



LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

AGENDA

29th Meeting, 2006 (Session 2)

Tuesday 21 November 2006

The Committee will meet at 2 pm in Committee Room 2.

1. **Decision on taking business in private:** The Committee will take a decision on whether to take items 4 and 5 in private.
2. **Petitions PE 875, PE 896 and PE 961:** The Committee will take evidence on the issue of common good from—

Andrew Fergusson, Fife Council, on behalf of Society of Local Authority Lawyers and Administrators in Scotland and June Murray, North Lanarkshire Council, on behalf of Society of Local Authority Lawyers and Administrators in Scotland

and then from—

Caroline Gardner, Deputy Auditor General and Controller of Audit, Audit Scotland, Fiona Kordiak, Director of Audit Services, Local Government, Audit Scotland and Gordon Smail, Portfolio Manager, Local Government, Audit Scotland.

3. **Subordinate Legislation:** The Committee will consider the following negative instruments—

the Closures Guidance (Railway Services in Scotland and England) Order 2006, (SSI 2006/2837); and

the Regional Transport Strategies (Health Boards) (Scotland) Order 2006, (SSI 2006/528).

4. **Prostitution (Public Places) (Scotland) Bill:** The Committee will consider a draft of its Stage 1 Report on the Prostitution (Public Places) (Scotland) Bill.
5. **Budget process 2007-08:** The Committee will consider a draft of its report to the Finance Committee on the budget process 2007-08.

Martin Verity
Clerk to the Committee
T3.40, Scottish Parliament, Edinburgh, EH99 1SP
0131 348 5217
email: martin.verity@scottish.parliament.uk

Agenda Item 2

Submission from Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) [LGT/S2/06/29/1](#)

Submission from Audit Scotland [LGT/S2/06/29/2](#)

Agenda Item 3

Covering note on the Closures Guidance (Railway Services in Scotland and England) Order 2006, (SSI 2006/2837) [LGT/S2/06/29/3](#)

[Closures Guidance \(Railway Services in Scotland and England\) Order 2006, \(SSI 2006/2837\)](#) [LGT/S2/06/29/4](#)

Covering note on the Regional Transport Strategies (Health Boards) (Scotland) Order 2006, (SSI 2006/528) [LGT/S2/06/29/5](#)

[Regional Transport Strategies \(Health Boards\) \(Scotland\) Order 2006, \(SSI 2006/528\)](#) [LGT/S2/06/29/6](#)

Agenda Item 4

Draft report on Prostitution (Public Places) (Scotland) Bill [private] – to follow [LGT/S2/06/29/7](#)

Agenda Item 5

Draft report on Budget process 2007-08 [private] [LGT/S2/06/29/8](#)

Agenda item 2**Local Government
and Transport
Committee**

24 November 2006

**Written Evidence to Local Government & Transport Committee by
The Society of Local Government Lawyers and Administrators in
Scotland (SOLAR)****1.0 Introduction**

- 1.1 SOLAR is the organisation that represents local government lawyers and administrators throughout Scotland. Its membership is drawn from all thirty-two Scottish local authorities. Many matters relating to treatment of common good assets and funds are dealt with within local authorities, either by law and administration officials, and/or their finance colleagues.
- 1.2 Common good funds and their assets were transferred to the current unitary authorities by means of the legislation which transferred the rest of former burgh and other property to them.¹
- 1.3 It is an important point to recognise that common good funds are owned outright by local authorities. However, in common with other funds owned by local authorities, they are subject to special rules. These rules principally relate to how common good property is administered and how and when it can be disposed of.

2.0 Current Law Relating to Administration and Disposal of Common Good Property

- 2.1 Section 222(2) of the Local Government (Scotland) Act 1973 directs that local authorities, in administering common good property, are to “have regard to the interests of the inhabitants of the area to which the common good formerly related”. This in most instances relates to the former burghs themselves. In the case of Aberdeen, Dundee, Edinburgh and Glasgow it relates to the entire city.²
- 2.2 Other than the requirement to have regard to the interests of the former burgh’s inhabitants, there is no specific legal requirement as to how the common good fund should be spent. There is nothing legally to stop the local authority from using the fund for one of its statutory purposes.
- 2.3 Proposals by local authorities to dispose of common good land (or buildings), either by way of outright sale or lease, frequently cause controversy with members of the local community. It is worth, therefore, setting out the provisions of the Act in full on this matter. Section 75 of the 1973 Act reads:

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

¹ The Local Government (Scotland) Act 1973, section 222; the Local Authorities (Property Etc) (Scotland) Order 1975 (SI1975/659) (Article 4); Local Government Etc. (Scotland) 1994 (section 15); and the Local Authorities (Property Transfer) (Scotland) Order 1995, article 2(SI1995/2499).

