

Review of Common Good in Edinburgh

Resource Management and Audit Scrutiny Panel 12 October 2006

Response by Andy Wightman

Note: This paper has been written at short notice from my current home in Ethiopia. Poor internet access and inability to consult all my records combined with a computer that needs to be sent to Nairobi for repairs means that this report is not as full nor as detailed as I would like.

As the author of the paper *Report on the Common Good of the City of Edinburgh April 2006* tabled at the Resource Management and Scrutiny Panel of the City of Edinburgh Council on 27 April 2006, I have prepared this further paper by way of a response to the *Review of Common Good in Edinburgh* paper of 12 October.

My intention is to continue the dialogue about the Common Good Fund of the City and to assist members in their deliberations about its future.

I welcome the *Review of Common Good in Edinburgh*. It contains a number of welcome suggestions and recommendations. The suggested strategic overview and more focussed and professional financial management are particularly welcome. In a limited way the Review also addresses some of the specific concerns raised by me in my report of April 2006.

However, the report still leaves a number of unanswered questions and is misleading in parts. In this paper I will comment on the Review's contents and add further comments by way of elaborating my concerns.

Definitions of the Common Good

The list of common good properties and the arguments put forward in Section 4 of the Review remain inadequate. The Review repeatedly talks about the Common Good *Account* (my emphasis). For example, in Section 4 it talks about specific assets either being or not being assets of the Common Good *Account* (my emphasis again). However, it is important to clarify that assets are either Common Good or not Common Good depending on their legal origins and history. Whether or not they are held on the Common Good Account is a separate question. As the Council itself admits in this Review, properties with common good title may be held on a number of accounts. Therefore the conclusions in Section 4 do not in fact answer the questions posed of the Council in terms of whether property x forms part of the Common Good or not. The fact that it is not held on the Common Good *Account* does not in and of itself answer this question.

The point was made clear the case of *Cockenzie and Port Seton Community Council v East Lothian District Council* (1997 SLT81) where Lord Osborne, in his ruling, said:

“Furthermore, it appears to me that the features of the accounts of the burgh which were relied upon by the respondents do not carry them very far. The way in which property is treated in accounts may or may not correctly reflect the classification of that property according to appropriate legal criteria.”

Andrew Ferguson, the author of the 2006 book *Common Good Law* (1), cited this case and stated that:

“It is clear from recent case law, then, that how a property asset has been treated in the common good account is virtually no guide at all as to whether it does form part of the common good -

although it is submitted that the existence of a building in the common good account might be more likely to be treated as persuasive evidence than the other way round.” (2)

Specific Property Queries

In this section of the Review I have a number of difficulties. These relate to the particular properties being discussed and to two further general points.

The first point is outlined in Definitions of the Common Good above.

The second point is that my own list contained on page 3 of my October Report was merely a list of examples. There are many more properties that should probably fall into the Common Good Fund and the flaw on the part of CEC is to place too much reliance on what Account certain properties are held under and not enough attention to the legal basis of determining the Common Good status of property.

This legal basis was substantially formulated following the case of *Magistrates of Banff and others v Ruthin Castle Ltd.* (3). This case, and the implications for defining what is and what is not Common Good is discussed at length in Ferguson’s book *Common Good Law* pages 68-85. In brief, the judgement concluded that **all** property of former burghs was Common Good **unless** it had been acquired using statutory powers or was held in a specific legally-constituted Trust. This is the analytical framework that should be adopted in determining whether or not the Common Good Fund held by CEC contains all the land and property it should.

In terms of the particular properties, I offer the following observations

Waverley Market

I contest this statement strongly on the basis of evidence. The argument appears little more than a fairy tale.

CEC are saying here that inclusion of Waverley Market as asset in 2005 “is an error”. This is based upon the claim that the 1937 and 1938 Acts transferring the market functions to East Market Street resulted in the transfer of the common good status. First of all this is not possible unless done by primary legislation or court order. No burgh can “transfer common good status” It is a legal quality of a property and can’t simply be swapped about. The fact that Waverley Market lost its status as a *market* in the Act has no bearing on its status as a *Common Good* asset. Second, if the 2005 asset register is in error, what about all the previous statements of CEC and its predecessors?

The 1905 Hunter & Paton Report (4) at page 42 acknowledged Waverley Market as part of common good. This status arises as a consequence of the *acquisition of the site by the Common Good Fund* as part of the land assembly of the First New Town (see Annex 1).

The City of Edinburgh District Council Accounts in 1982 contained the statement that: -

A major property owned by the Common Good Fund is the Waverley Market Site on Princes Street and since this is now being redeveloped as a speciality shopping centre there is no longer any rent income from its use as a temporary car park.

