for other uses.

The Local Government (Scotland) Act 1973 brought an end to the burghs, by abolishing the town councils which had been responsible for them. Town councils' Common Good assets were transferred to the new district or islands councils and then, in 1996, to the current unitary local authorities (Scottish Parliament, 2017).

The 1973 Act also set out what local authorities can do with Common Good land; it allows authorities to **dispose** of or **appropriate** for another use Common Good land which is alienable.

Wightman and Perman (2005: 13) argue that while Common Good assets had been 'reasonably well understood prior to 1975', this 'rapidly disappeared' with the further reorganisation of local government in 1996 'as institutional memory faded, and personnel and administrative systems changed.'

The tensions that this depleting lack of understanding raised can be best demonstrated in the case of Portobello Park. In 2012, Edinburgh City Council proposed to use Portobello Park as the site for the new Portobello High School. This decision was challenged by a local residents' association, and the Inner House of the Court of Session found that 'not only did local authorities have no power to appropriate inalienable Common Good land', but the Courts also had no power to authorise appropriation. However, after a Private Bill was introduced in the Scottish Parliament by Edinburgh City

Council, which allowed them to appropriate the land for educational purposes, Portobello High School was built (McKinlay, 2014).

The Community Empowerment Act (Scotland) 2015 helps to empower community bodies through the ownership or control of land and buildings, and places new duties on local authorities in relation to Common Good property. Authorities now have to 'create and maintain a publicly available list of all their Common Good property' (Scottish Community Development Centre, 2015: 15). It also requires local authorities to publish their proposals and consult community bodies before disposing of or changing the use of Common Good assets (Community Councils, 2015).

Definitions

Ferguson (2013, 7) defines **disposal** as 'selling or leasing the land to a third party. Short term leases are included; and case law has also found that some other actions, and particularly demolition, also constitute a disposal.'

Appropriation is when the local authority uses the land for something other than its current purpose. In the case of Portobello Park in Edinburgh, the Council proposed to use some of the park land to build a school. This was 'generally recognised to be a proposed appropriation from its current common good use, to an education purpose' Ferguson (2013, 7).

2.2 Issues

The reasons for the declining status of Common Good land are varied, yet the LRRG (2014, 76) identified that the fundamental issue is that the legal framework governing Common Good is 'archaic and not fit for purpose.' The LRRG (2014) also suggests that the archaic nature of Scots law with regards to the Common Good has meant that the debate has been clouded by hundreds of years of disagreement, administrative change, and evolving socio-economic contexts and landscapes. The legal framework applied to the management and governance of Common Good assets has often lagged behind the practical ways in which the land and concept has been utilised by real people, and this has created conditions of confusion, inertia, and hesitancy. This has particularly been the case in recent decades, in which there have been substantive and often contradictory changes to the approach of the Scottish Government to Common Good land and assets.

The confusion about the status of Common Good land and assets in Scotland means that the sense that Scotland is 'not getting the most' from its assets is pervasive at all levels, from both national and local government down to individual citizens (Wightman & Perman, 2005, 13). The Scottish public and state are therefore a long way from having

the adequate knowledge to make the most of their long-standing heritage, and within this there are a number of critical issues:

2.2.1 Poor record-keeping

It is clear that local authorities across Scotland lack knowledge of Common Good assets in two related areas. Firstly, local authorities often do not know whether land and assets they own are classified as Common Good, and within this there is further confusion about the *type* of Common Good asset something might be, for example alienable or inalienable.

Wightman & Perman (2005, 13) note that the numerous occasions throughout the twentieth century in which responsibility for Common Good assets have changed hands means that 'institutional memory...has been lost'. In practice, knowledge of these assets has been inadequately passed on from burgh, to town council, to district councils, and on to local authorities since 1996.

The practice of local burghs keeping assiduous records began to decline as early as the 1830s, meaning that by 1996 local authorities took control of common good assets with insufficient registers on the Common Good assets in their local area. The LRRG (2014, 76) found that out of the 197 original burghs (analogous with the respective town councils wound up in 1975), 54 reported no Common Good assets. However, since all burghs formerly held such assets, these findings were likely due to town council's and their successor's keeping insufficient records rather than having no assets in the first place. These findings were reflected in the work of Wightman & Perman (2005, 15-22), who asked for records on Common Good funds and assets from all 32 Scottish Councils. They found that, although a few councils kept adequate records, in general the 'standard of record keeping means that it is impossible for Councillors...to properly discharge their fiduciary duties.' In other words, local authorities had so little understanding of what Common Good assets they were meant to be holding, that it was 'impossible' to provide even the most basic answers to the survey, let alone develop comprehensive strategies for how said assets could help deliver good social, environmental, and economic outcomes for local citizens.

