

**Justice Committee**

**1<sup>st</sup> Meeting, 2011 (Session 3), Tuesday 11 January 2011**

**Long Leases (Scotland) Bill**

**Letter from John Park MSP to the Convener**

I have been contacted by a constituent with regards to the Long Leases (Scotland) Bill, who is particularly concerned about the impact of the proposals upon Common Good assets and property.

In particular, he is concerned about long leases which have been entered into with local authorities for property which is considered as Common Good property or as part of an areas Common Good Fund.

My constituent has highlighted with me the possibility that the proposals contained within the Long Leases Scotland Bill could inadvertently result in common good property being sold off or threatened.

Alongside this is the issue that any decisions on the recording, use and management of common good assets and funds are entirely local authorities' responsibility and I am not aware as to whether all local authorities are in a position to be able to outline what the common good assets in their purview are.

I am in the process of seeking this information from local authorities within my Scottish Parliament region, but I have anecdotal evidence from my constituent to suggest that some local authorities may not have a full and proper record of Common Good assets to be able to identify these properties.

I appreciate the intentions of the Long Leases (Scotland) Bill but am concerned about possible implications for Common Good assets and would be grateful if the Committee could give some consideration to this issue as it moves forward in the legislative process.

I would be happy to discuss this further if that would be of assistance.

John Park MSP  
Mid Scotland and Fife  
20 December 2010

**JusticeCommittee**

**1<sup>st</sup> Meeting, 2011 (Session 3), Tuesday 11 January 2010**

**Long Leases (Scotland) Bill**

**Letter from the Minister for Community Safety to the Convener**

**Common Good: Waverley Market**

I am aware that there has been some discussion about the impact of the Long Leases (Scotland) Bill on Common Good land and on the Waverley Market. I thought it would be helpful to write to you to clarify some points.

First of all, the City of Edinburgh Council have told us that Waverley Market is not held on the Common Good. They have drawn our attention to the report '*Review of Common Good in Edinburgh*' provided to the Council's Finance and Resources Committee on 29 January 2008. I attach a copy of this report – the relevant reference is paragraph 4.1 bullet point 1. The Committee Report can also be found by searching the Council's website at:

[http://www.edinburgh.gov.uk/info/811/minutes\\_agendas\\_and\\_reports](http://www.edinburgh.gov.uk/info/811/minutes_agendas_and_reports)

In any event, the Bill does not envisage that tenants are simply gifted land. The Bill allows landlords to claim compensatory and additional payments from tenants when ultra-long leases are converted to ownership.

Recent articles in the press and elsewhere have suggested the rent payable under the lease for the Waverley Market is 1p a year and the lease is due to expire in the year 2188 (in 178 years' time). Compensatory payments are based on a capitalised value of the rent. Clearly, a rent of 1p a year will attract a very low compensatory payment. However, additional payments may be claimed when the lease is due to revert to the landlord within 200 years (see section 49(1)(e) of the Bill). That is aimed at providing compensation when landlords have a genuine reversionary interest in the property.

I have seen no evidence that Common Good will be adversely affected by the Bill. If such evidence were to be presented, I would, of course, consider the need for any Government amendments to the Bill

Fergus Ewing MSP  
Minister for Community Safety  
23 December 2010



## Justice Committee

### Long Leases (Scotland) Bill: the common good

#### INTRODUCTION AND BACKGROUND

1. The common good is a fund of money and assets owned and administered by each Scottish local authority in respect of each former burgh within the area of that local authority.<sup>1</sup> In many council areas, it consists of a substantial portfolio of land, buildings, other assets and investments. There is no equivalent to the common good in any other part of the UK.
2. The first part of this briefing note summarises the legal framework associated with the common good. The second part discusses key policy issues related to the common good, including previous work on the topic by the Scottish Parliament and its committees. The final part of this note considers the relationship between the [Long Leases \(Scotland\) Bill](#) and the common good.