Notes to the Common Good Accounts, 1982.

Council internal papers and letters make clear that the site is part of the Common Good.

In a report of 9 November 1979 by R. McIntosh, Director of Estates and presented to the Policy Sub-Committee of the Policy and Resources Committee of 15 November 1979, it is stated that:

“Even on the most pessimistic view possible....net income to the Council will be not less than £500,000 per annum with growth linked directly to the increasing values in Princes Street.

It is appropriate to draw to the Committee’s attention the fact that the site is held on the Common Good Account which enables the District Council to make more flexible use of any funds engendered than would normally be the case.”

In an exchange of correspondence between the Director of Finance and the Director of Administration in Nov/Dec 1983 concerning VAT liability of the forthcoming Shopping Centre development, the Director of Finance writes:

“As you are probably aware, the site is held on the common good account””Whilst the site remains in the ownership of Common Good.....”

The Director of Administration replied and confirmed that the use of the site as a market had disappeared as a result of the 1933 Confirmation Act, that s.70 of the 1967 Act (which removed markets from the Common Good) would not have applied since Waverley Market was by then being used as a public exhibition space, and proposed that forthcoming legislation might seek to remove the Waverley Market site from the Common Good. *But such a clause was never drafted and there was no such legal provision ever made.*

As argued under Definitions above, the use to which the Waverley Market site has been variously put to over the years is interesting but does not affect its status as Common Good unless otherwise affected by Statute or a court ruling. What *may* be put at issue with changing use, however, is the legality and appropriate procedures for disposing of such a site (and particularly if a historic market site is moved to a new location). But that is a separate question.

The explanation offered in the Review defies belief. Members of the Scrutiny Panel are being asked to believe that the Waverley Market site was included in 2005 assets by mistake and should have been removed 70 years ago. You are being asked to believe that all the statements by Directors of Finance, Administration and Estates in the Council since then have been wrong and you are being asked to believe that some kind of transfer of common good status, unknown in case law, took place.

Why, in almost 70 years, did no-one notice that the Waverley Market was no longer a common good asset? Why did a major development take place with all the legal and financial appraisals involved and no-one notice? I suggest that they did notice and that is why the various Directors made the statements that they did but that after 1984 there was an official or unofficial effort to remove all reference to the Waverley Market site as a Common Good asset.

Before taking any of this explanation at face value a full legal explanation should be given as to when, how and why the Waverley Market ceased to form part of the Common Good and why the Council only discovered this “error” following the Scrutiny Committees call in of the 2005 Report.

The Meadows

Agree with Review (except please note that it, like others, is an asset of the Common Good or Common Good Fund not the Common Good Account - see discussion of this earlier in paper).

West Register House

Again, reference to the Account under which property is held is misleading and does not assist in identifying whether or not this property is an asset of the Common Good Fund. Following the *Magistrates of Banff and others v Ruthin Castle Ltd.* case in 1944, all property of a burgh was common good unless acquired using statutory powers or by a special trust. If West Register House was not acquired by the Town Council of the Royal Burgh of Edinburgh in either of these two ways, then it is an asset of the Common Good Fund.

Lady Stairs House

See comments relating to West Register House.

Parliament House/Old Royal High School

It should be noted that Parliament House and the Old Royal High School, as listed on page 3 of my October Report are not the same. Parliament House is located off Parliament Square opposite the City Chambers. The Old Royal High School is on Regent Road.

Parliament House was ascertained by Hunter and Paton to form part of the Common Good in 1905 (p.31). I know of nothing that has happened since then that would have removed it from the Common Good but perhaps it has. If so, it would be useful to have the information.

The Old Royal High School also formed part of the Common Good and from the discussion in Hunter and Paton (p.31) probably reverted to the Common Good when the property ceased to be used as a school. The property is clearly not now part of the Common Good as the current title dates from 1994 and only properties held by former Burghs at the date of their abolition (15 May 1975) can enjoy Common Good status. However, this raises the question of the proceeds of the disposal to the Secretary of State for the Environment in 1977. I am unaware of the sum involved but there is no meaningful increase in the balance of the Common Good in the following year. My suspicion is that this property suffered from the “accounting delusion” that, since it was (probably) on education account, it could not thus be a common good property.

If it is agreed that the School formed part of the Common Good Fund in 1977, then the receipts obtained from the sale should now be credited to the Fund with interest.