2.2.2 Legal imprecision

Why has record keeping been so difficult with regards to Common Good assets? It is evident that the lack of legal clarity regarding what constitutes a Common Good asset has made it difficult for Council's to keep adequate records. In Wightman and Perman's (2005, 15-22) study, the fact that some Council's replied that they held zero Common Good assets (when this is clearly not the case) implies that many Council's suffer from confusion over the terminology.

Furthermore, even once it has been established whether an asset is held under Common Good or not, there is further confusion; especially regarding whether said asset is held as alienable or inalienable by the council. Neil (2017, 3) notes that the distinction between alienable or inalienable assets in Scots Law is relevant in understanding the legal status of a common good asset. The 1835 Commission appointed to enquire into the state of Municipal Corporations in Scotland found that ‘alienable’ assets referred to houses, mills, fishing, feu-duties and other descriptions of heritage, whereas properties ‘not usually alienable’ consisted of churches, town halls, market places and common greens or ground set apart for the general use or enjoyment of the inhabitants.’ Neil (2017, 3) suggests that the distinction set out in the original 1835 is still instructive today.

Whether an asset could be considered alienable or inalienable has significant ramifications its status within Scots Law (Ferguson 2013, 2). Local authorities cannot grant a valid disposal or lease of buildings that (1) form part of the common good and (2) which are considered to be ‘inalienable’ unless authority has been obtained from a court under section 75 of the Local Government (Scotland) Act. Whereas, if assets are alienable, a local authority can dispose of or appropriate this land for other use.

2.2.3 Management and usage

Legal imprecision has also had a detrimental effect on the management of Common Good land and assets, with Miller (2018) noting that prior to the Community Empowerment Act (2015), there was no stated provision for local authorities to maintain Common Good land to ‘any particular standard’, other than the vague formulation of using such assets ‘for the good of the residents of the former burgh.’ This has meant that the statutory responsibilities of a local authority have been hard to pin down, and oftentimes has failed to keep up with the changing socio-economic circumstances of the communities such assets are meant to serve. For example, there are many cases of developments around environmental sustainability. Miller (2018) gives the example of *East Lothian District Council v National Coal Board* as one such case, wherein a local authority was given permission to develop a new school on an area of wildlife preservation, despite local resident’s desire to see the local land preserved. It could be argued that this case reflects the extent to which current Common Good law is prejudiced in favour of more traditional interpretations of ‘the Common Good’, for example prioritising economic over environmental concerns.

2.2.4 Lack of transparency

Poor record-keeping and legal imprecision on the part of local authorities has created a situation in which ordinary citizens feel disempowered and disconnected from assets to which they themselves arguably own.

The Scottish Government has sought to redress these issues through the provisions of the Community Empowerment (Scotland) Act (2015), which mandates local authorities to keep and maintain a register of all Common Good land and assets. Some Scottish local authorities have taken positive steps as a consequence of this Act, for example Fife Council have implemented this directive by creating an online map of all Common Good land and assets held under its authority.² Along with the development of the Scottish Government's Open Data Strategy (2015), it is clear that since 2015 there is a new focus on the registration and record-keeping of Common Good land and assets. Despite this, Gianna (2017) notes that Fife Council's proactive approach is atypical for the vast majority of Scottish local authorities, most of which are yet to take adequate steps in this direction. For example, some local authorities have no public information at all on the status of its Common Good assets.

2.2.5 Financial mismanagement

Poor record-keeping, legal imprecision, and a lack of transparency are conditions in which it is relatively easy for financial mismanagement (or even outright corruption) to go unchecked. Wightman & Perman (2005, 15) suggest that the data held by Scottish councils often displayed a 'worrying incompatibility between property records and financial accounts' with regard to Common Good land and assets. This has led to the mismanagement of Common Good assets, for example local authorities using revenue generated from the sale of Common Good assets to fund other council activities, which could be illegal if the assets in question have alienable status.

