

The Management of Common Good Assets and Funds

Report of Sample Survey of Council Practice

Colin Mair, Chief Executive,
Improvement Service

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Context of the Study

1. The study was occasioned by a number of petitions to the Scottish Parliament expressing concern with treatment of common goods assets and funds by Councils. This has also led to significant correspondence with individual Councils and with Scottish Ministers. The I.S. undertook to explore this matter as part of a broader examination of the management of land and property assets by Scotland's Councils. To put the matter in perspective, in 2006/07 common goods assets were valued at £190 million across Scotland in comparison to total land and property assets valued at around £21 billion.
2. Petitioners have specific issues with the disposition of common goods assets by specific Councils about which we have neither locus or competence to adjudicate. These specific concerns, however, have been seen to raise general issues of the competence, transparency and propriety with which the common good is managed. We have sought to address these matters by a **sample** survey of 8 (25%) of Scotland's Councils. The sample was weighted to reflect scale, urban/rural context and differences in political control. The survey focussed on Councils practice in the management and accounting of the common good. Participating Councils were as follows:

Council	Reference
Glasgow City	1
Edinburgh City	2
Fife 3	
Aberdeenshire	4
South Lanarkshire	5
Highland	6
Midlothian	7
Scottish Borders	8

Returns were received from Councils 1 - 7, inclusive although some were incomplete as they required more time to access the data requested. Scottish Borders Council did not submit a return before the closing date. A summary of the data is appended (Appendix 1).

Background and Legal Context


3. The 'Common Good' evolved historically from grants of land to support the administration of Burghs in the 17th century, through substantial augmentation through Victorian philanthropy (Carnegie libraries, etc), to further substantial augmentation in the last century often, but not always, related to the management of death duties. The typical formula in the last two hundred years has been that fixed or moveable assets were donated 'for the enjoyment of' or 'for the benefit of'; the people of a particular area. Again, typically, the particular area was defined with respect to the **then** local authority boundaries which have been subject to serial reorganisation across the last 100 years.

4. As petitioners to Parliament have noted, this has resulted in a number of issues. The maintenance and transfer of records and assets across sequential local authority reorganisations has been poor, and the precise nature and extent of the common good has become difficult to establish. Although there are serious issues with the accurate identification of fixed assets (land and property), these are in principle more traceable than moveable assets, and resolution of issues arising more practicable. Moveable assets (furniture, books, archives, paintings, etc) are significantly more difficult and even substantial research would be unlikely to establish accurate provenance and current status for all such assets. In many cases, they could have been lost, damaged or destroyed at any point across the last 150 years. Those of substantial importance and value are more likely to have been preserved and protected.
5. The current basis for the common good is provided by the Local Government (Scotland) Act 1973. Succinctly, that provided the common good should not be absorbed into the general fund of Councils (section 93(2)(B)) and this has subsequently been interpreted as a requirement to maintain separate accounts for the common good. The draft guidance issued by LASAAC (September 2007) questions whether that is a necessary or a useful interpretation (see below). The act also provides (Section 75(2)) that where the local authority wishes to dispose of common good assets, and 'a question arises' about their right to do so, they can apply to the Court of Session or the Sheriff for authority to proceed. A number of Councils have done so since reorganisation in 1996.
6. An important precedent was established in 2004, when the Court of Session deemed a petition by South Lanarkshire Council for authority to dispose of common good land to be 'unnecessary'. 'Disposal' under section 75 (2) of the 1973 Act, would only apply if a local community would be **deprived of the benefits** of the land. In other words, 'disposal' is about limiting or denying benefit, not about transfer of title or change of use (both applied in the South Lanarkshire case). This judgement has been treated as precedent in a subsequent judgement on a petition by North Lanarkshire Council which was also deemed 'unnecessary'. The South Lanarkshire judgement included the transfer of use (parkland to school) and transfer of ownership for a time limited period (to a PPP partner) so it would be unlikely that a transfer for continuing use for the same purpose (e.g. land or assets transferred to a leisure trust) would not be within the authority of Councils.
7. These precedent cases reinforce the substantial discretion Councils have with respect to the common good, subject only to conditions of lawfulness, good faith and continued community benefit. The making of continued community benefit the key criterion creates issues of how such continued benefit should be established with, and can be challenged by, the communities affected. The Court of Session judgements simply established that the courts approval was not necessary. They do not establish that community views should not be sought before changing the use or indeed ownership of the common good. The issues of the good governance of the common good, and the openness and transparency with which it is managed, are at the heart of current concerns and petitions, and are discussed further below.