East Market Street/Cranston Street

Agreed. However, the probity of the automatic transfer of the capital receipts remains problematic since it is not clear that this is either a prudent or legal application of the capital of the Common Good Fund as I argued in my October paper. I asked under Freedom of Information to see the Senior Counsel’s Opinion referred to but was refused and the Commissioner subsequently upheld this refusal. Capital receipts of the Common Good Fund must be used for purposes to which capital is properly applicable (see Edinburgh Corporation Order Confirmation Act 1967 s.511(b) and (c)). Moreover, if the Council adopts the recommendation in 5.5 of the Review (that capital resources of the Fund be used to generate annual revenue and longer term returns), then allocating this £1.82 million capital receipt to offsetting the revenue costs of a building (the new HQ) that the Council is merely a tenant of, appears to be a flagrant breach of an existing Statute and the recommended and commonly understood norms of managing capital funds.

Similar concerns relate to the sale of 7 Merchiston Park (a Common Good Property) and the £980,525 that was not credited to the Common Good Account and which it is currently proposed be simple handed back to the Council for use in the Fit for the Future project.

I suggest that were there now in existence a strategic overview of the purposes of the Common Good Fund and a dedicated Committee entrusted with its stewardship, a total capital sum of £2.8 million of Common Good Funds would not be handed over with no investment appraisal to another Department of the Council for use as they see fit and with no reference whatsoever to the legal and fiscal duties of those charged with managing the Common Good Fund. The loss of £2.8 million of the Common Good Fund assets remains a serious question and one which remains problematic in legal and public relations terms.

City Chambers

I agree that further work is necessary to clarify the situation.

Portobello

A burgh such as Portobello would have amassed a significant property portfolio over the many years of its existence. Significant amounts of this will be common good following *Magistrates of Banff and others v Ruthin Castle Ltd*. In one small Burgh in Scotland we have identified over 100 properties acquired by the Town Council between 1908 and 1975, most of which are Common Good Assets following *Magistrates of Banff and others v Ruthin Castle Ltd*. However, the Local Authority records no assets and total funds of £100. In a Burgh such as Portobello there will undoubtedly be many unrecorded Common Good assets.

Having had sight of the Portobello Park title for example (the subject of controversial proposals to build a new school), it is clear to me that this is a Common Good asset. The Town Hall and many other open spaces and buildings will probably also be found to be Common Good.

Canongate Council Chamber

I note the ongoing review.

Streets of the Old Town and first New Town and of Leith and Portobello.

In the description of these no mention is made of Portobello. Also wrapped up in the description is extensive properties such as Leith Links. These should be clearly identified. In the past there have been capital receipts to the Common Good Fund from the sale of property on the streets of the New Town. See, for example, the £22,000 sale of rights to erect a pedestrian bridge noted in Annex A of my October Report.

I also discovered the sale of airspace at the corner of Castle Street and Princes Street (for construction of an overhead canopy). I can supply the reference although my records are in Edinburgh. The capital receipt from this was not to my knowledge credited to the Common Good Fund.

Appendix 1

Appendix 1 of the Review remains an incomplete record of the Common Good assets of the City of Edinburgh. It remains unclear, for example, what properties were removed from the Common Good Account in 1989 (see Annex A of my April Report). Have all these now been brought back into the Asset Register?

Following the legally accepted definition of Common Good assets following *Magistrates of Banff and others v Ruthin Castle Ltd.*, there still needs to be a more thorough investigation into what assets truly belong to the Common Good but which are currently held under other Council accounting heads.

7.3 Accounting

I welcome the proposed changes in accounting practice, in particular the bringing together of the whole assets of the fund, the proposed strategic overview and the suggestions in Section 3 and 7 of the Review.

I would add that Council Departments occupying Common Good assets should pay a market rent to the Common Good Fund. This should not apply in the case of parks etc. where the Council is providing a valuable service to the public through the management of a Common Good asset for public benefit. However, where a building is being occupied which the Department concerned would otherwise have to rent from the private sector, it appears that the fiduciary duties of the Council as stewards of the Common Good Fund may not be being fulfilled.

Recommendations

The Review is welcome. However, more work needs to be done to properly identify the assets of the Common Good Fund. It would help if a proper map-based asset register could be developed. Scottish Borders Council are currently doing this in response to criticisms from the Accounts Commission.

It appears that the proposed Strategic Overview is also an opportunity to ask the citizens of Edinburgh what they would like to see happen to their Common Good assets and how they think they should be managed and how the capital and revenue should be used. Most of the public don't even know of the existence of the Common Good Fund never mind that it is lawfully theirs.

I welcome further dialogue on this topic.