For example, over £50 million pounds was raised by South Lanarkshire Council through the sale of land held by the Hamilton Common Good Fund. Wightman and Perman (2005, 22) note that this activity could be considered illegal under the historic precedent of Scots law, in which the value produced from Common Good assets does not belong to a local authority in and of itself, but instead is considered to be held by such an authority on behalf of local citizens. In this case, the value from any sales should have been retained by the Hamilton Common Good Fund, rather than South Lanarkshire Council as a corporate entity. This raises a series of further questions about the legality of local authorities extracting value from Common Good assets, for example whether a local authority should pay rent into a local Common Good fund if it uses a municipal town hall, which it could be argued are inalienable Common Good assets.

² <https://www.fifedirect.org.uk/topics/index.cfm?fuseaction=service.display&p2sid=E8815CA8-0DE1-E050-B2D097EB5C142FD6>

3 Practice Review

3.1 Context

The purpose of the practice review is to understand the practical realities ‘on the ground’ in the governance, management, and ownership of Common Good land and assets in Scotland. Specifically, the practice review focused on how Scottish local authorities have fared in carrying out the duties imposed by Part 8 of the Community Empowerment (Scotland) Act 2015. The Act contained two direct instructions for local authorities;

- Section 102 places a duty on local authorities to “*establish and maintain a register of property which is held by the authority as part of the Common Good.*”³
- Section 104 places a duty on local authorities that, “*Before taking any decision to dispose of, or change the use of, such [Common Good] property the local authority must publish details about the proposed disposal or, as the case may be, the use to which the authority proposes to put the property.*”⁴

The Scottish Government also published a guidance document offering local authorities’ advice and support on how to carry out this instruction. This included advice on how to establish Common Good registers; how to identify and contact community bodies; and how to consult when planning to dispose of or change the use of Common Good property.⁵

In understanding how Scottish local authorities have interpreted and acted upon these instructions, two concurrent methodological approaches have been deployed. Firstly, the research team looked at local authority websites to see how they have collected a Common Good register (as per the provisions of the Empowerment Act), as well as written evidence submitted to the Scottish Government’s Local Government and Communities Committee in February 2017.⁶ Secondly, a series of short interviews were held with relevant stakeholders who have experience of working for (or with) local authorities in the implementation of Sections 102 and 104 of the Empowerment Act.

3.2 Establishing a Common Good register

The practice review found that local authorities have adopted a variety of different strategies to act on and implement Section 102 of Part 8 of the Empowerment Act. As per the Guidance published by the Scottish Government, local authorities have been

³ Community Empowerment (Scotland) Act 2015, Part 8, Section 102, (1)

⁴ Community Empowerment (Scotland) Act, Part 8, Section 104, (2)

⁵ Scottish Government (2018), Community Empowerment and Common Good Property; Guidance for Local Authorities

⁶ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103491.aspx>

instructed to establish a comprehensive register of all Common Good assets within a local jurisdiction. Crucially, the Empowerment Act also stipulates that local authorities must undertake this process in consultation with local residents and community groups, in order to ensure a transparent and democratic process.

It is clear that the Empowerment Act has prompted Scottish local authorities to put more thought and resource into questions around the Common Good than was previously the case. The exercise of carrying out a register has forced local authorities to *'get to grips'* with the Common Good process, in the words of one interviewee, and that this was *'necessary 'because Common Good was previously an orphan in the local authority- nobody wanted to deal with it.'*⁷ By forcing local authorities to carry out the supposedly simple task of establishing a register, the Empowerment Act has succeeded in bringing a refreshed focus to Common Good land and assets in Scottish local authorities.

In particular, the new focus on Common Good has allowed local authorities to overcome one of the key reasons for their historically poor management of these assets; that Common Good often *'fell through the cracks'* of departmental silos within local authority administrations.⁸ One interviewee at a local authority noted that Common Good issues tended to sit between their local authorities' planning, legal, and assets departments; meaning that none of the three took on adequate responsibility for Common Good as a whole.

The registration process has evidently begun to redress this imbalance by forcing local authorities to clarify the place of the Common Good within internal organisational structures. In particular, it was found that the registration process has been particularly effective in local authorities where an individual officer has been given designated responsibility for carrying out this task. One local authority has created a dedicated post of a Common Good Fund Officer, spreading the cost of creating the post equally across the local committee areas of the local authority.