#### THE LEGAL FRAMEWORK ASSOCIATED WITH THE COMMON GOOD

3. The legal framework associated with the common good is a mixture of statute and case law. The law is very complex and contains a number of areas of uncertainty.

#### The role of local authorities in relation to the common good

4. At the time of the 1975 local government reorganisation the common good of the burghs was transferred to successor islands and district councils (Local Government (Scotland) Act 1973 (the 1973 Act), s 222). Similar provision was made for the transfer of the common good to the current local authorities following the 1996 local government reorganisation.
5. In administering the common good, local authorities (except Aberdeen, Dundee, Edinburgh and Glasgow) must have regard to the interests of the inhabitants of the former burgh to which the common good related. Aberdeen, Dundee, Edinburgh and Glasgow councils must have regard to the interests of all the inhabitants of their areas in administering the common good (presumably the thinking being that the city boundaries were more or less coterminous with the

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<sup>1</sup> Until 1975, local government in Scotland was delivered via a multi-tier system of councils. Some towns and villages, which had become burghs historically, were governed by burgh councils. In 1975 burghs were abolished and a new two-tier system of local government was created. In 1996 this system of local government was replaced with a single-tier system of unitary authorities.

boundaries of the former burghs) (Local Government etc (Scotland) Act 1994 (the 1994 Act), section 15(4)).

6. The assets comprising the common good must be held separately from a local authority's general fund account (1973 Act, section 93).<sup>2</sup>

7. Management of the common good fund or funds entrusted to each local authority does however sit within the overall framework for financial scrutiny of local authorities. The most recent expression of this financial scrutiny regime can be found in the Local Government in Scotland Act 2003 (the 2003 Act) and in particular section 1 of the 2003 Act which puts a duty on all local authorities to make arrangements which secure "best value". Broadly speaking, best value requires an authority to achieve a balance between the cost of the service and the quality of service provided. Policing of this aspect of council finance is undertaken by the Controller of Audit and the Accounts Commission for Scotland supported by [Audit Scotland](#).

8. Disposal of certain types of common good property by local authorities is subject to separate statutory control via sections 74 and 75 of the Local Government (Scotland) Act 1973 (the 1973 Act). (This topic is discussed in more detail below at paras 17–21).

### **Identification of common good property**

9. Identification of the property which falls within the common good of each local authority is an area which presents difficulties. In this regard Andrew Ferguson, local authority solicitor and author of the leading textbook on common good law, writes:

"...how can it be established in the first place whether former burgh property falls into the common good?

To say that the answer to this is not straightforward is something of an understatement. There is no magic formula for identifying the common good property in a burgh."<sup>3</sup>

10. Recent case law suggests that how a property asset has been treated in the common good account of a local authority is "virtually no guide at all" as to whether it does form part of the common good.<sup>4</sup>

11. Instead the case law suggests that *all* property owned by a former burgh now forms part of the common good, with two main exceptions. These are: 1) property forming part of a separate trust administered by the former burgh (thought to be rare in practice); 2) and property acquired by the former burgh using statutory powers.<sup>5</sup>

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<sup>2</sup> More information on the accounting arrangements can be found in [Accounting for the Common Good Fund: A Guidance Note for Practitioners](#) published in 2007 by the Local Authority (Scotland) Accounts Advisory Committee (LASAAC).

<sup>3</sup> Ferguson, A. (2006) *Common Good Law*. Edinburgh: Avizandum Publishing Ltd, para 5.1.

<sup>4</sup> *Cockenzie and Port Seton Community Council v East Lothian District Council* 1997 SLT 81.

<sup>5</sup> *Magistrates of Banff v Ruthin Castle Ltd* 1944 SLT 373; *Cockenzie and Port Seton Community Council v East Lothian District Council* 1997 SLT 81; *Fife Council v Leven Community Council*, Kirkcaldy Sh Ct, 25 July 2001, unreported.