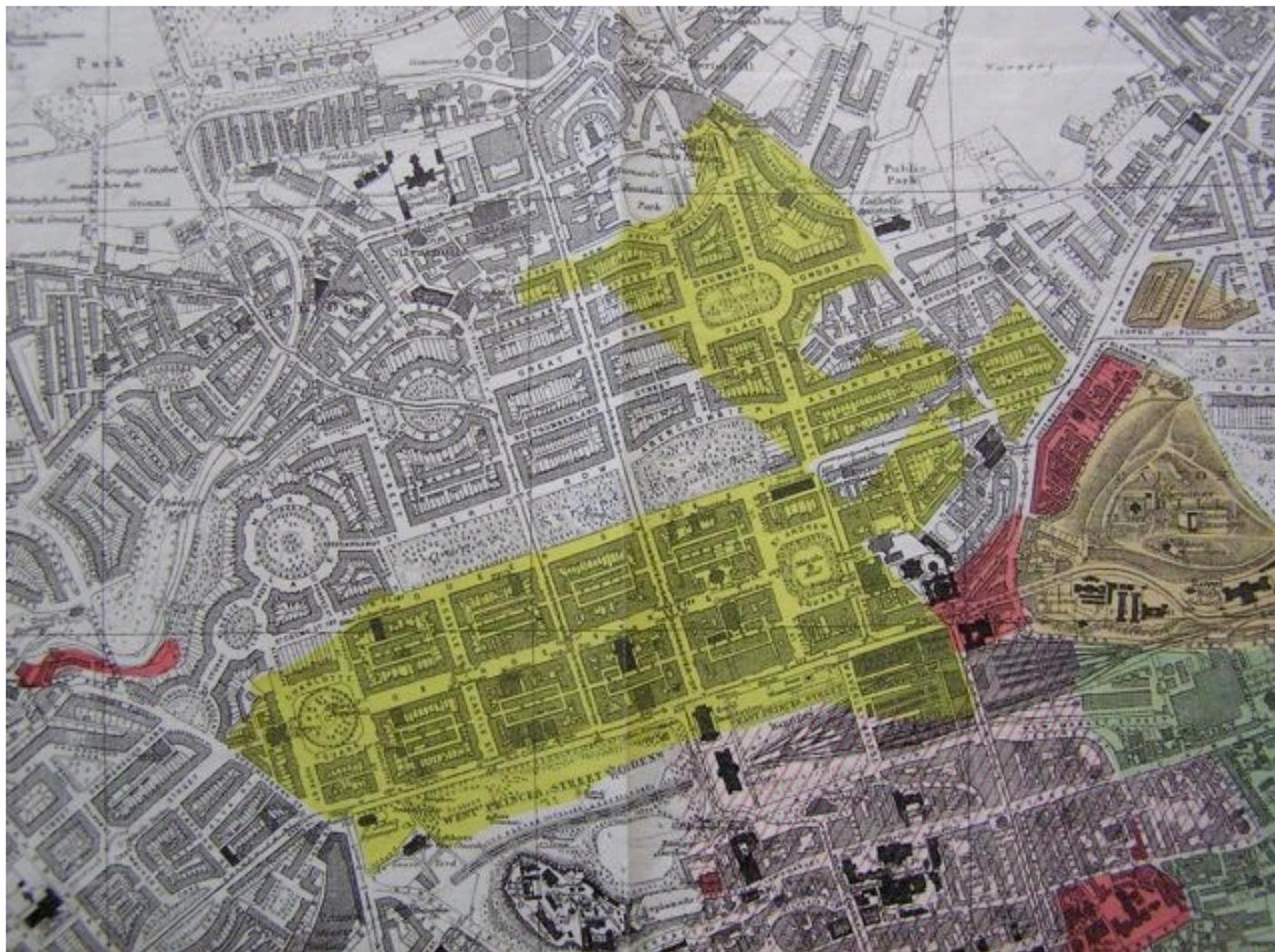
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4 October 2006

Annex 1

Extract from Hunter & Paton's *Report on the Common Good* 1905

Map shows in yellow the land forming the Extended Royalty or New Town acquired in the 18th century by the Common Good Fund of the Royal Burgh of Edinburgh.

The site of the Waverley Market can clearly be seen in the south east corner of the yellow shaded area.



References

- (1) Andrew Ferguson, 2006 Common Good Law. Avizandum Publishing, Edinburgh.
- (2) Andrew Ferguson at 67-68
- (3) *Magistrates of Banff and others v Ruthin Castle Ltd.* 1944 SC 36
- (4) Hunter & Paton, 1905. Report on the Common Good of the City of Edinburgh. Lord Provost, Magistrates and Council of the City of Edinburgh.