



Law Society
of Scotland

Consultation Response

Scottish Parliament Call for Evidence
Common Good Property and Funds

March 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Property and Land Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's call for evidence on the law relating to Common Good Property and Fund.¹ The Sub-committee has the following comments to put forward for consideration.

Response to Questions

Q1. Are the common law rules which define common good property adequate?

No. The existing common law rules relating to common good property are not clear.

The two core issues are (1) the definition of common good property and (2) whether common good property is alienable or inalienable.

Definition of common good property

Common good property and funds are not defined in statute. The definition at common law is as follows:

*"...all property of a royal burgh or a burgh barony not acquired under statutory powers or held under special trusts forms part of the common good."*²

While at face value, this may appear to be a relatively simple definition, problems can arise when it comes to practical application.

¹ <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103491.aspx>

² <http://www.gov.scot/Publications/2014/05/2852/298145>

Firstly, it may not be clear if property was acquired for “statutory purposes”. Ascertaining whether this was the case can involve resource-intensive investigations of local history and burgh records. Even where such material is available, it will not necessarily prove conclusive. The title to a particular piece of land will not necessarily specify that it was acquired for such statutory purpose.

Secondly, it is not clear whether, having been appropriated for a statutory purpose for the prescriptive period, the common good classification of a particular piece of land can expire. If so, the relevant local authority ceases to be constrained by the rules pertaining to common good property. So, not only must solicitors investigate whether a property was originally common good property they must also consider whether it remained common good property. Answering both these investigations may be time consuming and difficult and the ultimate answer may not be conclusive under the common law rules.

Again, in relation to creation of a public trust, it is not always clear from the original disposal if such a public trust was intended or not.

Extent of discretion to sell or repurpose

Even when it has been established that property falls within the definition of common good property, a further question requires to be answered: whether the property is alienable or inalienable. In practical terms, this determines whether a local authority requires court consent to dispose of the common good property: only inalienable common good property requires such consent.³

The main case in this respect is *Murray v Magistrates of Forfar* which points to “custom, dedication and direct grant” as the determining factors for inalienable common good property. However, in a practical context, again it may not be clear-cut as to whether any of the conditions required have been or can be satisfied.

This lack of certainty impacts on both local authorities who wish to dispose of property and community groups who may wish to prevent such disposals. On the one hand, such lack of certainty can discourage local authorities from attempting to dispose of land or appropriate it to a particular use in cases where they should in fact be able to exercise discretion as they have limited resources and do not want to spend time on a disposal which could be challenged.

Conversely, where there is community opposition to a particular proposal, it may be difficult to challenge a local authority’s decision as the only option for them may be to bring a judicial review in the Court of Session. If the community cannot assess the success of such a challenge due to the uncertainty surrounding the disposal conditions this may discourage community groups from pursuing a legitimate case.

³ See s75 of the Local Government (Scotland) Act 1973 <http://www.legislation.gov.uk/ukpga/1973/65/section/75>

Q2. Do you think the record keeping of common good property and assets held by local authorities could be improved?

Yes. However, good record keeping requires local authorities to know what records to keep. The lack of certainty around the definition of common property makes it harder for local authorities to know what records are relevant and which are not.

Q3. Is there enough openness and direct engagement with local communities on common good property and funds and the use to which common good property and assets are put?

The Law Society of Scotland believes in openness and effective engagement between all relevant parties when it comes to dealing with all aspect of law and policy. The form and effect of any such engagement would be a matter for local and central government.

Q4. Are details of common good property and assets and income generated by their sale clear and transparent?

Details of common good property and assets and income generated by their sale should be clear and transparent. The form of transparency required is a matter for local and central government.

Q5. Any other issues relating to common good property, assets and funds which you wish to bring to the attention of the Committee?

No.

For further information, please contact:

Carolyn Thurston Smith
Policy team
Law Society of Scotland
DD: 0131 476 8205
policy@lawscot.org.uk