12. Property falling within 2) above is thought to be much more common than that falling within 1), given the emergence of various statutory powers in the 19<sup>th</sup> and 20<sup>th</sup> centuries to acquire land. An example of this would be land acquired to build council housing under the Housing (Scotland) Acts. However, it is often difficult without extensive investigation for local authorities to work out whether or not property acquired many years ago was acquired for a particular statutory purpose (and is therefore now not part of the common good).

### **Inalienable common good property**

13. Whilst the category of common good property seems to be a reasonably broad one, the case law suggests that there is a much narrower category of common good property where there is some kind of prohibition or restriction on “alienation”. This old-fashioned legal term, which features in both statute and case law, means some kind of use by a third party which is alternative to the existing use of the property for the purposes of the common good. Disposal of this type of common good property is subject to statutory control via section 75 of the 1973 Act (discussed further below at paras 18–21).

14. There are three main types of common good property thought to raise issues about its alienability, namely:

- property in use “from time immemorial” by the public, eg a public park that has been used for this purpose for as long as anyone can remember
- property which a burgh authority had dedicated to various public uses, eg property dedicated to use as a burgh chambers
- property where the title deeds of the property have specified that the property should be used for certain public purposes (eg as a park or public hall)<sup>6</sup>

15. It should be noted that property may originally have fallen into the category of inalienable common good property but its character may later be found to have altered. One possible (judicially untested) example is land or buildings where the public use has been interrupted for a substantial period. This example is considered further below in the context of the relationship between the common good and the Long Leases (Scotland) Bill.

### **Sections 74 and 75 of Local Government (Scotland) Act 1973**

16. Section 74 and section 75(1) of the 1973 Act provides that a local authority may dispose of common good land or buildings “to which *no* question arises as to the right of the local authority to alienate” for best consideration, or in some circumstances for less than best consideration, without being required to go to court.

17. Section 75(2) of the 1973 Act provides that if a local authority wishes to dispose of common good land or buildings “with respect to which a question arises as to the right of the local authority to alienate” it requires to go to court for that

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<sup>6</sup> Murray v Magistrates of Forfar (1893) 1 SLT 105; Cockenzie and Port Seton Community Council v East Lothian District Council 1997 SLT 81; Fife Council v Leven Community Council, Kirkcaldy Sh Ct, 25 July 2001, unreported.

authority. The court may authorise the disposal, subject to any conditions it thinks fit, including the possibility of a requirement on the council to provide substitute land or buildings to be used for the purpose that the common good land or buildings were used.

18. “Disposal” under section 75 of the 1973 Act includes an outright sale or a transfer to a third party but also, according to several cases, a lease of a property. For example, in *East Lothian District Council v National Coal Board* (1982) a 99 year lease was categorised as a “disposal”.<sup>7</sup>

19. Recent cases have considered the term “disposal” and leasing and occupancy arrangements in the context of public/private partnerships (PPPs). In *South Lanarkshire Council Petitioners* (Inner House, unreported 11 August 2004) a school was being built on common good land via a PPP and the Inner House of the Court of Session found that a 30 year lease of the land to the contractor, with a lease back from the contractor to the council of the school for the same period, did not amount to a disposal, apparently on the basis that the public use of the land was not lost.<sup>8</sup>

20. If a local authority is proposing to alienate otherwise inalienable common good property in a manner falling short of disposal no vehicle is provided by the 1973 Act to gain authorisation from the court to do so.<sup>9</sup>

## **POLICY DEVELOPMENTS ASSOCIATED WITH THE COMMON GOOD**

21. In 2005 [Common Good Land in Scotland: A Review and Critique](#) (‘the Review’) was published. The co-authors were Andy Wightman (an independent writer and researcher on land-related issues) and James Perman (a Chartered Accountant).

22. Between 2005 and 2007 the [Public Petitions Committee](#) and the [Local Government and Transport Committee](#) of the Scottish Parliament considered three petitions relating to the common good namely: [PE875](#), [PE896](#) and [PE961](#). Investigations were concluded by the latter Committee in March 2007.