² Section 222(3) of the Act.

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

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- (2) Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.
- (3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used for the same purpose for which the former land was used.”

2.4 It should be noted that not all common good land needs the consent of the court before it can be disposed of. It is only that land to which “a question arises as to the right of the authority to alienate.” This is effectively a sub-group of common good property and whether or not particular land or buildings form part of this sub-group is the subject of extensive case law. Similarly, what constitutes a disposal has been the subject of recent case law³.

2.5 Although these are the main provisions applying specifically to common good funds and assets, the administration of the common good by local authorities does not exist in a legislative vacuum. Other local authority legislation applies to common good in the same way as the rest of local authority assets. The community right to buy land under the Land Reform (Scotland) Act 2003, for example, could apply to common good land. The requirement to obtain Best Value in relation to the use of property and assets generally, now enshrined in Part 1 of the Local Government in Scotland Act 2003, applies to common good property owned by local authorities, and local authorities’ general obligation to “make arrangements for the proper administration of their financial affairs”⁴ and for the keeping of proper accounts and provision for audit⁵ also apply.

2.6 One final point which should be made in relation to the legal framework relating to common good is that it is not a straightforward matter to determine what assets formerly held by burghs fall into the common good of those burghs. The existing case law is complex, and, to a certain extent, contradictory. Not all heritable and moveable assets formerly held by burghs fall into their common good as now administered by unitary authorities. The law on common good in general is unclear and, until recently, had not received much attention in university law courses or text books. The latter has now been rectified to a certain extent.⁶

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³ See, in particular, *North Lanarkshire Council, Petitioners*, 7th October, 2005 - available on the Scottish Courts website.

⁴ Section 95 of the Local Government (Scotland) Act 1973.

⁵ Section 96 of the 1973 Act.

⁶ See, e.g. Wightman and Perman; *Common Good Land In Scotland. A Review and Critique*, available via www.caledonia.org.uk; Ferguson, *Common Good Law*; Edinburgh, Avizandum Publishing Limited, 2006.

3.0 **Petition PE875**

- 3.1 The petition by Mary E. Mackenzie calls for the Scottish Parliament to urge the Scottish Executive to ensure that all moveable and heritable common good assets throughout Scotland are properly recorded, audited and insured and to introduce legislation to ensure that such assets are properly safeguarded.
- 3.2 SOLAR agrees with the comments made by the Minister that the principal thrust of this petition is covered by existing legislative duties and in particular by the duty of Best Value. Local authorities are under an obligation to account properly to Audit Scotland on all funds held by them and SOLAR notes the point made by Audit Scotland that there has to be a question whether the extent of identified problems with common good assets is in proportion to the overall finance of Councils and whether therefore it would merit the additional burden of regulation by statute. Any additional guidance by the Scottish Executive to Councils as to what is expected of them, as suggested by Audit Scotland, would be welcomed.
- 3.3 SOLAR recognises that a proper record of all common good assets should be kept by local authorities. However, this is not a straightforward task. Records inherited from previous local authorities and, in particular, from the former burghs, tend to be incomplete and at times misleading. At local government reorganisation in 1975, many burgh councils spent as much as possible of their common good funds so that the new district councils would not have access to them. Similarly, many common good assets were misleadingly attributed to other departments of burgh councils rather than them being properly recognised as common good assets by the former burghs.
- 3.4 Compiling a proper register of all moveable and heritable common good assets is a laborious and resource intensive process, albeit that many local authorities are now undertaking this in response to community concerns. However, in the current financial climate, it is difficult for local authorities to direct resources towards this area and it may be that the Committee consider that the Executive should make available additional resources to facilitate this process.