3.3 Community Consultation

Section 106 of the Empowerment Act refers to the need for local authorities to engage in substantive consultation with *'community bodies'*⁹ in the registration process and beyond. The Guidance document pointed local authorities towards the National

⁷ CLES Interview, March 2019

⁸ CLES Interview, March 2019

⁹ "Community bodies", in relation to a local authority, means bodies, whether or not formally constituted, established for purposes which consist of or include that of promoting or improving the interests of any communities (however described) resident or otherwise present in the area of the local authority. Empowerment Act, Part 8, Section 106

Standards for Community Engagement, a series of good-practice principles designed to support community engagement in Scotland.¹⁰

In relation to the registration process local authorities have taken these instructions in a number of different directions. In some places, community engagement on Common Good has a long-standing history. A number of interviewees suggested that community councils and groups of these kinds actually had *more* knowledge of which assets were or were not Common Good than the local authority, on the grounds that such community groups often predated local authorities and contained individuals with more intimate knowledge of specific plots of Common Good land or buildings. For example, an interviewee described how consultation with a coastal community group had revealed that a set of steps leading down to the beach were in fact Common Good, where the local authority had previously been unaware.

Another example of this was provided by Hawick Callants Club in written submission to the Local Government and Communities Committee in May 2017.¹¹ When the Scottish Border Council (SBC) began the community consultation process, the Callants Club provided a number of corrections and clarifications that helped the Council better clarify the Common Good register. In one case, this involved demonstrating to the Council that a number of possessions donated to the local museum should not be recorded as Moveable Assets because the donors had stipulated that the items were donated to ‘the town’ rather than to the Council; thereby falling under the Common Good.

These examples demonstrate the crucial role community consultation plays in helping local authorities to collect their Common Good register, and of course in ensuring a transparent and democratic process. The Empowerment Act is clearly a stimulus to make this process work even better; for example, once local authorities have a clear register available on their websites, community groups will be better placed to provide comments and clarifications. Yet despite this, it was found that there are a number of unresolved issues within the current community consultation process:

- Consulting with community groups at the ultra-local level can be a resource and time intensive process. One interviewee described the instruction of the Empowerment Act as ‘*almost impossible*’ to implement without significant investment (of which most local authorities do not have access to).
- It was also found that the Guidance published by the Scottish Government was viewed by some local authority officers as ‘*weak*’ in suggesting which ‘community groups’ should be prioritised.

¹⁰ Scottish Government, The National Standards for Community Engagement (2015)

¹¹ http://www.parliament.scot/S5_Local_Gov/Inquiries/20170321_CG_HawickCallants.pdf

- In some cases, there is a lack of trust between community groups and local authorities. Community groups have suggested that some local authorities '*seldom wish to discuss openly Common Good issues*', which demonstrates a lack of trust or good faith in this discussion.¹²

3.4 Defining Common Good

In undertaking the registration and consultation processes, local authorities have sought to redress the confusions about defining what does or not does constitute a Common Good asset.

3.4.1 Management of Common Good Funds

The consequence of imprecision around defining the Common Good means that mismanagement of Common Good assets is rife, specifically with regards to Common Good Funds. A recurrent theme throughout the practice review was a lack of clarity about whether an asset was held under the Common Good. This meant that local authorities and councils often processed finances inappropriately by either taking profits on Common Good assets that should be retained by the fund, or conversely by passing costs on to Common Good Funds that were actually built up by other Council activities.

One example of this is from 2013, when Highland Council was forced to write off £390,000 of "fees" which it had charged to the Nairn Common Good Fund for the mismanagement of Common Good land that had been erroneously declared alienable by the local authority.¹³

3.4.2 Effect on the planning process

The review found that a significant consequence of confusion around defining, managing, and funding projects related to the Common Good is that these assets are often under-utilised in the community planning process. A number of interviewees suggested that Common Good issues were so complicated that planners often '*gave up*' on local planning projects that might take place in Common Good land or buildings, for fear of being caught up in acrimonious and lengthy judicial processes and community consultation.