23. One of the main concerns expressed by the authors of the Review and by the petitioners in the aforementioned petitions was that the records kept by local authorities of common good assets were far from complete. In relation to this Wightman and Perman observe:

“it is impossible to be satisfied that the finances are in order when the location and extent of the assets is partially or completely unknown” (the Review, p 15)

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<sup>7</sup>*East Lothian District Council v National Coal Board* 1982 SLT 40. See also *Murray v Magistrates of Forfar* (1893) 1 SLT 105 in relation to a 10 year lease.

<sup>8</sup> This case was followed in *North Lanarkshire Council Petitioners* (2006) SLT 388 (OH) in relation to an occupancy right for a contractor under a PPP arrangement.

<sup>9</sup> Ferguson has suggested that there may be alternative heads under which a court action could be brought by the local authority but that there are also procedural difficulties bringing such a court action (Ferguson, *op cit*, para 6.4 and Ferguson, *Alienation and Appropriation of Common Good Land* (2009) SLT 235).

24. Other concerns raised related to the adequacy of accounting practices for the common good and the appropriateness of use of common good assets and funds to fulfil other statutory functions of local authorities. The authors of the Review and petitioners also argued for greater community involvement in the management of the common good, particularly where disposal of assets was proposed. Mention was also made of existing legal uncertainties, particularly around the issue of whether a common good asset was alienable.

25. As a result of the Local Government and Transport Committee's investigations, George Lyon MSP, the then Deputy Minister for Finance and Public Services Reform, committed to [write](#) to Scottish local authorities reminding them of their statutory powers and duties in relation to common good funds.

26. In December 2007, in order to promote consistency in accounting and record-keeping, the Local Authority (Scotland) Accounts Advisory Committee (LASAAC) published [Accounting for the Common Good Fund: A Guidance Note for Practitioners](#). Full implementation of this guidance, which includes the requirement on individual local authorities to establish an asset register for the common good, was expected of local authorities by 31 March 2009.

27. In June 2008, as a result of some of the issues raised in the three petitions described above, the [Improvement Service](#) (which provides advice, consultancy and support to councils) published a report entitled [The Management of Common Good Assets and Funds](#) based on a sample survey of existing local authority practices. The report acknowledged that local authorities may face difficulties in implementing the aforementioned LASAAC guidance.

28. In February 2010 [Audit Scotland](#) published its annual report, [An Overview of Local Government in Scotland 2009](#). It found that:

“Councils have generally taken reasonable steps to comply with the [LASAAC] guidance, but auditors have highlighted concerns about whether some of the registers in place represent a complete record of common good assets.” (para 49)

It further noted:

“Carrying out searches of all land and buildings to identify common good assets can be time-consuming and expensive. Some councils are adopting a practice of checking title deeds at the point of sale, disposal or change in use of their assets and are introducing a rolling programme of title deeds review.” (para 50)

29. Between October 2007 and June 2010, the Public Petitions Committee of the Scottish Parliament considered [PE1050](#), a further petition on common good funds. The Committee agreed to close the petition in June 2010 in the light of the findings from Audit Scotland on councils' progress referred to above, and the fact that the Scottish Government was satisfied that common good sites were appropriately protected and saw no need for new legislation in respect of common good assets. The Committee also took into account the fact that [Audit Scotland](#) will continue to monitor progress made by local authorities as part of the annual audit process.

30. The [Local Government and Communities Committee](#) of the Scottish Parliament also continues to monitor local authorities' progress in relation to their common good funds as part of the committee work programme. Further details of its work in this regard can be found [here](#).

