

Scottish Parliament Justice Committee

Long Leases (Scotland) Bill

Response from Andy Wightman

7 January 2011

INTRODUCTION

1. I am independent self-employed researcher on land rights in Scotland and elsewhere and in recent years have undertaken research on common good land in Scotland's 196 burghs. This work has been done on a voluntary basis and thus is modest in scope but I have uncovered some issues of concern. One of these is the impact of the Long Leases Bill on common good land and I would like to make some observations to the Justice Committee on this topic.

PROPOSAL

2. ***I am inviting the Justice Committee to agree that common good land should be exempted from the provisions of the Long Leases (Scotland) Bill.***

COMMON GOOD

3. Common Good Funds are the moveable and heritable assets formerly held by the burghs of Scotland. In 1975, with the abolition of Town Councils (though not of burghs), title to these assets were transferred to District Councils and then, in 1996 to Scotland's current local authorities. These assets are held on behalf of the inhabitants of the former burghs and still belong to the inhabitants collectively. More information can be found in *Common Good Land. A Review and Critique* (1) and *Common Good. A Quick Guide* (2).

LONG LEASES

4. The Long Leases Bill proposes to convert all leases in excess of 175 years (and with at least 100 years left to run to full ownership). As argued in the Scottish Law Commission's report on Long Leases, the origins of these long leases lies predominantly in Scotland's entailed estates which in the 19th century covered over half the land area of Scotland. (3) However, there is at least one other category of property where leases were preferred to feus - common good land.
5. As described above, common good is the historic property of the burghs of Scotland and its administration and management is governed by both statute and case law. This includes provisions relating to alienability and inalienability and the powers of a Council to dispose of or alienate common good land. In many cases, the consent of the courts is required before common good land can be disposed of. As a consequence, common good land has often been leased rather than sold.
6. The incidence of common good land held on leases (including long leases) is unknown because the precise extent of common good land remains unclear (many councils are still in the process of creating registers of common good assets). I am only aware of one such property - the Waverley Market in Edinburgh. It is currently let on a 206 year lease which was granted in 1982 and thus expires in 2188.
7. The following points should be noted.
 - Common good land was often only leased due to legal restrictions on disposal.

- Any such disposal would, in the ordinary course of events, require the authority of the courts
- Such land is held on behalf not of some private interest but the residents of former burghs

8. It thus appears to me that it is inappropriate that this special class of historic property (which has only found itself subject to long leases through the particular legal safeguards surrounding disposal) should be subject to the conversion to ownership which the Long Leases Bill provides for. Common good land is part of the historic fabric of burghs dating back several centuries in many cases. It is not in the same class as private property where leases were entered into as an alternative to feuing.
9. This is particularly the case when considering the circumstances of the Waverley Market (see below) which, if the Bill is enacted as it is, will mean that a commercial property developer will obtain ownership of a site worth millions of pounds for a few pence. Not only is this manifestly unfair, it means that future citizens of Edinburgh will be deprived of the income from this valuable site.

RECOMMENDATION - EXEMPTING COMMON GOOD

10. I submit to the Committee that all common good land be exempted from the provisions of this Bill. The detail is straightforward (that there be inserted in the Bill as Section 1(4)(d) "*it is of land forming part of the common good of a burgh*").
11. I am aware there is a problem here in that on the appointed day, there will almost certainly still be uncertainty and dispute in many local authorities over what land is held in common good funds. It will be difficult therefore to know what land held on a long lease should be exempt by virtue of its common good status if that status is at the time still not conclusively determined. If the Committee accepts that common good property should be exempted then some way needs to be found of ensuring that no property can be converted where the status is unclear. One way may be to require councils to seek court approval that any property IS NOT common good before any lease is converted. Given the relative rarity of leases in excess of 175 years, this would not be an unreasonable condition.

