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Local Government and Transport Committee Official Report 14 November 2006

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Scottish Parliament

Local Government and Transport Committee

Tuesday 14 November 2006

[THE CONVENER *opened the meeting at 14:03*]

Item in Private

The Convener (Bristow Muldoon): I call today's meeting of the Local Government and Transport Committee to order. We will shortly take evidence by a videolink to Addis Ababa, but before we do, we need to consider whether to take in private item 6, which is the consideration of the possible contents of our report to the Finance Committee on the draft budget. Do members agree to take item 6 in private?

Members *indicated agreement.*

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Petitions

Common Good Assets (PE875)

Listed Buildings (Consultation on Disposal) (PE896)

Common Good Land (PE961)

14:03

The Convener: That brings us to agenda item 2. For members and our witness, Andy Wightman, I will go through a few points. The evidence that we will take by videolink will relate to the several petitions on common good funds. We will hear from supporters of the petitions later in the meeting. Andy Wightman is the co-author of a report entitled "Common Good Land in Scotland: A Review and Critique". As he is currently in Ethiopia, he will give evidence by videolink from the British embassy in Addis Ababa, which I thank for hosting the videoconference. We have the videoconference booked only until 2.45, so I ask members to ask concise questions to allow us to get through as much business as possible with Mr Wightman.

To ensure that the videoconference runs smoothly, I point out that, because of the technical aspects of the link, a delay will occur between members' finishing their questions and Mr Wightman hearing them and responding. Equally, there will be a delay the other way. Because we are using a videolink, it is important that no one tries to speak over anyone else. Therefore, members should speak only if I call them to do so and should not try to interrupt a colleague or the witness, as that would affect our ability to hear the answers.

I welcome Andy Wightman to the committee. I hope that we have a useful session. Before I ask him

to make any introductory remarks, I will say which committee members are present. We have Paul Martin, Michael McMahon, Maureen Watt, Mike Rumbles, David McLetchie and Tommy Sheridan. When members ask questions, if I do not introduce you, please say who you are. I invite Andy Wightman to make any introductory remarks to the committee on common good funds.

Andy Wightman: I have only four brief points to make. First, this is not simply a problem that needs to be sorted out; common good funds also present a huge opportunity to stimulate social and economic regeneration in towns throughout Scotland. Secondly, I want to highlight the scale of the problem. Until 1975, Scotland had 196 burghs with town councils. In our survey in 2005, only 78—or 40 per cent—of those 196 burghs reported

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having common good funds. Therefore, 118 common good funds are missing. Another 220 burghs throughout Scotland did not have town councils, although many of them have assets. Further investigation is required to discover the fate of those assets.

Thirdly, there is a long history of the Scots Parliament and Westminster trying to root out corruption and improve the accountability of those who are charged with the stewardship of common good assets, dating back to the Common Good Act 1491, which is still on the statute book. Those attempts have largely failed. What the committee is doing today is part of a continuum of effort over the best part of six centuries.

Finally, some practical issues will have to be sorted out after the 2007 local government elections. For example, because of the move to multimember wards, the link between local councillors and the former burghs, and therefore the councillors' role in stewarding and charring common good fund committees, will change. Practical considerations arise for local government about the stewardship of the existing common good funds.

Tommy Sheridan (Glasgow) (Sol): I thank Andy Wightman for his verbal and written information. I have two basic questions. First, you call for new legislation on common good land in Scotland. What legislation do you think is necessary and what issues would it cover?

Andy Wightman: It is time for legislation because the stewardship of the assets throughout Scotland in the past 30 years has been pretty chaotic. My 2005 report, "Common Good Land in Scotland: A Review and Critique", outlines the sort of measures that I think are necessary. They include the introduction of a proper public register of common good assets and a clear accounting standard to be implemented by all councils. In the long term, we should give statutorily constituted bodies in the former burghs a statutory right to take back the assets if they so wish.

As I say in my written submission, that would contribute to a number of policy agendas, such as community regeneration, land reform, urban regeneration, economic development and civic renewal. We need a new act, broadly in two parts: first, to clarify in statute what common good is and how it should be stewarded and accounted for; and secondly, looking forward, to provide opportunities for communities to have greater say in how they are managed and in how resources and funds are used, and to give them the opportunity to take back title to those assets.

Tommy Sheridan: In answering my next question, I wonder if you could say a bit more about whether the legislation should be introduced

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in the form of a member's bill, a committee bill or an Executive bill. Which would you prefer? Given the obvious complications, it might be better to have an Executive bill, but I do not know whether the political will exists for that. Perhaps you could comment on that.

Your paper refers to common good assets amounting to £1 billion. Could you explain where that figure comes from and perhaps give some examples to flesh it out?

Andy Wightman: I do not have a view on whether any bill should be introduced as a member's bill or an Executive bill. That is a decision that would be made some way down the line.

The figure of £1 billion—£1.8 billion, in fact—arises because, when we did the survey in 2005, we could account for £180 million-worth of assets across Scotland, based on written records. Looking

at councils, we saw that many of those assets were massively undervalued. My submission mentions the Waverley market in Edinburgh, which is worth £20 million or so, but the value of which is recorded in the books at £1. There are many cases like that across Scotland. Then, of course, there are the missing assets that were not recorded in the financial information. Taking all that together, I estimated that those assets were about 10 times undervalued and under-represented. We had a figure of £180 million from the reported accounts, but, taking account of the low valuations and the missing assets, I think that we are talking about a figure somewhere in the region of 10 times that—around £1.8 billion.

Michael McMahon (Hamilton North and Bellshill) (Lab): Thank you for that last answer. The figures and the evidence that we have create a picture of incompleteness and a lack of knowledge of what common good land or property exists and what does not exist. Can that list ever be comprehensive?