## **LONG LEASES (SCOTLAND) BILL AND THE COMMON GOOD**

### **The relationship between the Bill and the common good**

31. The general principle of the Long Leases (Scotland) Bill is that a tenant's right under an ultra-long lease is akin to a right of ownership and therefore the Bill provides for such a right to be automatically converted to a right of ownership on an appointed day, with appropriate compensation for the former landlord. Broadly speaking, an ultra-long lease is defined as a lease of over 175 years which has more than 100 years left to run. Leases with a rent of over £100 are excluded from the definition, with the aim of excluding leases let on commercial terms (section 1).

32. The basic compensatory payment available to the former landlord is based on the rent paid under the ultra-long lease. In addition, under sections 48 and 49 of the Bill, the former landlord can claim 'additional payments' on top of the compensatory payment in certain specified circumstances. This is intended to cover situations where the compensatory payment based on rent would be insufficient to compensate the former landlord for the loss suffered.

33. The Scottish Government undertook an online [consultation](#) in respect of the proposed Bill in March 2010 and received [15 responses](#). 13 of the 15 respondents who expressed a view on whether ultra-long leases should be converted into ownership were supportive of the conversion scheme.

34. An emerging policy issue associated with the Bill is the extent to which common good land and property will be affected by the conversion scheme for ultra-long leases contained in the Bill and, if it is so affected, whether this is desirable in policy terms.

35. This issue was not considered by the Scottish Law Commission in either its discussion paper<sup>10</sup> or report<sup>11</sup> on the topic. As part of its work on long leases, the Commission carried out some empirical research to enable it to estimate the likely number of long leases presently existing in Scotland but this also did not address the issue of long leases of common good land.<sup>12</sup>

36. The following Parliamentary Question and Answer gives an indication of the Scottish Government's position on the topic in 2008:

**S3W-14926 - Patrick Harvie (Glasgow) (Green) (Date Lodged Wednesday, July 09, 2008):** To ask the Scottish Executive how it will ensure common

<sup>10</sup> Scottish Law Commission. (2001) *Conversion of Long Leases*. Discussion Paper 112. Edinburgh: Scottish Law Commission. Available at: [http://www.scotlawcom.gov.uk/download\\_file/view/133/](http://www.scotlawcom.gov.uk/download_file/view/133/)

<sup>11</sup> Scottish Law Commission. (2006) *Conversion of Long Leases*. Scot Law Com 204. Edinburgh: Scottish Law Commission ('the SLC Report'). Available at:

[http://www.scotlawcom.gov.uk/download\\_file/view/251/](http://www.scotlawcom.gov.uk/download_file/view/251/)

<sup>12</sup> For a summary of the empirical research work see Appendix C of the SLC report.

good assets are protected and retained for community ownership in any future legislation regarding the conversion of long leases.

**Answered by John Swinney (Tuesday, July 29, 2008):** The protection of common good assets and their retention for community ownership will be given careful consideration in any future legislative proposals on the conversion of long leases.

37. The Scottish Government's [consultation paper](#) on the proposed Bill and the [Policy Memorandum](#) in respect of the Bill do not refer to the issue of the possible effect of the Bill on common good property.

38. Of the 15 [responses](#) the Government received to its online consultation, one [response](#), received from Andy Wightman, co-author of the Review referred to above, commented on the issue as follows:

“The SLC report proposes that no exemptions to conversion should be made due to the nature of the landlord and that seems correct. However, there is a situation where long leases were entered into because of the character of the property involved – common good property.

I have taken a close look at the Waverley Market in Edinburgh...This property forms part of the common good of the City of Edinburgh and was leased in 1982 on a 125 year leases for one penny a year. In 1989, the Council extended the lease to 206 years.

If the proposals to convert leases of over 175 years with 100 years to run become law then the current tenant of Waverley Market will become the owner of a multi-million pound asset which currently costs only 1p per year in rent. Since this property forms part of the common good fund of the City of Edinburgh and is probably inalienable...it does not seem appropriate that the tenant should be able to convert to full ownership.