8. The fact is that the 1973 Act makes an essentially negative provision (the common good should not be absorbed into the general fund) rather than a positive one (the common good will be a distinct legal entity with defined governance structures and accountabilities). The balance of case law and precedent does not support the latter interpretation and, indeed, establishes that Councils have almost unlimited discretion to pursue 'lawful purposes' with the common good. However lack of a clear legislative framework means that Councils and the public face uncertainty over precise empowerment and accountabilities. The fact that the uncertainty exists about when a 'question arises' may have lead Councils to a cautious approach of seeking authorisation from the courts, even when unnecessary, where any opposition is identified. This is costly and unproductive.
9. It is absolutely clear that where a **specific** deed of trust, or conditions of bequest or donation, exist for land or assets, a Council is bound by them. A Council can petition the Court of Sessions to have a deed of trust, or conditions of bequest or donation, modified or overturned. This is only likely to be successful if it can be shown that changing circumstances since the deed, bequest or donation mean that the conditions attached are irrelevant, outdated or likely to frustrate the original intention of the donor.
10. A clear distinction needs to be drawn between those assets where a clear and extant deed of trust, bequest or donation exists and those for which no extant documentation exists. Where extant legal documentation exists, Councils are bound by any specific requirements or conditions attaching to the management or disposal of the assets specified in that, rather than by generic principles or legal provision relating to the common good (e.g. Burrell bequest, Sutherland bequest, etc). The need to clarify the status of the common good, and Councils duties with respect to it, most applies to assets where no precise conditions or requirements exist. This has relevance for the implementation of the recent LASAAC guidance and is discussed further below.

The Evidence of the Study

11. In all Councils, there is a defined arrangement for decision making and reporting on the common good (See Appendix Table 1). This varies as the political arrangements within Councils vary. In most cases, specific committees or executive councillors have delegated responsibility for the common good, and only in Highland would the **whole Council** automatically consider common good issues. In the other cases, however, the delegation is from full Council and decisions could be challenged in full council. In a number of cases, **corporate** and **area** committees have locus with respect to the common good which allows both the local and the whole authority interest to be accommodated. In all cases, decisions about disposal of the common good are public domain.
12. Two Councils, Glasgow and Edinburgh, have a single common good fund while the others have multiple funds, ranging from 2 in Midlothian to 17 in Aberdeenshire. This reflects the provisions of the Local Scotland (Scotland) Act 1994 (Section 15) that allowed the four main cities to manage the inherited common good for the benefit of all inhabitants after reorganisation in 1996. However, it required other Councils to have regard to the interests of the inhabitants of the area to which the common good related **prior** to reorganisation. (The aim was not to prevent the common good being combined to the benefit of the whole population of a new Council, but to avoid a situation where pre-existing common good **had** to be sold to provide the funds for the new authority as a whole).

13. All the Councils with common good assets had **either** a separate common goods asset register **or** a common good coding within the general asset register (Appendix 1, Table 6). All Councils had separate common good accounts on which common good funds and assets are held (Appendix 1, Table 5). Officer arrangements for administration of the common good were highly varied, and this reflects the different management structures of different Councils and the number of management functions that contribute to the common good (Appendix 1, Table 6). All Councils had appropriate valuation and insurance arrangements in place (Appendix 1, Tables 11, 12 & 13).
 14. The nub of the matter for critics is whether the common good is being exploited for general fund purposes. (As valid a concern may well be whether the general fund is being used to prop up the common good). The data from Councils (Appendix 1, Tables 8 & 9) indicate that in only two cases (Glasgow and Aberdeenshire) is maintenance and upkeep of common good assets funded entirely from the common good. In the others, a mixture of common good and general fund contribution to repair and maintenance prevails. We followed this up in detail with two Councils (Edinburgh and Fife) and the detailed evidence from these Councils is that the **general fund contribution** is overwhelmingly the largest contribution to the maintenance and upkeep of the common good.
 15. One reason for this is that common good assets are used by some Councils to deliver mainstream services, and it is therefore proper for the Council to maintain them. Where common goods assets are used in this way by Councils, practice varies. In some Councils rent is paid to the common good fund for use of assets: In others, this is not the case (Appendix 1, Tables 16 & 17). This reflects underlying ambiguity about the status and purpose of the common good itself and we explore it further in the final section of the report.
 16. **Finally**, we explored practice on consultation around the disposal of common good assets (Appendix 1, Tables 14 & 15). Half the Councils operate on the view that, if the Council has legal stewardship of the common good, and the Council is the elected representation of the community, then approval at committee is sufficient. Others would consult on common good disposals or change of use **only** where they would consult with respect to the Councils own assets, i.e. no specific approach is necessary for the common good. One Council would routinely consult the relevant community council. We can only note that practice varies, and that there is no specific requirement for a particular form of consultation. The Court of Session precedent makes it clear that it is for the Council to decide matters within its stewardship unless a question at law arises. In that case, it is for the courts to decide. This situation leads directly to some of the concerns expressed by petitioners, and great openness and engagement with communities would be desirable.
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Ways Forward