This is especially the case with regards to the lack of clarity on the distinction between alienable and inalienable assets. One interviewee in particular stressing that their local authority planning department '*tip-toed around Common Good*' in order to

¹² http://www.parliament.scot/S5_Local_Gov/Inquiries/20170320_CG_BrechinCC.pdf

¹³ http://www.parliament.scot/S5_Local_Gov/Inquiries/20170320_CG_NairnResidentsConcernGroup.pdf

avoid having to prove in judicial review that a plot of land was alienable.¹⁴ The interviewee described this in terms of '*wanting to avoid an incident similar to Portobello Park*', a reference to the dispute between Edinburgh City Council and local residents on the Common Good status of Portobello Park.¹⁵ There was a general sense amongst interviewees that this lack of understanding meant planners were less likely to utilise Common Good resources than other Council-held assets, which in turn contributes to the under-utilisation of Common Good assets for socially, economically, and environmentally productive purposes.

¹⁴ CLES Interview, March 2019

¹⁵ City of Edinburgh Council (Portobello Park) Bill

4 Opportunities

4.1 Discussion

If the status of Common Good in Scotland has been in steady decline for decades (or even, centuries), then developments in recent years represent a welcome opportunity to reverse this. It is clear from both the Literature and Practice Reviews that the Scottish Government, local authorities, and local citizens are all now putting more thought into how the Common Good can be updated for the twenty-first century.

Most notably, the statutory requirements of Community Empowerment (Scotland) Act to establish and maintain a register of all Common Good assets in the area is forcing authorities to pay more heed to Common Good. However, creating a baseline inventory should be viewed as a minimum requirement for any transparent public service and significant challenges remain if this process is going to be a success across Scotland.

The Empowerment Act does not offer a strategic discussion and framework for the more fundamental question about whether Common Good is a useful concept in modern Scotland. While the current legislative frame has helped local authorities collect better registers for their assets, engage local communities in deeper consultation, and see the status of Common Good rise back up the agenda; what is missing from this approach is a more strategic, socially-minded analysis of the role of Common Good.

If Common Good is considered to be useful – in that it utilises the productivity of Scottish land and assets in a sustainable and accountable way for the benefit of people and place – then what does a truly modern, progressive form of Common Good look like?

4.1.1 Framing the recommendations

The recommendations are framed by the view that it is vital to go beyond the administrative questions set in motion since the Community Empowerment Act, and instead reassert the predominant role the Common Good can, and should play in ensuring that Scotland's land is productive, sustainable, and transparent.

Asking more fundamental questions about the purpose of the Common Good is also in line with the strategic remit of the Scottish Land Commission, and the wider land reform agenda in Scotland. In particular, the recommendations are framed by the vision for the productive use of Common Good land and assets, as set out by the Land Reform Review Group in 2014:

The Review Group considers that Common Good land should be recognised more clearly as one of Scotland's oldest and most enduring forms of community land ownership, and something which plays an important part in the historic, cultural and economic heritage of Scotland's towns and cities. A reformed system of Common Good Funds would safeguard that heritage, while enabling Common Good lands to play a

*more progressive role in the public interest in urban areas and as part of that, become a valuable part of revitalising community land ownership in urban Scotland.*¹⁶

4.1.2 A spectrum of three approaches to Common Good

Given the context of renewed interest in land reform across Scotland in the second decade of the 21st century, there are three distinct options that could be taken at this juncture.

4.2 Option 1 – Abolish the Common Good.

Somewhat surprisingly, a number of participants interviewed suggested scrapping Common Good as a categorisation entirely. It was reported that the management of Common Good land is potentially hindered due to both a lack of awareness and understanding as to what it is, and also the complicated legal processes that apply to the management of Common Good assets – as the example of the lengthy and costly process to build a school on Edinburgh’s Portobello Park demonstrates. By managing Common Good land and assets in the same way as other local authority land, issues of alienability could be negated, and land could have a more productive use, both for authorities and communities who wish to have more access to assets.

If the reason for Common Good in the first place was to ensure that assets were held in perpetuity for local citizens, then it could be argued that the Community Empowerment Act has set Scotland down a road in which it is no longer necessary to specifically categorise the Common Good as a unique form of classification, given that the intent of the Act is to ensure that every publicly-held asset in Scotland is subject to democratic accountability.