WAVERLEY MARKET

12. I include here some details of the Waverley Market case in order to illustrate the impact of this Bill on valuable common good assets.
13. The Waverley Market is a 1.68 acre site in Edinburgh bounded on the north by Princes Street, on the east by the Waverley steps, on the south by Waverley Station and on the west by Waverley Bridge. The Princes Mall shopping centre currently occupies the site.
14. The land formed part of the original land acquired by the Common Good Fund of the City of Edinburgh in the 18th century and has been a recognised asset of the Common Good Fund since then. (4)
15. The old market was demolished in 1971 and the site then lay undeveloped until 1982 and was used as a Car Park by the Chamber of Commerce. In the period 1979 - 1982 the Council agreed to enter into a leaseback arrangement with a developer whereby the site would be leased for 125 years, the developer would construct a speciality shopping centre, and the Council would then lease back the Centre and

sub lease the individual retail units. The Council would pay a rent calculated at 6.5% of the development cost and rental yields over and above this would be shared with the first £1.4 million accruing to the Council and income in excess shared between both parties.

16. Numerous references by senior City of Edinburgh officials attest to the site's common good status. For example, 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.

17. 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."

18. 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.....

19. 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.**

20. The City of Edinburgh Council informed me in 2005 that the Waverley Market formed part of the common good and I undertook research which exposed serious questions surrounding the probity of the development of the shopping centre in the early 1980s (5). The Council subsequently claimed that the site was not part of the common good.

Waverley Market is not an asset of the Common Good and its inclusion on the asset register and balance sheet of the Fund in 2005 is an error. The property should have been shown as an asset of the former Edinburgh Corporation, then subsequently the City of Edinburgh Council, following the transfer of the Fruit and Vegetable market

from Waverley Market to East Market Street subsequent to the Acts of Council in 1937 and 1938. The Council provided substituted premises at East Market Street, as noted below, to which the Common Good status of Waverley Market was transferred.
(6)

21. I refuted this claim at the time. (7) The Council's explanation has been repeated in evidence to the Justice Committee in a letter from Fergus Ewing, Minister for Community Safety (paper J/S3/11/1/7 11 January 2011). I disagree with the contents of this letter and am disappointed that the Minister has chosen to rely on the spurious argument presented by the Council without undertaking further research.
22. As is made clear in para. 19 above, the market did disappear as a result of the 1933 Confirmation Act but the common good status remained (with the Director of Administration - presumably on legal advice - suggesting that a future Corporation Act be used to remove the common good status). Common Good status cannot be removed simply by a change of function but is an intrinsic quality of the title unless and until it is removed by order of a Court, by statute or by sale to a third party.
23. It should be further noted that the City of Edinburgh District Council never obtained the approval of the courts for the grant of a long lease in 1982. It should have done so and, arguably, the lease is in fact *ultra vires*. This issue is explained further in the SPICE Briefing provided to the Justice Committee on 11 Jan 2011 in paras 16-20.
24. The City of Edinburgh Council is asking people (and has apparently persuaded the Minister for Community Safety) to believe that all the statements by Directors of Finance, Administration and Estates in the Council in the early 1980s were incorrect and that some kind of transfer of common good status (unknown in case law) took place.
25. The Council appear to be denying the common good status in defiance of all previous statements for the simple reason that this neatly avoids the tricky question of why this valuable common good asset was alienated without court approval for 1p per year on a 206 years lease.

NOTES

- (1) available at www.scottishcommons.org/docs/commongood_v3.pdf
- (2) available at www.scottishcommons.org/docs/commongoodguide.pdf
- (3) see Scottish Law Commission *Leasehold Reform* SLC 204 para 1.7
- (4) details of the land acquisitions are provided on pages 25-26 of *Report on The Common Good of the City of Edinburgh* by Thomas Hunter, Town Clerk and Robert Paton, City Chamberlain, 1905. A map illustrating the land acquired can be found in Annex I of the paper referred to in Note 7 below.
- (5) See my report at www.scottishcommons.org/docs/edinburghcg_20060426.pdf
- (6) Council reports of 12 October 2006 (prepared but never tabled) at www.scottishcommons.org/docs/scrutiny_20061012.pdf and 29 January 2008 at www.scottishcommons.org/docs/finance_20080129.pdf
- (7) see my response to Council 12 October 2006 paper at www.scottishcommons.org/docs/aw_response.pdf