17. It is clear that the financial accounting and reporting of the 'common good' will be progressively standardised and scrutinised. The implementation of the recent LASAAC guidance, and audit scrutiny will ensure that. That is important but does not fully address the issues raised by petitioners to parliament which more concern **governance** than **accounting**: The quality of decision making about the common good and the openness and transparency with which decisions are taken. More specifically, the petitioners focus the issue of how communities are engaged with, and accounted to, around the management of the common good.
18. There are potentially two ways forward in ensuring transparency and accountability in the governance and management of the common good. First, primary legislation could be proposed to put clear requirements for governance and management of the common good onto a statutory footing. We are not convinced this is necessary as a potentially relevant statutory basis already exists (see below) and we are unconvinced that this issue would attract priority in the legislative timetable. In any case, new primary legislation would be excessive to deal with the issues raised by petitioners.
19. The adoption and implementation of the recent LASAAC guidance should bring greater clarity to accounting for the common good. Treating the common good as a managed fund with its own asset register and income and expenditure account will create consistency across Councils and better disclosure. While both the established role of the local authority in the management of the Common Goods and the distinctive history and character of the common good are already perfectly clear, treating them in this way would reinforce the position in the eyes of the public.
20. However, we think that implementing the guidance will be more difficult than might be assumed. (e.g. it assumes we know precisely and accurately the extent of the common good as a basis for the asset register). As indicated at 4 above, many Common Good funds have roots that are centuries old and are unable to produce evidence of ownership of assets that would satisfy today's standards. Without care, and possibly further clarification, it may generate a substantial industry managing transactions, service level agreements, etc between the common good and general fund activities. This may over time undermine the sustainability of the common good itself. Finally, it does nothing to address the issues of governance and community engagement that have concerned petitioners.


Constructing the Asset Register

21. The creation of a definitive asset register will need to address a number of the issues raised above: Adequacy of records and demonstration of provenance; clarity of definition of what is common good and what is a specific trust, bequest or donation bound by its own stated conditions; testing the accuracy of the final register generated. These are dealt with in turn below.
22. Petitioners have provided us with a number of examples of where Councils have misidentified assets belonging to the common good, and Councils have expressed concerns as to whether assets currently treated as part of the common good were so in any **legally** demonstrable sense. The Sheriff Court judgement, that an asset being regarded as common good did not demonstrate it was such, is a source of insecurity. Insecurity here will undermine the intention of the guidance to establish a clear and stable footing for the common good. We would make two proposals to eliminate uncertainty for Councils and communities.
23. First, statutory provision should be made that any asset that has been regarded and managed as common good for 50 years **without successful legal challenge** will be treated **for all legal purposes** as common good. We are unsure whether this will require new legislation or whether it could be accomplished by extending guidance under existing legislation (e.g. under the 1973 act that established the separateness of the common good from the general fund). **Second**, we would propose that the asset register should be published and the public invited to challenge and correct perceived defects in scope and coverage. Given uncertainty about provenance, drawing on local knowledge makes sense. This may particularly apply to moveable rather than fixed assets, where local historical knowledge and memory can contribute. Publicly testing the register will contribute to a culture of openness around the common good. This should be for a specified period only, after which the register would be taken as definitive and unchallengeable.
24. Definitional clarity about what counts as the common good will also be important in constructing the register. There is a case for including all assets for 'community benefit' on the common good register, but we think there are good reasons for discrimination between formal trust and bequest arrangements that have legal status in their own right, and the generality of the common good. If the aim is to get to consistency in governance, accounting and management of the common good, it might be unhelpful to include assets that are managed under separate and distinct legal arrangements. Irrespective of whether that point is accepted or not, further clarification is necessary to ensure registers are compiled on a comparable basis.