The situation may very well be repeated in other cases in Scotland's 196 former burghs and it would be retrograde indeed if the existing attrition of common good was to be exacerbated further by leasehold reform.” (p 2)

39. Under sections 48 and 49 of the Bill, where a landlord's reversionary interest (ie the right to resume possession of the land subject to the lease) has a residual value and the lease has an unexpired duration of at least 200 years from the appointed day, the landlord can claim an additional payment on conversion of the ultra-long lease from the tenant (as well as the standard compensatory payment based on rent).

40. There seems to be some difference of opinion regarding whether or not Waverley Market is part of the common good of the City of Edinburgh. In 2008 a report was prepared by officials in the Finances and Resources Committee of the Council entitled [Review of the Common Good in Edinburgh](#) which the Council has

subsequently confirmed reflects its position on Waverley Market.<sup>13</sup> The report refers to Waverley Market in the following terms:

“Waverley Market ceased to be an asset of the Common Good and its inclusion on the asset register and balance sheet of the Fund in 2005 is an error. Acts of the Council in 1937 and 1938 transferred the fruit and vegetable market from Waverley Market to premises in East Market Street. In effect the then Council substituted the East Market Street premises for the Waverley Market premises, and with it the common good status. Accordingly Waverley Market ceased to be part of the common good at the time of the transfer of the fruit and vegetable market to East Market Street.”

41. Andy Wightman, in his recent book, “The Poor Had No Lawyers” (2010)<sup>14</sup> comments as follows on the Council’s position:

“The Council are claiming here that the inclusion of Waverley Market as a common good asset in 2005 ‘was an error’. This is based upon the claim that the 1937 and 1938 acts transferred the market functions to East Market Street resulted in the transfer of the common good status. This is a fairy story. In 1983, an exchange of letters between the Director of Administration and the Director of Finance in relation to VAT liability for the shopping centre construction confirmed that the site was common good. The letters confirm that the site was freed from any statutory market obligations in 1933 but that the loss of these rights had no impact on the common good status since that was derived from the fact that the land had been purchased by the Common Good Fund in 1766. The Director of Administration even suggests that forthcoming private legislation could be used to remove the site from the common good as had been done with the markets and slaughterhouses in 1967.

The Waverley Market is part of the Edinburgh Common Good Fund because it was acquired by the Common Good Fund as part of the land assembly of the First New Town in the late eighteenth century. Nothing that has transpired since alters that.” (p 228)

### **Possible policy issues for further consideration**

42. Whilst written evidence will of course provide the best indication of areas which merit further investigation in the course of any committee consideration of the Bill, at this stage it is possible for SPICe to make some tentative preliminary suggestions as to some areas which may merit further work. These are as follows:

- a) Does Waverley Market currently form part of the common good fund of City of Edinburgh Council?

<sup>13</sup> Email from the Director of Finance of The City of Edinburgh Council to the Scottish Government dated 15 December 2010 (made available to SPICe by the Scottish Government).

<sup>14</sup> Edinburgh: Birlinn Limited.

- b) Depending on the answer to a) above, does Waverley Market form an isolated example of an ultra-long lease of common good property affected by the current Bill or is it a situation likely to be replicated in other parts of Scotland?
- c) Depending on the answer to a) and b) above, are the difficulties local authorities have had in identifying their common good property now largely historical, or (to any extent) still current? (This may affect how easily ultra long leases of common good property could be excluded from the scope of the Bill if this were thought desirable in policy terms)
- d) What are the policy arguments for and against retaining ultra-long leases of common good property within the scope of the Bill?

### **Uncertainties associated with common good law**

43. Finally, it is worth concluding this briefing by highlighting that consideration of the policy issues surrounding the Bill and its relationship with the common good may well be complicated by a number of prevailing legal uncertainties associated with the common good. The Appendix to this briefing outlines some further examples of such legal uncertainties (although the list is by no means intended to be exhaustive). However, two prevailing uncertainties have a particularly close relationship with the subject matter of the Bill and so merit consideration in the main body of this briefing.