Andy Wightman: It can be. We are dealing with assets that were owned on 15 May 1975 by town councils across Scotland and which, on 16 May 1975, became vested in district councils. The records exist, by and large, although they are incomplete, and that incompleteness can be filled in by diligent investigation. We have property records in Scotland going back to the early 17th century and we have good archives from the burgh and town councils, so it should be possible to compile an inventory that is, if not 100 per cent complete, certainly in excess of 95 per cent complete.

Michael McMahon: Do you believe not only that the legislation is necessary to make that happen,

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but that it would benefit local authorities by letting them know exactly what their assets are?

Andy Wightman: Yes, indeed. There have been examples of local authorities not being clear about what their assets are. For example, Fife Council, which inherited about a dozen common good funds from places such as Auchtermuchty and St Andrews, has never got round to investigating what land corresponds to the descriptions in the old burgh records. It has tended not to need to investigate until it has been given a reason for doing so, such as someone coming along and wishing to put a gas pipeline through or to conduct some other kind of works. There has never been a motive for councils to investigate properly.

The extent of the mistakes that have been made—the assets that have been sold that should not have been sold and the money that has been received for assets but never credited—is such that it is imperative that a proper inventory is compiled.

14:15

Ms Maureen Watt (North East Scotland) (SNP): Can you give us any examples of best practice in the management of common good funds in Scotland?

Andy Wightman: In my report, I was tempted to issue a scorecard on how well local authorities were stewarding common good assets, but I chose not to do so because it was a first survey and a number of councils were in the process of improving their records. The most impressive practice that I saw was that of Angus Council because it had highly complete and detailed large-scale maps, together with a pretty good set of accounts. The information was there, although I am not sure how wisely the council was stewarding its assets. At the other end of the scale were councils that said that they did not know what common good was and those that knew what it was, but said that they had none or felt that it would be too time consuming to locate it.

There are examples of best practice. Dumfries and Galloway Council is undertaking some useful work. Although Scottish Borders Council has been castigated for sloppiness in the past, it has been asked to improve matters and the situation is slowly getting better. I would like the local authorities that have little knowledge of the subject or that have poor records to seek advice from councils who have done a little bit better.

Ms Watt: Thank you for that. I am sure that it will not have escaped people's notice that Angus Council is, of course, run by the Scottish National Party.

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Do you think that any bill that was introduced should include guidelines on how common good funds should be managed or should that be left to local councils and councillors?

Andy Wightman: All political parties are culpable. I could cite other councils on which the SNP has a degree of control and in which the situation is less rosy. We are talking about a cross-party problem and it is important not to bring party politics into consideration of how to tackle it.

Legislation should introduce more than guidelines—it should embody specific measures that councils must take and standards that they must adopt and meet, particularly on record keeping, publication and accountability. It is interesting to look at the debates in the 1970s to do with the Wheatley commission and so on. Town councils jealously guarded their common good, to the extent that some did not want it to go to the district council. St Andrews golf course, which was part of St Andrews common good, was transferred to a trust and North Berwick transferred its common good to a trust. There was a great deal of distrust of the new authorities taking over.

Councils have always jealously guarded their independence of action when it comes to common good funds. There is no way in which ministers or Government—at Westminster or in Scotland—can tell local authorities what to do. That flavours the debate because it allows ministers to say that they cannot do anything on the grounds that the issue is nothing to do with them and they have no statutory powers to intervene, and it gives councils ammunition for saying that the funds are theirs or the burgh's and that they do not want anyone else to interfere.

My point is that we have reached a stage of such chaos, confusion and mismanagement that statutory guidelines must be followed. After all, we are dealing with billions of pounds-worth of assets that belong to people who live in towns in Scotland. If local government has spent 30 years failing to steward those assets properly, now that we have a Scottish Parliament it seems a statement of the obvious that the Parliament should pass a new bill to replace the 1491 act and bring the stewardship of the assets under statutory enforceable management.

Ms Watt: It would cost some councils quite a bit of money and time to look back in the records to find out what assets, if any, should be allocated to common good. If a bill were passed, should it be accompanied by the relevant finance from the Scottish Executive?

Andy Wightman: I do not know. You are right: the research would take resources. I have suggested that such research is interesting and is

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well capable of being done by local civic societies, local history societies and community councils—in fact, many such groups have done it. Given that, the finances that are needed to do such research might not be as significant as they would be if we made it a statutory obligation on councils and they had to fund it, with all the overheads that are associated with staff costs and so on. Undertaking the research would have financial implications, but I would like to think that it would not be too onerous and that it could be made part of a broader civic education exercise that gave people in towns the opportunity to discover for themselves some of their heritage.

The timescale can help. We should not expect local authorities to produce an asset register overnight; we could allow time for it to be pulled together. Since 1975, councils have been under a statutory duty to steward the assets, so the fact that they do not have a proper register is evidence of their failing. In many respects, they should pay for that, but that cost falls on the local tax payer.

I acknowledge that finance is an issue but I do not have definitive answers about how to solve it.

David McLetchie (Edinburgh Pentlands) (Con): Will you explain a little more about the purposes of common good funds—what the moneys and assets are meant to be applied for—relative to the statutory powers and purposes for which local authorities are empowered under local government legislation? What is the significant and fundamental difference between the purposes for which common good funds can be applied and the purposes for which the general funds and assets of a local authority can be applied?

Andy Wightman: The fundamental difference is that the tax base of a local authority—the moneys that are raised through statute, council-levied taxes, grants from the Scottish Executive and various local government statutes that empower local authorities to charge for cleansing or whatever—is

constrained and regulated. Such funds can be put to limited purposes.