Governance and Management of the Common Good

- 25.** If the common good is taken to be a ‘managed fund’ of the Council, then our view is that the ‘best value’ and related duties and powers of the 2003 act apply to it. The guidance under the 2003 act includes requirements to make arrangements for the efficient and effective governance and management of resources, and for engagement with the community around how such resources are used. A major complaint with respect to the common good is that governance and scrutiny has been less than transparent, and community engagement around the use and disposal of the common good often limited.
- 26.** Given the vastly different operating contexts of different Councils, and the legitimately diverse political and management structures they have evolved, it would be inappropriate and impractical to stipulate a single governance and management arrangement that all Councils should adopt. A more helpful route is to identify conditions that should be met by whatever committee or executive arrangements Councils adopt for oversight of the common good. Conditions might include:
- (i) That when the committee/executive group consider common good matters, there is a clear agenda and papers related to the common good.
 - (ii) That the committee/executive group publicises in advance when it will consider common good matters, and the items it will address.
 - (iii) That the committee/executive group approves and publicises arrangements for public consultation and community engagement on common good matters.
 - (iv) That the committee/executive group considers and approves all proposals for use or disposal of common good assets and funds, and the annual statement of income and expenditure.
 - (v) That the committee/executive group agrees plans and performance requirements to optimise community benefit from the common good, and to ensure the common good is solvent and sustainable over time.
 - (vi) That members of the committee/executive group are provided with appropriate training on the nature of the common good and their stewardship duties with respect to it.
- 27.** None of the above qualifies the Councils’ ultimate right and duty to make decisions about the common good. The Council is acting as trustee on behalf of the community and must remain free to do so. It is aimed at putting the governance of the common good on par with the governance of general fund activities. This means, however, that members will have the duty to make the same hard decisions about the solvency and sustainability of common good funds and assets as they make about the general fund and the Councils own asset base. Achieving best value will require robust asset management within that framework.

Establishing the Income and Expenditure Account for the Common Good

- 28.** The study indicated that Councils would have concerns about the creation of substantial bureaucracy in the management of the common good and its interface with the general fund. Councils would also have concerns about any requirements that created inflexibility in the use of all available fixed assets to achieve outcomes for communities. On the other hand, petitioners and others have concerns that the common good is being used for purposes that should be resourced through the general fund and the Councils own asset base.
 - 29.** The nub of the matter is how the LASAAC guidance is interpreted and implemented. For example, does it require that where a common good asset is used for general purposes, an appropriate charge or rental is determined and paid to the common good fund from the general fund? If so, this may raise a number of issues in practice.
 - 30.** It is clear from the two cases pursued in detail that, where Councils use common good assets for general purposes, they often fulfil maintenance and repair obligations, and insurance obligations, that would normally fall on the landlord. (In this case, the common good). If market based rentals should be paid, as may be implicit in the LASAAC guidance, then the full burden of the landlord obligation, including the cost of risk, should fall on the common good. This could generate an unproductive paper chase with in Councils in terms of multiple transfers between accounts achieving no practical outcome whatsoever.
 - 31.** As importantly, given its historical character, many common good assets may require substantial investment in conservation, maintenance and upgrading over time. It is not clear, in all cases, that common good funds will be sufficient to provide the necessary investment. Under their power to promote community wellbeing, Councils would be empowered to make investment in the common good as long as the level of community benefit warranted it. However, if strict accounting for transactions is necessary, that investment in the common good should be repaid over time to the general fund. Again, there is a real risk of multiple accounting transactions to no practical purpose. Finally, the issue of what happens if the common good becomes insolvent might need addressed.
 - 32.** If the key aim is transparency, then as long as the use and deployment of the common good is properly documented and accounted for, it should be possible to minimise complexity. The authority is the end decision maker in each case and the LASAAC guidance is explicitly based on the recognition that the common good is not a separate legal entity. Accounting for what is in but not of the Council is an unusual requirement, but burying it in paper transactions and adjustments is unlikely to aid transparency.
 - 33.** We would recommend that a light touch is adopted to establishing the new account arrangement. As we move towards the implementation of the SOA's, all funds and assets should be deployed to deliver community benefit, and the historical distinction between common good and Council's own resources is of declining relevance. What will be unhelpful is rigidity and excessive bureaucracy in managing funds and assets all of which are intended to promote the common good.
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Appendix 1