The case for abolition is particularly strong with regards to ensuring the productive usage of Scotland’s land and building assets. The review found that local authority officers (especially in planning departments) are more cautious with utilising Common Good assets than other assets owned by the local authority, which in turn means that these resources do not go as far in providing economic and community development as they could. It is likely that a number of high profile cases (e.g. Portobello Park) have increased the ‘fear-factor’ within local authorities and local communities. As argued by Wightman & Perman:

Most communities (and councils) only wake up to the reality of the situation when faced with a potential sale and there follows a rapid scrambling around to recover something

¹⁶ ‘The Land of Scotland and the Common Good’- Report of the Land Reform Group (SG, 2014)

*of their forgotten history. The fight is fought and then everyone forgets about the topic until the next time.*¹⁷

However, it is likely that the abolition of the Common Good is not the best course of action for Scotland because it would cause the loss of an important legal and cultural tradition that is at the cornerstone of the relationship between the people of Scotland and its land. The principle that assets are held by the community, rather than simply by the state on behalf of the community, is a fundamental one. Thus, Common Good should be updated for modern usage. As one interview described: *“there has to be a compromise that recognises the tradition and the community benefit aspect of the issue but ensures that the principle of the Common Good is maintained.”*

The second key reason that it is not recommended that Common Good should be abolished is that **Common Good can be a useful frame through which the Scottish Government can drive forward the land reform agenda.** As previously stated, ensuring the democratic ownership of land across Scotland has recently become a key priority for the Scottish Government, as enshrined through the provisions of the Community Empowerment Act. Common Good can complement this process because it is in effect a deeply historic version of community-ownership, with deeper roots and centuries of precedent and lessons to be learnt.

4.3 Option 2 – ‘Community Empowerment approach’

The second option is to continue with the work as set out in the Community Empowerment Act of 2015. As found in the Practice Review, the Act provided a statutory responsibility for local authorities to ‘get to grips’ with Common Good, specifically through establishing a register of Common Good assets, and engaging in a long-overdue community consultation.

The review found that progress has indeed been made in these areas, but that local authorities need further guidance and support to intensify their efforts and achieve greater results. This is clearly important, as being aware of what assets are held is useful for both local authorities and community groups and can prevent the assets falling into disrepair.

However, the extent to which local authorities are keeping up with this new requirement varies. Best practice should be shared, building on the guidance provided, with authorities more advanced in their journeys sharing advice and expertise to authority areas which have made less progress in this regard.

¹⁷ Wightman & Perman (2005), pg. 32-33

Similarly, further work should be done around community consultation. Communities hold banks of expert knowledge that run deep and can often be vital wells of information to draw on in registering, and ensuring that all Common Good land and assets are properly recorded.

The review found that areas where registration had been most successful were areas which had appointed a specific Common Good Fund Officer (such as the Highlands). Therefore it is recommended that a permanent post be created in each local authority in order to ensure that Common Good is better managed into the future.

Within Option 2, it is recommended that:

- Resource is provided for each Local Authority to appoint a Common Good Fund Officer. It would be this officer's duty to drive forward the registration and consultation process;
- A national Common Good Best Practice Working Group for Common Good Fund Officer's from Scotland's 32 local authorities is created, to share ideas and lessons;
- A review is undertaken in to the role Common Good Funds could play in economic development in local places; and
- A judicial review of the alienable/inalienable distinction could give local authorities more freedom to utilise Common Good assets in a productive manner, especially if 'inalienability' was abolished as a form of categorisation.

4.4 Option 3 – A new Common Good (Scotland) Act

If Option 2 is followed through, local authorities would be strengthened in their efforts to understand the full scope of Common Good in their localities. This would mean a full register of assets held, democratic mechanisms for the usage and disposal of these assets, and a better grasp of how these assets can be strategically safeguarded and deployed to benefit the community.

However, under this process the Common Good is still inherently a legal anachronism, in that it largely only continues to exist because of the precedent set by the Common Good Act 1491, and it is now too deeply-entrenched to be easily abolished by the Scottish Government. Common Good would continue to be a form of legal categorisation that mainly lives through *inherited* law and practice, rather than one that is an alive and meaningful form of categorisation in the twenty-first century. The story of the Common Good over the long term would arguably still be one of gradual decline, in which communal local resources used to play an important part of Scottish civic and cultural life, but have now been relegated to small plots of land and the resolution of minor, often petty, disputes. Many assets will even continue to be undervalued, underused, and

unaccounted for, on the grounds that local authorities would lack sufficient resource to ever restore the Common Good Funds to their former glory.