4.0 **Petition Number 896**

- 4.1 This petition calls for local authorities to be required to conduct structured and meaningful public consultation before proceeding with any disposal of listed buildings, common land or related endowments held in public ownership or trusteeship.

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4.2 Any proposed disposal of common good land for which the local authority requires court consent needs to have gone through a consultation process of some kind before the local authority takes the matter to court⁷. There is no such requirement in relation to common good property which does not require to go to court before the local authority disposes of it; listed buildings, or, usually, any other property held by local authorities as trustees (under section 16 of the Local Government Etc. (Scotland) Act 1994. It would be perfectly possible for legislation to insert an obligation on local authorities to carry out such consultation. However, it would appear preferable to deal with the matter by way of Scottish Executive guidance if it was felt that this was a particular problem.

5.0 **Petition Number 961**

5.1 This petition calls on the Scottish Parliament to urge the Scottish Executive to introduce legislation to provide greater protection and increased powers for local communities in respect of the ownership and use of common good land.

5.2 For the reasons stated above, SOLAR does not consider that there is necessarily a lack of legislative power to control the activities of local authorities in this regard. Some common good land needs the consent of the court before it can be disposed of. Common good land could be subject to a community buy out under the Land Reform Act 2003 if the community felt that it should not be disposed of to a third party⁸. The way in which local authorities manage, and use, all of their common good assets, is subject to the scrutiny of Audit Scotland and any concerned communities can raise issues concerned with that body who have powers to force local authorities to act accordingly.

5.3 It is important to recognise that local authorities require to manage their common good assets along with all of their other assets. Some common good assets will be in active use by local authorities in a way that benefits the local community and the wider community of the whole local authority area. In other instances, there may be no obvious use for a common good asset by a local authority. In such circumstances, the local authority has to have the flexibility to seek another user of the property.

5.4 Historic Scotland has stated that it had reservations for putting in place a statutory mechanism that could result in the owners of historic properties being compelled to retain ownership when they do not have the financial resources to ensure due care and maintenance. This point is well made. Local authorities are increasingly under financial pressure and, if there is no obvious use for a common good asset, then it is only right and proper that local authorities look to dispose of the assets to another party who can make good use of them. This could be a community body or it could be an interest from the private sector.

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⁷ See, for example, Lord Maclean's comments in *West Dunbartonshire Council - v - Harvie* 1997 SLT979(OH); 1998 SC789, 1998 SCLR639

⁸ If the former burgh is below the settlement level set by that legislation: currently 10,000. This does not protect larger settlements and common good land in the cities.

5.5 If the Committee was minded to introduce legislation in relation to this matter, then the Committee may wish to consider recommendations relating to the provisions under which such community bodies would operate common good properties; and how they themselves would require to show that they were representative of the community.

5.6 One final point. Would communities have a right to take on any common good asset? Many existing assets, such as theatres, libraries and so on, are extremely efficiently run by local authorities - but not necessarily funded by the common good. Would community bodies' ownership of them improve their running in every instance?

6.0 **Summary and Suggestions for Further Reform**

6.1 Petitions 875, 896 and 961 are symptomatic of a general feeling of discomfort amongst many communities based in former burghs about the treatment of both heritable and moveable common good assets. This is reflected in the historical case law through the centuries of common good's existence. Petition 896, rightly in our view, links the issue of common good property to those of listed buildings and buildings held in trust as the real issue is often about preservation and control of assets in some of the country's most historically significant places.

6.2 As we have stated, the existing legal framework provides an adequate device for ensuring that local authorities act properly in relation to their stewardship of common good assets - albeit in a somewhat reactive way. Common good in particular raises strong emotions amongst local communities. However, community bodies may not, in every instance, represent a solution to any perceived neglect or misuse of common good assets by local authorities. If communities were, for example, to take on the common good fund and its assets, the net effect might be to increase expenditure out of the common good on professional advisors and consultants required to ensure the fund and its assets were properly administered. Community bodies are generally staffed by volunteers and may not have the necessary capacity to administer funds and assets which may be valued in the millions of pounds.

6.3 A middle way might be to abolish the distinction between the common good and general funds of local authorities, but to impose extra obligations on local authorities for properties that have historic or recreational significance - whether or not these exist within former burghs. In many instances, the principal concern of communities has been the disappearance of recreational land, or the unsympathetic conversion of historic property into one kind or another by local authorities who, in some instances, have neglected the properties for years. Perhaps if that is the main issue, then it should be recognised as such. Such obligations need not be limited to former burghs.