Summary Of Questionnaires

The following questions relate to the management and administration of Common Good Heritable Property Assets and the Funds which support their retention, improvement or maintenance.

1. Committee structure overseeing and approving the administration of Common Good Funds and Assets

Council	Full Council	Executive	P&R & General purposes	Area Comm.	Finance	Scrutiny Comm.	Delegated powers to officers
Glasgow City	x	x			x		
Edinburgh City				x			
Fife			x	x	x		
Aberdeenshire		x	x				
South Lanarkshire				x			
Highland	x						x
Midlothian			x				
Borders							

2. Number of separate Common Good Funds operate within councils

Council	Nr. Of Funds
Glasgow City	1
Edinburgh City	1
Fife 16	
Aberdeenshire	17
South Lanarkshire	4
Highland	8
Midlothian	2
Borders	

3. Last time that the Common Good administration arrangements were reviewed

Council	Date of Review
Glasgow City	04/2006
Edinburgh City	current
Fife	01/2006
Aberdeenshire	11/2003
South Lanarkshire	2003
Highland	09/2007
Midlothian	n/a
Borders	

4. Specific training for Elected Members provided to support their stewardship role in administering common good funds and asset management

Council	Full Training programme incl. Common Good	None
Glasgow City	x	
Edinburgh City		x
Fife		x
Aberdeenshire		x
South Lanarkshire		x
Highland		x
Midlothian		x
Borders		

5. Internal Account which the CG Funds and Assets are held on

Council	Separate Common Good Accounts
Glasgow City	x
Edinburgh City	x
Fife	x
Aberdeenshire	x
South Lanarkshire	x
Highland	x
Midlothian	x
Borders	

6. Officers who administer the CG Funds and Assets on behalf of the Council

Council	Law & Admin	Finance	Area Managers	Property/ Estates	Corporate Managers
Glasgow City		x			
Edinburgh City	x	x		x	
Fife	x				
Aberdeenshire			x	x	
South Lanarkshire		x		x	
Highland					x
Midlothian	x	x			
Borders					

7. The process of commissioning maintenance or improvement works on CG Assets

Council	Normal Council approval mechanisms	Issued by Officers
Glasgow City	x	
Edinburgh City	x	
Fife		x
Aberdeenshire		x
South Lanarkshire		x
Highland	-	-
Midlothian	No fixed assets	
Borders	-	-

8. CG Works are funded by:

Council	CG fund only	CG Fund & Occupying Service	CG Fund and Council Maint. Budget	Service Budget
Glasgow City	x			
Edinburgh City				x
Fife		x		
Aberdeenshire	x			
South Lanarkshire		x	x	
Highland N/A				
Midlothian		No fixed assets		
Borders				

9. Breakdown of funding for CG Improvement and maintenance works in the last 5 years

Edinburgh

Funded by:	02/03	03/04	04/05	05/06	06/07	Total
Common Good Fund	£n/a	£2,238	£1,989	£3,107	£5,602	£12,936
Council Funding	£n/a	£n/a	£n/a	£553,539	£n/a	£
Total	£	£	£	£	£	£

...The figure for Council funding for 2005/06 was identified as part of the review of the management of the Common Good. This information is not readily available but similar levels of expenditure would be expected in the other years...

