
Report To:	Policy and Resources Committee	Date: 29 March 2011
Report By:	Head of Legal and Democratic Services	Report No: LA/669/11
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Subject:	Common Good Asset Review	

1.0 PURPOSE

- 1.1 To advise the Committee of the completion of the Common Good Asset Review and to make recommendations on its outcome

2.0 SUMMARY

- 2.1 The common good is a fund of money and assets administered by local authorities in respect of each former burgh within the area of that authority. Inverclyde Council administers the common good for the former burghs of Gourock, Greenock and Port Glasgow. The common good must be administered separately from other local authority assets, but is owned outright by the authority. There are statutory and common law constraints on all local authorities on how the common good may be administered.
- 2.2 In terms of guidance provided by The Local Authority Scotland Accounts Advisory Committee (LASAAC) all Councils are required to maintain and publish accurate registers of their common good assets. Audit Scotland expects all local authorities to comply with this requirement
- 2.3 The Head of Legal and Democratic Services has completed over the past eighteen month period a review of all of the Council's heritable property as listed on the Physical Asset Management Information System (PAMIS). The purpose is to identify the full extent of the properties which should be classified as common good. The result of this comprehensive exercise is to establish a common good asset register which reconciles to the information presented in the Council's financial statements and to maintain that register for the future.

3.0 RECOMMENDATIONS

- 3.1 That the Committee consider this report and its recommendations
- 3.2 That the Council's financial records be amended to list the heritable assets detailed on the attached Appendix 1 as part of the common good estate.
- 3.3 That the Council publish via the Council's website a common good asset register making these findings available to the general public in such suitable form as the Head of Legal and Democratic Services approves, subject to consultation with ICT and Corporate Communications.
- 3.4 That it be remitted to the Head of Legal and Democratic Services in consultation with the Chief Financial Officer to keep the register updated and accurate with any such additions and deletions as are required from time to time.

- 3.5 That the Council's current practice of maintaining one consolidated common good fund for the three former burghs is continued.
- 3.6 That the provisions of paragraph 4.9 be adopted as the Council's practice for accounting for receipts and expenditure in respect of the common good.

4.0 BACKGROUND

- 4.1 The common good is a fund of money and assets, previously owned by a burgh, now owned by a unitary authority, administered subject to specific rules in relation to:
- the interests of the inhabitants of the former burgh; and
 - disposal of assets.

Historically, the former burghs developed as important centres of commerce in Scotland. With the Burghs came various forms of burgh authority to administer the same. In Scots Law burgh authorities were not recognised as having a separate legal personality. Accordingly deeds passing property to, or indeed from, them ran in the name of the office bearers at the time of the deed. It was common, particularly but not exclusively where land was gifted, to adopt a style of wording that made it explicit the asset was held for the benefit of the people of the burgh, importantly distinguishing it from the personal assets of these office bearers, for example “for behoof of the people of the said burgh”. Scots Law, in both statute and case law, evolved to recognise property so held as the common good of a burgh.

- 4.2 The functions fulfilled by the burgh authorities expanded over time. As they grew to include a number of statutory functions, a creature much closer to the modern Local Authority emerged. The legal position therefore progressed to a point where property could only be held by a burgh in one of three ways:
- in terms of a particular statutory purpose or power (for example housing or roads);
 - in terms of a separate trust; or
 - as part of the common good.

It is therefore worth noting that it is possible that an asset held by a burgh for the benefit of the public, which accordingly might on the face of it appear to form part of the Common Good, need not do so. An example of this is the McLean Museum and Art Gallery, held under a separate trust.

- 4.3 The identification of an asset as common good does not of itself necessarily mean that such property cannot be sold or leased out. It is possible for certain common good assets to be sold. However, case law has further evolved to recognise some types of common good property which could not be disposed of or otherwise alienated by a burgh authority. This is known as the inalienable common good. The three recognised classes of common good property which are inalienable are where :
- there has been use from time immemorial by the public;
 - the property has been dedicated to a public purpose; and
 - the wording of the deed granting title explicitly dedicates it to a public purpose.

In this context it is important to note that alienation includes sales, leases or even simply actions which defeat the established public use or purpose.

- 4.4 Title to common good land is held by local authorities as statutory successors to the Town Councils of the burghs which were abolished in 1975 under the Local Government (Scotland) Act 1973. This Act, and later The Local Government etc. (Scotland) Act 1994, states that local authorities have certain duties with regard to common good. In particular:
- the 1973 Act provides that common good assets should not be absorbed into the general fund of the Council and that where a local authority wishes to dispose of common good assets, and a question arises about their right to do so, they should apply to the Court of Session or the Sheriff for authority to proceed (Section 75); and
 - the 1994 Act (section 15) provides for the transfer of all common good property to the new unitary authorities stating that, in administering such property, any authority to which it is transferred shall have regard to the interests of the inhabitants of the area to which the common good related prior to 16 May 1975,

mirroring a similar provision in the 1973 Act.