6.4 Local authorities could be tasked with keeping a register of such properties; they could also be required to allow disposal only if specific criteria can be met and if no community use can reasonably be found after diligent investigation.

Agenda item 2**Local Government
and Transport
Committee****24 November 2006****THE SCOTTISH PARLIAMENT****LOCAL GOVERNMENT AND TRANSPORT COMMITTEE****CONSIDERATION OF PETITIONS ON COMMON GOOD FUNDS AND ASSETS****COMMENTS BY AUDIT SCOTLAND**

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1. At a meeting earlier this year the Local Government and Transport Committee considered petitions on common good funds and assets referred to it by the Petitions Committee. The Local Government and Transport Committee agreed to seek views from, among others, Audit Scotland.
 2. The legislation makes it clear that councils are the stewards of common good assets and they are therefore under an obligation to ensure that those assets are properly recorded and insured. The standards of stewardship expected in relation to common good assets are equal to those for council owned assets and systems of internal control within councils generally extend to such assets in all councils, although there are always opportunities for improvement.
 3. The Accounts Commission is responsible for securing the audit of councils and the common good is subject to that audit and is covered in the audit opinions given on the annual financial statements of councils. The Code of Practice on Local Authority Accounting in the United Kingdom does not require councils to report full common good accounts, but many continue to do so. Where full accounts are not provided, councils are required to report the nature and amount of common good funds.
 4. The extent of detailed audit work on the common good is determined in each council in accordance with a number of factors. The work is conducted in compliance with the Code of Audit Practice and Auditing Standards and covers all areas to a minimum level. Detailed work is targeted to areas which
 - are material to the accounts. Common good assets are generally minor in comparison to the value of assets held directly by a council, although this varies significantly from area to area
 - are judged to have a potentially significant impact with a reasonable likelihood of occurrence. Audit work is targeted to such areas of risk.
 5. A variety of issues relating to the stewardship of common good funds have been reported to councils across Scotland over a number of years. A number of detailed audit reviews have been undertaken in individual councils, responding to identified risk areas. Such reviews are sometimes undertaken in response to concerns raised by individuals or groups in the community, as common good issues often have a high local profile. Findings from these reviews have been reported to councils and corrective actions agreed where necessary. Issues raised in individual councils over the last 5 – 10 years have included

- Completeness of common good asset registers
 - Ownership and title of common good assets
 - The valuation of common good assets
 - Securing best value from the disposal of common good land
 - Allocation of overhead and interest to common good funds
 - Accounting for the repair costs of common good assets
 - Funding common good activities by loans from general funds, which is prohibited
 - Implementing a strategy and performance measures for common good fund investments
 - Reviewing the operation of minor dormant common good funds inherited from predecessor authorities.
6. Where detailed audit work identifies concerns in the stewardship of common good funds by an individual council, detailed recommendations are made and a corrective action plan agreed. The audit process subsequently reviews the implementation of agreed actions.
 7. Councils face practical difficulties in maintaining records of common good assets. Those assets tend to have been held over a significant period of time, having been inherited from predecessor authorities through a number of periods of local government re-organisation and this undoubtedly presents significant challenges for record keeping. Questions about the origin and nature of common good asset holdings may require research of documentation going back many years to establish the position.
 8. While acknowledging the concerns expressed in the petitions, there has to be a question whether the extent of identified problems with common good assets in proportion to the overall finances of councils would merit the additional burden of regulation by statute and separate audit. If there are areas where further clarity is required it may be possible for this to be addressed through guidance by the Scottish Executive to councils as to what is expected of them.
 9. The Committee will be interested to note that the Local Authority (Scotland) Accounts Advisory Committee which, with the Chartered Institute of Public Finance and Accountancy (CIPFA), sets out proper accounting practice for local authorities has decided to undertake a review with the intention of producing guidance on the operation of and accounting for common good in Scotland.
 10. These comments will hopefully be of assistance to the Committee in its consideration of the petitions. We will be happy to respond to specific questions or offer any further assistance which the Committee may wish.

pages

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