Common good funds are a legacy of the first four or five centuries of local government, in which no statutory control was exerted over what local government did. A number of instances of corruption and nepotism, for example, led to court cases and attempts to rein in the worst excesses of municipal government. From that came the notion that the moneys that were levied through feu duties, tithes and various other means were to be used to the common good of the people of the burgh. That has been interpreted widely in various cases down the years, but it means that common good funds can be spent flexibly with nobody looking over local authorities' shoulder to tell them what they can and cannot do. That is part of the problem. The only people who can really take an

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action against a local authority if they feel that common good funds are being misused are local people; community councils also have title and interest to sue, but of course that is expensive and time consuming.

The fundamental difference is that common good funds are free of any statutory encumbrance, which makes them flexible. That is also a reason why a lot of the funds have disappeared. The kind of audit and statutory checks and balances that are in place have not been applied as effectively to common good funds as they have been to other council service funds.

David McLetchie: Presumably, some councils would say that, given that they have the freedom and flexibility relative to their common good funds, what does it matter for what purpose they have been expended, whether to supplement a statutory power—or purpose for which they are constituted—or a discretionary power. The measure of control would be more operable if it applied the other way round, would it not?

Andy Wightman: That is a good point. I should have said that my understanding is that common good funds should not be used for statutory purposes. In other words, common good funds cannot be used for purposes for which there are statutes in place that empower councils to raise certain funds or make certain charges.

The other thing to bear in mind is that local authorities such as Scottish Borders Council, Fife Council, East Lothian Council and Aberdeenshire Council are responsible for a number of common good funds throughout their areas, which should not be spent for any purposes that are not to do with the inhabitants of the former burghs to which they apply. For example, the Banff common good fund should not be spent on things to do with Peterhead.

David McLetchie: So, there is a geographical basis for the application of certain funds, such as funds for the former burgh regions in the Scottish Borders.

Andy Wightman: Yes, the funds are ring fenced and can be applied only for the common good of the people living in the former burghs to which they apply.

David McLetchie: Is there any suggestion that common good funds or assets in Galashiels have been improperly expended on people living in Hawick or vice versa? Is that the case in any other two Borders towns that you might care to mention?

Andy Wightman: I have not found much evidence that common good funds are being used for other towns. The predominant problem is that the fund for any given town does not have the full

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range of assets allocated to it and therefore it does not have the potential for revenue generation that it should have. In many cases, the burghs themselves are losing out, because their own common good funds have been badly stewarded.

David McLetchie: On the point that you made about common good funds not being used for a statutory purpose, is that your view of what the law is, or your view of what it should be in relation to the application of the funds?

Andy Wightman: That is my interpretation of what the law is, having looked at it and been helpfully

informed by Andrew Ferguson, who is a solicitor with Fife Council and whose recent book on common good law I commend to the committee.

David McLetchie: But is there not in the Local Government (Scotland) Act 1973 a general power of expenditure on the part of local authorities for purposes beneficial to the community? The statutory powers in the act have quite a lot of width to them anyway. I am thinking of the definition of the powers of the council. The council could be acting under that general statutory power, which is expressed in a wide context. Would that mean that the common good fund could not be spent on anything, because the wide discretionary power is also a statutory power?

Andy Wightman: I think that that would be taking things a little too far. A general power of expenditure on the part of local authorities would not be interpreted as a statutory power that would preclude the expenditure of any common good funds in the same way that other statutory powers that are much more tightly defined would.

Paul Martin (Glasgow Springburn) (Lab): You mentioned your concern about some of the valuations that had been reached, particularly in relation to the City of Edinburgh Council. Have you collated any information on what it would cost to carry out an independent evaluation of all the common good assets? Substantial sums would be involved in valuing properties in Glasgow, for example.

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Andy Wightman: A number of local authorities regularly revalue their assets, including their common good assets, and several told me that the valuations that they provide on their balance sheets and accounts are of fairly recent origin.

There are a couple of problems. First, the historical cost convention is used in accounts. Basically, under that convention, assets are valued at their original cost, which can lead to some ridiculous figures. I know that there is an issue with capital borrowing consents for local

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government—I am straying into a field that I have little knowledge of or interest in—but the bottom line is that if common good funds were valued at their current valuation, it would increase the capital valuation of assets that councils held and would affect capital borrowing consents.

The second problem is that some assets are simply not in the common good accounts. I mentioned Waverley market, which is valued at £1 and is earning an income of 1p a year for a 206-year lease. Of all the significant value associated with that site—David Murray's company recently paid £40 million to acquire the shopping centre—none has found its way to the common good fund.

The missing assets are the problem. The use of the historical cost convention can be sorted out relatively easily. If we know what the asset is, valuation is not a big problem.

Paul Martin: I want to continue on that important point about the process of valuing the different properties and assets. Do you accept that councils will be expected to do that on some occasions, or are you saying that on all occasions, for all properties and assets held in the common good fund, the process should be carried out objectively? Do you never expect councils to make those valuations?

Andy Wightman: Councils have a statutory duty to steward the common good funds, which involves proper valuation and record keeping of the assets, so I expect councils to have been doing that for the past 30 years. The problem is that, in many cases, they have not been doing that.

We need a common accounting standard, which I mentioned in response to Tommy Sheridan's question. It should be commonly accepted and legally binding, so that all communities across Scotland can have a proper knowledge of their assets and the income that they should be generating.

Paul Martin: Do you know whether any freedom of information requests have been submitted to extract information on common good assets, and whether the requests have been processed and accepted?

Andy Wightman: Our 2005 survey used the Freedom of Information (Scotland) Act 2002 to ask councils what the common good assets were and whether they could provide the latest set of accounts. Most councils responded positively. As we outlined in our report, some councils said that they did not have the information or that it would be too time consuming to find it, while others simply provided what they had, which was all that they were required to do but was clearly deficient. Other councils made efforts to help, which was useful. Freedom of information is central. We

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would not have our picture of the situation today if it were not for the 2002 act.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): You said that councils already have a statutory duty to steward their accounts and assets. The information that we have been given by the Scottish Parliament information centre is that, according to section 93 of the Local Government (Scotland) Act 1973, the

"assets in a common good fund must be held separately from a local authority's general fund account".