- 4.5 The Council and its predecessor Inverclyde District Council have historically maintained one consolidated common good account. The strictest interpretation of the wording of the present legislation, would suggest that for the clearest technical compliance a separate common good account be maintained for each of the three burghs. As historically neither the Council nor its predecessor Inverclyde District Council have done so, it is considered, following consultation with Finance, that:
- an attempt to divide the current fund into separate accounts for each Burgh by way of investigation of historical income from and expenditure on common good assets will be impractical in light of the available records, and would constitute a disproportionate use of resources; and
 - in view of the proximity of and links between the three burghs, that the maintenance of the consolidated account is, in the particular circumstances of Inverclyde, compatible with the Council's obligations in terms of the legislation

Accordingly, it is recommended that the current practice of maintaining a single consolidated common good fund be continued. This is Finance's preference and in their opinion will meet audit requirements.

- 4.6 The Local Government (Scotland) Act 1973, s.75 also made provision that a Local Authority could seek authority from the court to dispose of common good property where "a question arises as to the right of the authority to alienate". The court then has discretion to "authorise the authority to dispose of the land subject to such conditions, if any, as they may impose".
- 4.7 Accordingly, in any disposal of property by a Local Authority careful consideration must be given to the common good position. If the property forms part of the common good:
- such disposal or alienation may not be competent; and
 - if it is competent any sale proceeds or income should be credited to the appropriate common good fund
- 4.8 The concept of the common good has become more topical in recent times, particularly in connection with public objections to high profile disposals or attempted disposals by Local Authorities. It has also been the subject of a number of petitions to the Scottish Parliament. In this context, LASAAC produced guidance in 2007 "Accounting For The Common Good Fund: A Guidance Note For Practitioners". Compliance with this requires Local Authorities to produce clear publically available records of the extent of their common good assets. Such compliance is being actively pursued by Audit Scotland. This Council has undertaken a process of comprehensive review of all land assets over an eighteen month period to investigate and confirm the extent of its common good assets. This is necessary to:
- demonstrate accurate and proper stewardship of these assets and to ensure comprehensive record keeping;
 - account appropriately for rental or other income from and maintenance costs of these assets; and
 - address certain misconceptions that it is not possible to dispose of any common good property.

For Councils to fully maximise the potential of their assets, they must hold accurate records of the assets they are responsible for. This would include those assets held for the common good.

- 4.9 In considering common good assets presently in use as operational buildings by the Council, in particular the Greenock Municipal Buildings themselves, Finance advise that if all expenditure in respect of these assets is met out of the common good fund it is anticipated the fund will be rapidly depleted. This is an issue that has been encountered by other Councils.

An accounting scheme is accordingly proposed whereby:

- the Council is treated as a managing agent in respect of common good assets in

- operational use;
- the Council receives a payment of £1 if asked from the common good fund in respect of this role; and
- that as property managed by the Council, all income and expenditure is directed through the Council's general fund, and not through the common good fund, thus maintaining level of funds in the common good account.

Finance have been advised that a scheme of this nature has been implemented by the City of Glasgow Council in respect of all common good assets and has been accepted by their auditors, Audit Scotland.

This treatment proceeds on the assumption that the assets in question will not generate any surplus of income stream in excess of ongoing costs and liabilities. It is however proposed that where income is likely to be generated from an asset, consideration can be given on a case by case basis to directing that all income and expenditure for that asset to the common good fund.

The above scheme will not apply to those various properties currently let on commercial leases and so generating income, for example the shops at John Wood Street and Bay Street, Port Glasgow. and other miscellaneous properties in the common good which are occupied by third parties and these will continue to be accounted for through the Common Good in respect of income and expenditure.

- 4.10 For the Council's information, an alternative approach to that outlined at 4.9 above, would be that a notional full repairing and insuring (FRI) lease is acknowledged for any asset or part asset forming part of the common good estate utilised as operational property for accounting purposes. For the purposes of this approach, the Council or the individual service are treated as the tenant. In terms of this notional FRI:
- the tenant accepts the liability for insurance, maintenance and repair of the asset, payments for which are made out of the general fund; and
 - the tenant makes rental payments from the general funds to the common good funds, but that the rent payable is suitable reduced to acknowledge the significant repairs liability that has been undertaken.

In a scheme of this type, as common good assets by their nature tend to be older buildings, the maintenance and repairs liability is significant and thus the rental payable significantly reduced.

This is the scheme which from discussion with Fife Council's legal services it is understood they adopt.

A scheme of the type outlined at 4.9 is preferred by Finance as it is firstly more compatible with existing systems and procedures and secondly considered likely to produce a similar practical result in the particular circumstances of the Council.