Fife

Funded by:	02/03	03/04	04/05	05/06	06/07	Total
Common Good Fund	£	£34360	£7488	£3019	£1935	£46802
Council Funding	£	£29693	£23091	£19387	£48021	£120192
Total	£	£64053	£30579	£22406	£49956	£166994

10. CG Asset records are held on this basis:

Council Reference	1	2	3	4	5	6	7	8
Separate Asset Register				x				
Held on main Council Asset Register but Coded so they can be isolated	x	x	x		x	x		
Held on main Council Asset Register but not Coded so they can be isolated								
Not held on an Asset Register								
Other (state) No fixed assets							x	

11. CG Assets covered by appropriate Insurances:

Council	Yes	No
Glasgow City	x	
Edinburgh City	x	
Fife (Land not insured)	x	
Aberdeenshire	x	
South Lanarkshire	x	
Highland	-	-
Midlothian	NFA	NFA
Borders		

12. Basis on which insurance values are assessed:

Council	Reinstatement Value	Historic Value	
Glasgow City	x		
Edinburgh City	x		
Fife	x		
Aberdeenshire		X (1996)	Under Review
South Lanarkshire	x		
Highland	N/A		
Midlothian	NFA	NFA	NFA
Borders			

13. Source of funding for insurance premiums:

Council	CG fund only	CG Fund & Occupying Service	CG Fund & Council Budget	Service Budget	Education
Glasgow City	x				
Edinburgh City				x	
Fifex					
Aberdeenshire					x
South Lanarkshire		x			
Highland	x				
Midlothian	NFA	NFA	NFA	NFA	
Borders					

14. Public consultations typically taking place over CG Asset maintenance or improvements:

Council	Same as Council property	Notes
Glasgow City	x	Routine- None Major- budget/plan process or approval at executive
Edinburgh City	x	
Fife	None	
Aberdeenshire	None	Only Planning if required
South Lanarkshire	x	
Highland N/A		
Midlothian	NFA	
Borders		

15. Consultations which have, or would, take place before the sale, or transfer to others, of a CG Asset:

Council	Same as Council Property & legal	Approval at committee	Community Council	Court of Session approval
Glasgow City		x		
Edinburgh City	x			
Fife		x	x	
Aberdeenshire		x		x
South Lanarkshire	x			
Highland				
Midlothian	NFA			
Borders				

16. Number of CG Buildings the Councils occupy and utilise for the delivery of public services

Council	Number	Notes
Glasgow City	0	
Edinburgh City	Several	No Number specified
Fife	11	
Aberdeenshire	1	
South Lanarkshire	0 Several	Used by Council Leased out externally by Council
Highland	N/A	
Midlothian	NFA	
Borders		

17. The overall payment (o6.o7) the Council made to the CG fund/s for this utilisation

Council	Amount	Notes
Glasgow City	o	
Edinburgh City	o	
Fife	£61,610	
Aberdeenshire	£7,100	
South Lanarkshire	o £ ?	Income from Leases
Highland	£238,000	
Midlothian	NFA	
Borders		

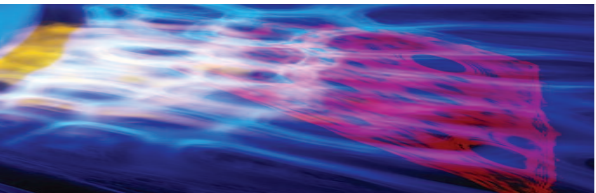
18. Suggested changes to the Mechanisms for Administration of CG Assets and Funds that would be beneficial to Councils

(a) At local Level

Council	Suggested Change
Glasgow City	o
Edinburgh City	o
Fife	o
Aberdeenshire	o
South Lanarkshire	The current practice of complying with Best Value guidance and linking asset use (including Common Good Assets) to meet objectives is beneficial to the council. Unnecessary restrictions specifically on Common Good assets could impair the decision making process, and hinder the Council's ability to meet the needs of the community.
Highland	o
Midlothian	o
Borders	

(b) At National Level

Council	Suggested Change
Glasgow City	o
Edinburgh City	<ol style="list-style-type: none"> 1. Identification of CG properties 2. Ability for the council to appropriate inalienable CG property (subject to authority) 3. determination of what period of lease constitutes the basis for legal disposal 4. legal use of CG Fund 5. Ability to spend Council General Fund Capital resources on CG property
Fife	o
Aberdeenshire	o
South Lanarkshire	As Above
Highland	o
Midlothian	o
Borders	



Westerton House, Westerton Road
East Mains Industrial Estate
Broxburn EH52 5AU

T. 01506 775558

F. 01506 775566

E. info@improvementservice.org.uk
www.improvementservice.org.uk

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