As the legislation to ensure that this issue is dealt with properly seems to be on the statute book already, I am at a loss as to why you are asking for new legislation.

As a supplementary, are our local councillors not the right people to be custodians of local assets for local communities?

Andy Wightman: The 1975 act says something about how common good assets should be accounted for, but the plain fact is that they are not being properly accounted for. I accept that there are various legal remedies such as judicial review, but it is very difficult for communities to get to grips with this issue or to take the local council to task on it. It might be possible to use existing legislation, but the scale of the problem is such that we need new, expanded and clearer legislative guidance on stewarding common good assets.

For example, the 1975 act and its 1994 successor say nothing about what happens if assets are removed from the common good fund, which has happened frequently. Indeed, millions of pounds have been lost that way. The 1975 act is very thin and, if you have read the Wheatley commission's report or are aware of the debates that took place in the 1970s, you will know that that is because the successor district councils did not want any interference in how they stewarded the assets, despite the fact that, at the time, many local people wanted to retain them. If you take our research and the evidence produced by the petitioners and others as evidence of how the 1975 act and its successor 1994 act have been implemented, it suggests that those pieces of legislation are deficient.

On your second question, councillors are, in many respects, the people who should steward these assets. However, since 1975, when, before reorganisation, a small burgh might have had 12 councillors, we have slowly lost real local democracy and control. In fact, the new electoral arrangements, which will come in next year, are a bit of a mish-mash, which is in itself an imperative for putting in place new governance mechanisms that give local people a meaningful and statutory say in decision making on the common good fund.

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I believe that the electoral changes mean that councillors are not in the best position to manage funds.

Mike Rumbles: You keep referring to the 1975 act but, with regard to the common good fund being held separately from the local authority's general fund account, our SPICe paper mentions section 93 of the Local Government (Scotland) Act 1973.

I wonder whether you can expand on your intriguing comment that assets have been sold that should not have been sold and tell us more about your fear that local democracy will be lost. The fundamental point is that our democratically elected local councillors should be responsible for common good assets and, as long as they are discharging that duty within the existing law, I simply do not see why the committee should initiate new legislation. You seem to be saying that you do

not agree with the way in which previous legislation has been implemented, but you have not really told us why we require new legislation on this matter.

Andy Wightman: I apologise for confusing matters. When I said "the 1975 act", I meant the Local Government (Scotland) Act 1973, which came into force on 16 May 1975.

The petitioners' evidence and our research suggest that the 1973 act is deficient, because it gives the people who own the property—in other words, the inhabitants of former burghs—far too little power and too little say in how it should be stewarded and gives far too much power and discretion to councillors and officials, who, over the past 30 years, have not used them wisely. The protection that the legislation affords to the beneficiaries of the funds is thin and there have been many abuses. In my written submission, I cite the Waverley market in Edinburgh, which is earning a penny a year for the common good fund. In Hamilton, £50 million of common good assets have been sold and the common good fund now stands at £3 million. The council there has told me, quite blithely, that the assets have been transferred to other parts of the council. It cannot do that.

The response to that could be a whole series of legal actions and campaigns by local people across Scotland. That would be perfectly feasible and preparations are in hand in a number of cases. However, the legislation is so thin, and the protection afforded to beneficiaries so scant, that we must have new legislation to clarify matters and to give statutory underpinning to the beneficiaries so that they can see clearly whether the funds are being stewarded properly.

Mike Rumbles: You do not seem to think that people have any comeback when democratically

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elected local councillors make decisions. You say that those councillors make strange decisions, abuse the system and are not held to account. However, we have a system—called an election—whereby people can judge their councillors' decisions.

Andy Wightman: One could take that view of all the legislation passed by the Scottish Parliament to date. One could say, "If you don't like the way people are implementing existing legislation, just vote them out." However, the point of legislation is to clarify, in black and white, for the citizens of this country certain matters of public importance. The common good fund is not well served by existing legislation and that has allowed councils over the years to do the things that we have documented and against which the petitioners are arguing.

I accept that it is legitimate to say, "Just vote them out." However, local democracy—and local participation in decisions on the assets that are owned by the former burghs—is not strong or powerful or accountable enough. We have a fairly poor system of local democracy when it comes to the way in which people participate in decision making. That is why we have had the problems that we have had.

The Convener: That brings us to the end of our questions. I thank Andy Wightman for his participation via video link from Addis Ababa; and I thank again the British embassy in Ethiopia for providing the link.

Andy Wightman: Thank you, committee.

The Convener: I will suspend the meeting so that we can remove the video link equipment and bring in the next group of witnesses.

14:43

Meeting suspended.

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14:48

On resuming—

Budget Process 2007-08

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extracted

agree on the starting point for the calculations, we are never likely to reach agreement on whether the budget is sufficient to meet local authorities' demands. Are we making progress toward agreement on the baselines or has it stalled?

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David Henderson: In the minister's answer to the convener's question about resources for 2007-08, he referred to the on-going discussions with COSLA about pressures and what extra might be needed. Those discussions, which are positive, have involved an exchange of information on sums of money. For the forthcoming spending review, local government is preparing figures to submit to us next year, which will feed into ministers' and our thinking. We are talking to local government and, at this stage, I am not aware of any difficulties over the baselines for the figures.

Fergus Ewing: Your budgetary plans for 2007-08 state that you will focus your resources on several matters, including

"a significant increase for care for the elderly and for improvements in the quality of the service".