44. In the first place, if a local authority has previously disposed of common good property via a lease and the local authority then wishes to transfer ownership of the property to a tenant (or another third party) does this second transaction require the authorisation of the court or has the property lost its inalienable common good character by virtue of the first transaction?

45. Ferguson, in his textbook on common good law, suggests that common good property may lose its inalienable character, for example, when it has been leased to a third party for retail or industrial purposes and has therefore been taken out of public use, although he suggests the cautious approach would be to consider this to have occurred only where the property has been out of public use for at least 20 years.<sup>15</sup> On the other hand, at least one case would suggest that that the courts take a dim view of local authorities arguing that the character of the common good property has changed where their own actions have resulted in the public use of the property ceasing.<sup>16</sup>

46. The matter has not been directly judicially tested so no firm conclusions can be drawn. However, any speculation on this point is arguably of relevance when attempting to assess how many properties subject to ultra-long leases have retained their inalienable common good character. On the other hand, it is also important to remember for the purposes of the Bill that the issue of alienability is a separate legal question from the issue of whether such properties remain part of the much wider

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<sup>15</sup> Ferguson, *op cit*, para 7.2.

<sup>16</sup> *Grahame v Magistrates of Kirkcaldy* (1879) 6 R 1066. However, the latter case was concerned with a situation where the land had been neglected and that neglect had, in turn, resulted in dwindling public use. It did not involve a lease to a third party.

category of common good property in general (see paras 11–12 above on the latter point).

47. The second uncertainty relates to the situation where a local authority does not seek a court ordered disposal under section 75(2) in circumstances where it ought to have done. It is not clear whether the third party who receives an interest in that property (whether a right of ownership or, for example, an interest under a lease)<sup>17</sup> has a right which is exempt from legal challenge or in fact has to wait 20 years before the title is exempt from legal challenge. The case law is not conclusive on this point.

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23 December 2010

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<sup>17</sup> Assuming a lease does actually amount to a disposal in the first place under section 75 of the 1973 Act. As referred to earlier in this briefing, there is now some uncertainty surrounding this issue, at least where the public use of the property has not been lost (see paras 19–21 of the briefing and also the Appendix, para 4).

**APPENDIX: FURTHER EXAMPLES OF AREAS OF UNCERTAINTY ASSOCIATED WITH COMMON GOOD LAW**

1. The paragraphs below outline some examples of prevailing areas of legal uncertainty associated with the law relating to the common good.
2. In the first place, it is not entirely clear how wide the category of inalienable common good property actually is. A particular issue relates to the sub-category of such property which is said to acquire its inalienable character by virtue of public use “for time immemorial”. Is 20 years sufficient to establish its inalienable nature or is a long period required? The case law is not consistent on this point.
3. More generally, it is not an absolutely straightforward matter as to when “a question arises” as to the inalienable nature of common good property for the purposes of section 75(2) of the 1973 Act (with permits court authorised disposal). On one view of the case law inalienable common good property is restricted to the three categories of case described at para 14 of the briefing, on another view it could be argued that every time there is a dispute between the public and a local authority about a proposed disposal of common good property, a question could be said to arise. Some cases do seem to favour a wider interpretation of what constitutes inalienable common good property.
4. Another uncertainty already alluded to in paras 19–21 of the briefing, is when a lease counts as a “disposal” for the purposes of section 75(2) of the 1973 Act. Several cases refer to the fact that a lease amounts to a disposal (eg *East Lothian District Council v National Coal Board* (1982) where a 99 year lease was categorised as a “disposal”) but a recent case (*South Lanarkshire Council Petitioners* (Inner House, unreported 11 August 2004) suggests that the position may be more complicated in a lease and leaseback arrangement, at least where the public use of the property is not lost. The recent uncertainty is significant because if a local authority wishes to do something with inalienable common good property falling short of disposal, it lacks an obvious procedure by which to seek the authorisation of the court to alienate otherwise inalienable common good land.