Is this the right future for the Common Good in Scotland? To answer this, it is worth going back to the original provision of the Common Good Act 1491. The purpose of the Act at the time was to protect local resources from the corrupt practices of local sheriffs and magistrates. Holding resources *'for the behoof of the community'* was a mechanism to ensure that decisions were taken at the most local level possible, and that communities could exercise democratic power over their own land and buildings. In this sense, Common Good can be seen as the 'original' form of community empowerment in Scotland, in that it has always been a process by which communities can exercise democratic control over the resources and assets that they own.

The original intention of subsequent Common Good law was to protect local communities from the corrupt practices of Burgh Councils and other distant forms of local authority, who might use their statutory powers to take over the control of Common Good lands and assets. The idea was that resources should be accountable to the hyper-local level, with decisions being made on the individual street in a small town, rather than in a remote District or Town Council. Since the 1990s, local authorities have taken on the management of the Common Good, and the Community Empowerment Act 2015 clearly places even more emphasis on the role that local authorities should play. Local authorities can and should play an important role in the management of the Common Good – and the recommendations set out in Option 2 would accentuate the role the local authority can play.

Yet in order to truly restore the vibrancy of the Common Good to people and place across Scotland, it is necessary to go beyond empowering local authorities to exercise more control over these assets, but instead seek ways to ensure that the management, ownership, and governance of the Common Good is redistributed down to the lowest level. This would require a process 'recommoning' the Common Good, in which Scotland returns to the original purpose of the 1491 legislation, and fits it into a modern context.

In order to 'recommon' the Common Good, a **new Common Good (Scotland) Act** should be written; a new statutory framework to modernise Common Good law and replace the original Act of 1491. The purpose of this Act would be to go beyond the local authority focus offered by the Community Empowerment legislation, and instead provide formal mechanisms for the residents of former Burghs to exercise direct democratic control over Common Good assets.

It is recommended that a new **Common Good (Scotland) Act** should include the following provisions;

- an explicit statement that the purpose of the Act is to uphold the concept of the Common Good in accordance with the original Act of 1491, and that the Scottish

Government considers Common Good a legitimate and necessary legal frame through which to make Scotland’s land more productive, accountable, and sustainable;

- provides a clear definition of the Common Good, which should consider the current imprecision on the distinction between alienable and inalienable land;
- gives the residents of former burghs the right to exert control over Common Good assets and Common Good Funds through a local ‘Common Good Council’;

The purpose of the third provision would be to allow residents on a local level to exercise direct control of Common Good assets by effectively restoring the direct control Town Councils held before their abolition in 1975. This would reduce the likelihood of protracted conflicts between the local authority and local residents, and rather than forcing local communities into a long arbitration process, handing the power of ‘recall’ back to the local level would allow communities to exercise clear democratic control.

This would also apply to Common Good Funds. Residents of the former Burghs could, if they so wished, take on the direct management of Common Good Funds from the local authorities. This process would require democratic insight from a combination of community groups and third-party regulators, such as independent charities.

4.5 Options

The table below demonstrates the strength of each of the three options.

	Option 1 - Abolish Common Good	Option 2 - Community Empowerment approach	Option 3 - Common Good Act
Empowers Scottish Government?	✓	✓	✓
Empowers local authorities?		✓	✓
Empowers local citizens?			✓

4.6 Conclusion

This report should function to start a conversation across Scotland about how the Scottish Land Commission can drive forward the Common Good agenda.

The renewed focus on questions of landownership and democratic accountability in Scotland means that Common Good should be leading the way in terms of reform, rather than lagging behind. In the landmark 2014 paper 'The Land of Scotland and the Common Good', the Scottish Government acknowledged that the very purpose of land policy across Scotland should be to provide for the "*Common Good of the people of Scotland*". Common Good (the actual form of categorisation, rather than the abstract concept) should therefore be at the heart of efforts to ensure that Scotland's land and assets work for the people.

This report has set out how this process can be driven forward, arguing that empowering local authorities, through the Community Empowerment Act for example, has been a good start, but that this approach alone is insufficient to the task of making the most from Common Good assets for all. Instead, it is time to 'recommon' the Common Good by developing a comprehensive vision for the role these assets should play in local communities across Scotland. To do so will require both changes at a national level, for example a Common Good Act, but will also require thought and practice at a local level.

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