As the minister will know, in the Highland Council area and in other rural areas such as Argyll, a huge pressure exists on local government to meet the costs that are involved in caring for elderly people, especially the costs that arise from residential and personal care. Is the minister willing to reconsider the total allocation of resources? Have remoteness and the additional costs of providing services in rural areas been properly factored in?

We should also take into account the extremely high proportion of elderly people in the population in many rural areas. I believe that, in the Highland Council area, it is estimated that the proportion will increase substantially by 2020. The relative lack of sheltered housing accommodation exacerbates the cost to local authorities of providing the services. It is Highland Council's view that it is up against it; I suspect that that may also apply to Argyll and Bute Council. Would the Executive agree to look again at how that cake is allocated, to see whether rural areas, such as those that we represent, are receiving a fair deal?

George Lyon: I am very aware of the concerns that have been expressed not only by Highland Council and Argyll and Bute Council, but throughout Scottish councils. A number of councils are under some pressure, particularly in relation to care of the elderly. One of our great difficulties at the moment is to agree baselines and what moneys should be allocated where. It has been confirmed that Argyll and Bute Council is spending substantially below the GAE figure for services for elderly people and that money has been reallocated into children's services. There seems to be a bit of disparity there. Work needs to be carried out jointly with councils to try to bottom out all of that. It is in all our interests to establish what the real costs are and, if possible, to try to benchmark throughout Scotland. I would hope that, working closely with COSLA, we can make some progress on that.

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The Convener: I thank the minister for his evidence to the committee. I thank also his officials, David Henderson and Graham Owenson.

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Petitions

Common Good Assets (PE875)

Listed Buildings (Consultation on Disposal) (PE896)

Common Good Land (PE961)

15:42

The Convener: In item 4, we will be taking evidence on PE875, PE896 and PE961. The petitions all deal with the issue of common good funds, on which we took evidence earlier. I welcome the three petitioners to the committee: Miss Mary E Mackenzie, who is responsible for PE875; Sally

Richardson, who is responsible for PE961; and David Harvie, who is responsible for PE896.

Miss Mary E Mackenzie: PE875 is about safeguarding by legislation heritable and moveable common good assets. Historically, common good stretches back 800 years. You already have some notes from me, which I will introduce briefly. Audit Scotland's recommendation on stewardship of common good includes marking heritables on Ordnance Survey maps, using geographical information systems. That is shown on your maps, marked in red. There is an example of safeguarding moveables in the extract from the system that has been used by Glasgow art galleries, museums and library services since 1996. Collections have itemised records showing details including their acquisition, history, access number—as marked on the object—and updated movements. The museum records go back to 1870.

15:45

My current views on safeguarding common good assets are more detailed than those that I expressed in September 2005, and I have extended the proposals for possible future legislation.

This all concerns 194 or more Scottish burghs, many of which lack current legally recorded common good funds. Councillors are not told when they are elected that they are now trustees of common good funds. There is a four-year gap between council elections, so the entirety of common good assets could disappear before electors can vote for new councillors.

In save-the-planet mode, I say that playing fields, and even golf courses, which are needed for the young and the obese, may be fast disappearing to developers, while parks and cared-for open spaces, which are needed as lungs

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for cities and as walking spaces for everyone, also disappear to developers. Both those types of place are probably part of the common good, but they are not recorded as such.

Thought must be given to community-owned development trusts; to community buy-ins; to the Scottish Executive's plan to recover rights to the sea bed and foreshore from the Crown Estate commissioners; to reopening farmers markets; and to the acceptance of bequests, gifts and artefacts. Those would all be part of forward-looking, democratically accountable common good legislation.

Sally Richardson: The present situation in Scotland is like a jigsaw that is slowly being put back together again. New legislation would help to complete the puzzle, and it would help to co-ordinate people in every community to that end. We would then have a complete picture of Scotland's common good assets and, if a piece were to go missing, it could easily be traced through complete and accountable records. You will note the example in the submission accompanying PE875, in the extract from the January to March 2006 edition of *Preview Glasgow Museums Magazine*, to which Mary Mackenzie has referred.

In the past, wealthy businesspeople would share their success with their communities. I refer to the philanthropists of the Victorian era. Nowadays, wealthy businesspeople strip communities of their assets with the support of the local authorities, although those local authorities are meant to be safeguarding the assets on behalf of their communities.

David Harvie: I will begin with a question. To whom do public listed buildings and common land truly belong? That is surely not uniquely a legal question. Is it adequate simply to claim that they are owned at the whim of a council or one of its committees? Perhaps we need more rigorous legal definitions.

Gratuitous disposals of heritage assets not only directly reduce and devalue local and national heritage; they compromise and prevent the community's ability to protect, enjoy, use and further contribute to that continuing heritage. Such assets have typically been donated in perpetuity, specifically for the recreation, enjoyment and benefit of the inhabitants of a burgh or town, with all councillors acting as trustees. Where the moralities that motivated the original donor are ignored, disposal can be more offensive, and it can often go directly against the donor's intentions. The purpose is too often seen as a blatant attempt to raise so-called found money to plug a hole in a council's accounts or to free up land for development and the generation of tax revenues.

Col 4296

We recognise that financial strictures are rigorously applied and that councils have reduced financial leeway. Lamentably, however, they are all too prepared to indulge in the kind of priority setting that always results in the derisive accusation that a listed building must be regarded as a millstone rather than an asset. No one should expect a council single-handedly to carry the burden of securing the future of complex buildings with structural and revenue problems. However, in our experience, there is a woeful reluctance to consider alternative means.

Requests to establish a public trust with a broad, experienced and imaginative membership and to seek the funding not often available to a local authority never get beyond the first informal airing. The insensitive impetus to make an instant buck while offloading future responsibility always seems to prevail. In one case involving an attempted sale of common good land, the council was evenly split in the face of strong public dissent. The provost used his casting vote to permit the sale and said derisively to objectors, "You can have your say in court." They did, but the process took five years at the Court of Session. The objectors won the case and the appeal, but it cost time, energy and money. The case exposed objectors to substantial financial risk. Incidentally, the common good land in that case was not included by West Dunbartonshire Council in its submission to Andy Wightman in the preparation of his recent book; it did not take the council long to lose sight of it.

Our urgent proposal is that all councils that wish to sell or otherwise dispose of inherited assets, such as listed buildings or common good land, should be required to obtain clear public consent in a process that is legally defined and monitored by Parliament.

The Convener: Thank you for those remarks. Members will now ask questions.

Fergus Ewing: I thank all the petitioners for putting their case. They are to be commended for bringing the issue on to the agenda in Scotland. Obviously, we would not condemn any council without a hearing, so I expect that we will take evidence from councils in due course.

I am interested in the possible ways in which we could legislate to secure a better system, in particular those in the list appended to the submission from Mary Mackenzie. It contains a number of recommendations—including the proposal that there should be a complete record of common good assets to be held by each council—that seem to me to be no more than common sense. The record would include a proper description of the assets and contain information such as the date of acquisition and details of the rental value. Another recommendation is for the appointment of archivists and people to administer

Col 4297

the records and to take other measures to let people in Scotland know what the common good assets are. The lack of such information seems to me to be the fundamental problem. Once people know what the common good assets are, there might be more of a debate during a local election campaign about what should be done with them.

I support many of the petition's aims, but I want to focus on number 6 on Mary Mackenzie's list, which I am less sure is a good idea. I do not have a fixed view, but I want to get a debate going about it. It states:

"all proposed disposals, including sales of both heritable and moveable assets must be duly notified/advertised in advance, including in the local press, to allow third party objections."

That seems to be a reasonable proposal, but you go on to say:

"Where six or more on the Voters' Roll register objections, a public hearing must be held, expenses to be met by the Local Authority, not by Common Good Funds."

Is that trigger perhaps a little on the low side? Given that the cost of holding a public hearing could be substantial, might there be a case for a rather more onerous trigger than six people registering objections? If there were many public hearings, it could detract from the moneys that local authorities have to run their basic services.

Miss Mackenzie: The problem is setting a figure. If I said 1,000, that would be a very difficult

number to reach. It is better to start the bargaining at six and move up.

Fergus Ewing: Do the other witnesses have a view?

David Harvie: I suspect that, realistically, six is rather low, but I am intrigued by Miss Mackenzie's response to your question.

Fergus Ewing: Yes, we do not usually conduct our proceedings as a negotiation, although perhaps we should take a lesson from you and change our practice in that way too.

Miss Mackenzie: A hundred is a nice round number. I would be perfectly happy with that.

Fergus Ewing: Do you agree that the justification for a hearing is to involve the public; that that justification is at its strongest when the assets are at their most valuable and significant; and that there would not be any point in having a hearing for a proposal to dispose of assets of fairly minor value, which would be a matter of administrative good practice? Six voters or 100 voters should not prevent the sale of some premium bonds that are worth a few thousand pounds. That is not what you are driving at. You are saying that the public should have a say, even at a hearing, in matters relating to a major piece of land, park or building of historical significance.

Col 4298

Miss Mackenzie: It is not fair to point the finger, so I will just say that I have been involved in this. Right now, in a small town where people have independent views and do not normally come together, all the notable organisations have come together unanimously, verbally—violently almost, in the press—but we have made no impression whatever on our three trustee local councillors. One councillor has stated—and the others agree—that they are not there to represent the views of the people in their wards. I am not saying that they must agree with those views, but they should be willing to represent them.

There are good councillors and bad councillors. If councillors ignore a whole community, whose members have given reasons for their views, sent in letters and done everything legal that can be done, and refuse to represent them, which means that the whole council, which makes the decision, is unaware of those views, what are the voters to do? Our aim is to build into our system a better opportunity for amicable agreement and consensus rather than disagreement. However, at the moment the voters are left out in the cold.

Fergus Ewing: I am aware of the difficulties in always finding a consensus in Scotland, which seems somewhat elusive. Am I right in thinking that the council to which you were alluding is Scottish Borders Council?

Miss Mackenzie: I live in the Scottish Borders now.

Mike Rumbles: Who could disagree with the argument that a complete record of common good assets, heritable and moveable, should be held by each council? That is a perfectly commonsense approach.

I want to build on the question that I asked Andy Wightman earlier. He made the point several times that councils already have a legal statutory duty to steward their assets. Our researchers in the Parliament have pointed out to us that, under section 93 of the Local Government (Scotland) Act 1973,

"assets in a common good fund must be held separately from a local authority's general fund account".

We have a situation where our local councillors, who are democratically elected—we live in a representative democracy—take decisions on disposal of assets and are trustees of, or are in charge of, the accounts. I do not understand why you are asking the Scottish Parliament to create a new law in addition to the laws that we already have, given that, it seems to me, the issue is good management of the assets.

Miss Mackenzie: There is considerable confusion between accounts and funds. That is the problem. The common good funds should

Col 4299

contain complete records of what are in them. Accounts can be shifted around. In one of the papers, I have given the committee an example of a cross-mix within one council, whereby about eight departments are involved in handling common good finances, but they do not talk to or consult one another. The auditors can audit only what they can see. There is no suggestion that anyone is deliberately lying about the funds or concealing them, but there is a lack of clarity. One has only to read through the law to find out that different judges make different statements, which are contradictory. Lord Osborne, for example, seems to hate common good. We cannot go on in this muddled way. It is time that someone took a cold, hard look at the existing laws and decided to pull them together to make sense of matters. There is no point in having a Scottish Parliament if we cannot do things.

16:00

Mike Rumbles: I hear what you say, but the point that I am making is that we are really talking about best practice in the management of common good funds.

Miss Mackenzie: And how would we control that?

Mike Rumbles: That is precisely the point that I am making. Audit Scotland has the remit of ensuring that best practice is adhered to in all the public accounts of public bodies throughout the country. Should the target not be to focus on ensuring that the laws that we have already are properly implemented in practice? I do not have to say to you that I do not think that we need to produce even more legislation in which we instruct our councillors what to do. Surely in a representative democracy—

Miss Mackenzie: The legislation goes back 800 years and it is muddled. It is high time that we put it in plain English. As I have said, councillors do not know that they are trustees—they do not have a clue. That causes the biggest headache throughout Scotland.

Mike Rumbles: I have one other line of questioning. I am not convinced that it is inappropriate that councillors should make decisions about the selling off of common good assets. Councillors are elected by the local people. In a representative democracy, if councillors should not be responsible for the funds that they manage, who should be responsible for them?

Miss Mackenzie: Councillors are supposed to be responsible for them, but they do not know what their responsibilities are, so they cannot use them. They are unaware of the law.

Col 4300

Mike Rumbles: So we are talking about best practice.

Miss Mackenzie: Technical terms do not help.

Mike Rumbles: You just said that councillors are not aware of the law.

Miss Mackenzie: They are not aware of their responsibilities as trustees. We could argue the matter till kingdom come. There is an opportunity to tidy up a huge bunch of contradictory statements that have been made over centuries. Let us stop tinkering about and spending money on lawyers. If I want to disagree with my council, I have to employ a Queen's counsel because it will already have done so. The system is not as democratic in practice as it is in theory. I am not attacking councillors; I am suggesting that all of us are not being practical and that we should put things right.

David McLetchie: I have some questions about disposals of land in common good funds. As I understand it, the issue for determination by a court is not the purpose for which land is being sold, but whether the council has the right to sell it. The issue is whether the land that was bequeathed is alienable or inalienable. Is that right?

Miss Mackenzie: Yes.

David McLetchie: Gifts comprising a mixture of cash, property and so on will be made to a council—in the past, they will have been made to a common good fund—to which no particular purpose is

attached. As far as land in that category is concerned, there is no issue about whether it is sold, because it is simply an asset of a fund.

Miss Mackenzie: But it might be a park.

David McLetchie: That is true, but it might just as well be an investment asset. For example, someone might have given to the council a farm that was subject to a lease, from which it derives rental income. The land might not be a park at all.

Miss Mackenzie: I think that I am failing to put the case properly. The common good is for the community. The community usually hears that something is cooking after everyone else has heard. By the time the community pulls itself together, has meetings, discusses things, gets down to business, rakes up money to employ a lawyer or a QC and all the rest of it, things have happened to such an extent that the situation becomes difficult and antagonistic instead of consensual.

There is an enormous gap—that is not the way to express it. There is a lack of information. When councillors have an idea that they would like to do something, there is a lack of consultation and they

Col 4301

are under no obligation to go through certain processes with the community before community assets are disposed of.

We have a problem now with three councillors giving away 16.4 acres to the director of education for 99 years. That was wrong because too large a sum was involved, so it had to go to the full 34 councillors for a decision. No one instructed the 34 councillors about local opposition. In the meantime, I have searched the minutes of the council's meetings and I can make the ridiculous statement that if I come back as a butterfly in 99 years and look for the records of all that has happened and what the conditions are of the arrangement, they will simply not exist.

David McLetchie: I understand the point that you are making. Do you accept that land will be held as an investment in the same way that stocks, shares and money in the bank are investments, and that land is freely alienable and can be sold by the council? That land might be in the common good fund. Equally, there might be other special, dedicated land, such as a park, golf course or some other community facility; in such cases, the law on whether the land can be sold is applicable if there is an issue about whether, rather than for what the purpose, it can be sold.

Miss Mackenzie: You are very worried about the sales, but I am very worried about the lack of records because we do not have them.

David McLetchie: I accept that we need records, but I am just trying to make clear that there is a distinction between land that is held as an investment, which might be an asset of a common good fund, in the same way as stock and shares, and land that has been dedicated or might have been given to a council in the past as a park. Perhaps Mr Harvie could describe his experience in West Dunbartonshire.

As I understand it, the issue that was resolved in court was not the purpose of the sale, but whether there was a right to sell. Is that correct?

David Harvie: It was both.

David McLetchie: Could you describe the piece of ground to which you referred when you were talking about five years of litigation? What was that piece of ground and what was the issue?

David Harvie: It was part of Dumbarton common, which is approximately 12 acres of parkland in the centre of the town. The local authority had offered it to the Scottish Court Service for the construction of a new sheriff court and car park. Whether it was common land was not at issue; that was agreed by everyone concerned, which was something of a blessing. The issue was extremely controversial in the town.

Col 4302

There is a whole issue to do with public participation that is completely missing here.

David McLetchie: I accept that, but I am trying to get to the legal issue that was at stake. Did the council have the right to sell the land or was there an issue around what the land was being used for?

David Harvie: It was both. Lord MacLean, the judge, was particularly scathing about the fact that the Secretary of State for Scotland, as it was at that time, had not been called as a party in the case. That was his objection, although it does not relate to the two issues that you have mentioned. That was his legal sticking point. I am not enough of a lawyer to qualify that.

David McLetchie: So that determined the case. In effect, the case was decided by a procedural question whether certain parties were competent.

David Harvie: I would not say that that was the sole deciding factor, but Lord MacLean found it particularly significant. It came as a surprise to me, but then I am not a lawyer.

David McLetchie: Can you remember the year of that judgment?

David Harvie: I can give you the judgment here and now.

David McLetchie: If you can put it on record, we will be able to read it later.

David Harvie: The judgment is dated 11 July 1996, and is Lord MacLean's opinion on the petition of West Dunbartonshire Council.

David McLetchie: That is helpful. We will have a look at that.

Paul Martin: We have heard about the issue of the priority given by councils to recording what is in the common good fund and the fact that there has been good practice in some councils and not so good practice in others. Is there an issue about whether we should support a common good fund in the first place? It seems that the common good fund just gets put to the back of the queue and dealt with only when all other council business is carried out. Perhaps we should decide to look at this matter in a new way. What if we had something that was not given this second-class status and was within the ownership of the council? Have you considered that? I am not advocating such a move; I am just playing devil's advocate.

Miss Mackenzie: Can you ask a much more concise question?

Paul Martin: At the moment, there is a common good fund that is managed by the councils—

Col 4303

Miss Mackenzie: There should be, but often there is not.

Paul Martin: Is that an argument for scrapping the common good fund and bringing such matters within the councils' full ownership? Is there another way of managing this matter to ensure that councils give it more priority than they do at the moment? I am not advocating this position; I am just playing devil's advocate.

Miss Mackenzie: The councils already have the power, but they do not know it. They do not know that they are trustees. I know that I am harping on about that, but this is the problem. They do not tell the population what they are up to, which is why splits emerge. When we ask for a list of our buildings, we get involved in terrific arguments. Indeed, £1,000 had to be spent on a QC before we could be told about the councillors' decision to spend certain money, and then £3,000 had to be spent on another QC on another matter. Surely if our laws were clearer, that sort of thing would not need to go on.

Paul Martin: But you do not want these assets to be managed in any way other than through the common good fund.

Miss Mackenzie: Absolutely.

Paul Martin: Mike Rumbles asked about concerns that elected members' stewardship of common good assets is not living up to the local community's expectations. Have you raised your concerns

with the Standards Commission for Scotland, which is responsible for ensuring that councillors carry out their duties?

Miss Mackenzie: The commission is not terribly interested when we bring matters to its notice.

Paul Martin: But have you brought your concerns to its notice?

Miss Mackenzie: I have already drawn to its attention my concern that councillors do not seem to be responsible, in the sense that they are not representing the views of the people in their wards. It is getting to the point that various people are wondering whether to vote at all if councillors are not going to represent us.

Paul Martin: What would happen if the Parliament did as you wanted and firmed up the legislation, but the councils simply said, "Sorry, but we're just not going to bother recording this"? As Mike Rumbles pointed out, refusing to provide information is currently against the law and, indeed, Andy Wightman made it clear that recording this information is a legal requirement. Instead of simply adding to legislation, should we not ensure that the trustees—in other words, the councillors—live up to the community's expectations and that, as elected members, they do what they are required to do?

Col 4304

16:15

Miss Mackenzie: We brought the matter to Audit Scotland, which said that common good heritables should be listed on Ordnance Survey maps. I think that members have an example of such a map for the Borders. I am suggesting that that should be done by law throughout Scotland, so that when a developer comes for the first time to propose a development, the map could be put on top of the developer's plan to show immediately, without wasting time, that a certain piece of land is common good land. That would avoid the problem and there would be other things that could be done with that land. It would not stop development, but it would create a pause in the process.

At the moment, many development proposals go through because of total ignorance on the part of the councillors, who simply do not know. The officials are not particularly interested, perhaps because the Parliament has never made it part of their job or told them, "It's time you paid attention to this." There may be a need for legislation, or for tightening up of legislation, but at least we should start with something, rather than continuing to put off a decision on the matter, because there will soon be no land left.

David Harvie: Andy Wightman might be able to comment more academically on the matter, but it seems that we have anecdotal evidence that the whole system of management of common good accounts has so withered on the vine that it is a piecemeal procedure when it does take place. There is considerable suspicion that that piecemeal, casual procedure is quite different in different local authorities. It seems that there is substantial room for a major improvement. The idea that people can just hang around until the next election and then attempt to vote a council out is hopeless. Meanwhile, we are losing assets left, right and centre.

Paul Martin: The issue seems to be that the common good fund has been set aside from the council and that the council is not involved in the day-to-day running of those matters. You would not expect a council not to submit its annual budget—there is no way that a council would fail to do that. However, in relation to the common good, there appear to be situations where such practices are not being carried out. Can an argument be developed about how to make the management of these funds a more integral part of what happens in local councils? As Andy Wightman said, the funds were set up in the days when there were burghs in place. Is there an argument for reforming common good funds to make them more in line with the workings of the councils, rather than trying to continue with the way in which they operate at the moment?

Col 4305

David Harvie: There may be. It seems to me that, in different areas of the discussion around the subject, we can consider different ways of managing individual aspects, but looking at it in the round reveals that major restructuring would be required, and that such restructuring would have to be common to all local authorities. It could not be a matter of everybody trying to deal with the issue

in a different way because they were not terribly sure about it.

The Convener: That brings us to the end of our questions, so I thank Mary Mackenzie, Sally Richardson and David Harvie for coming before the committee to give evidence. We also heard evidence from Andy Wightman earlier today. No further evidence sessions are scheduled, but at some point we will discuss whether there are other parties from whom we want to hear before we respond fully to the petition. In due course, when we feel that we have heard sufficient evidence, we will come to a conclusion about any recommendations that we want to make, and then we will correspond with you to let you know our views.

Col 4306

Subordinate Legislation

Local Government Pension Scheme (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/514)

16:20

The Convener: Item 5 is subordinate legislation. No members have raised any points on the regulations and no motion to annul has been lodged. Do members agree that we have nothing to report on the regulations?

Members *indicated agreement.*

16:20

Meeting continued in private until 16:30.