5.0 COMMON GOOD ASSET REVIEW - METHODS AND ASSUMPTIONS

- 5.1 The review has been restricted to the heritable estate, being the Council's land assets. This has been the primary focus of the Audit Scotland's interest, it being recognised that heritable estate will represent by far the most significant proportion of value and income within the common good.
- 5.2 Prior to the commencement of this project, The Physical Asset Management Information System (PAMIS) database had been populated with the details of all heritable property known to be within the Council's ownership. This has been utilised as the basis of the review.
- 5.3 Subject to certain instances detailed below, for each property listed on PAMIS a title examination was conducted, producing a Report on Title. This report is of a type normally produced by Legal and Democratic Services in connection with a proposal for

part of the heritable estate. These reports assess the basis of the title to the particular subjects, the likely extent, title conditions affecting and culminate with an opinion on the common good position, namely:

- Do the subjects form part of the Common Good?
- If so, do the subjects form part of the inalienable Common Good?

A check has also been completed of the asset list on the Logotech system to ensure that there are no assets listed there which should form part of the common good register but which were not captured by the above process.

- 5.4 Whilst the common good position is in some cases clear and explicit in the title deeds, in others it is not and a legal assessment has been undertaken in each case in order to finalise the Council's register.
- 5.5 Assets held by authorities other than the burghs themselves, for example property in Inverkip, Wemyss Bay or Kilmacoll held by the former Renfrew County Council, cannot form part of the common good. Title reviews were therefore restricted to properties within Gourock, Greenock or Port Glasgow.
- 5.6 In the case of some properties it can be safely concluded prior to examination of the titles that the property is not part of the common good, for example:
- where a site has been acquired and developed primarily for housing, but commercial premises have been included in that development, it can be assumed not to form part of the common good as the primary purpose for the acquisition was a statutory purpose, namely housing;
 - for the schools estate, where the property has passed through the ownership of various Education Authorities, it can be assumed to also be held for a statutory purpose, namely education; and
 - it has been assumed that any property which formed part of Strathclyde Regional Council's (SRC) estate does not form part of the common good as:
 - in light of the wording of The Local Government (Scotland) Act 1973, it is the opinion of this service that the intention was all common good property would pass to the District Councils, not Regional Councils; and
 - in light of the largely statutory nature of the functions fulfilled by SRC, such property would in any event be excluded from the common good.

So, as stated in 5.3 above, in order to avoid devoting a disproportionate amount of project time and resources on complex title assessments where it was at the outset clear the subjects do not form part of the common good, it was decided to not complete full Reports on Title on such subjects.

- 5.7 The nature of the titles varies widely from site to site, ranging from some in the modern Land Certificate form introduced by the Land Registration (Scotland) Act 1979 with clear Ordnance survey plans, to historic deeds, the oldest encountered dating from the 1700s.

There are a number of difficulties encountered in the older deeds:

- they often contain no plan, only a reference to historical boundaries which may or may not be identifiable on the ground today; and
- where there is reference to a plan, if the original deed has been lost, Registers of Scotland copies do not include these plans on most deeds prior to the early 1900s, and after that date often only include a black and white copy.

Whilst not necessarily an obstacle to assessment of the title for the purposes of this project, this has meant that in producing the Reports on Title it has not always been possible to make definitive statements as to the boundary extent of the titles. Reference is made below at paragraph 6.4 to the commencement of a programme of title plotting which should assist in clarifying this for future reference.

- 5.8 During the course of the title examinations, a number of missing deeds have been noted. Where of essential to the title examination for the project purposes or thought to be otherwise significant, copies have been obtained. However, where they are older

deeds thought unlikely to contain any meaningful or still enforceable conditions or otherwise unlikely to have any impact on the assessment of the common good position, copies have not been ordered with a view to conserving project resources.

6.0 COMMON GOOD ASSET REVIEW – OUTCOMES

- 6.1 The completion of this review has produced lists for each burgh of the properties identified as clearly common good, shown at Appendix I, which will now be maintained as the Common Good Register.

The benefits of completion of the register include:

- The production and maintenance of such a register is a requirement placed on the Council by Audit Scotland.
- Subject to committee approval of this report's recommendations, the Register will in due course be made available to the public via the Inverclyde Council website, furthering open and transparent stewardship of these assets and compliance with the LASAAC guidance.
- This Register will be available to officers throughout the Council, allowing the early identification of any potential common good issue in proposed disposals, lets or other matters affecting heritable property.
- Reference to the Register will ensure that any proceeds or income received from or expenses incurred in connection with common good property, are properly accounted to or from the Common Good Fund.

- 6.2 In addition to the production of the Common Good Register, the method adopted in this project has produced a number of results beneficial to the Council as follows:

- Reports on Title have in the large majority of cases been completed and retained on the PAMIS system as an explanatory document;
- as part of the title examination process, title deeds have been scanned on the PAMIS system, allowing for easier future reference;
- as stated at 5.9 above, copies of deeds missing from Council title packets have on the whole been obtained and again linked to the PAMIS system;
- in the completing this project:
 - where in the course of the title check it has been verified that a site listed on the PAMIS system has been disposed of, that PAMIS entry has been removed; and
 - where a site has been identified as in Council ownership but is not listed on the PAMIS system, an entry on that system has been added.
- where a discrepancy between expected ownership and legal title has been identified, steps have been taken to commence any remedial conveyancing considered necessary.

As a result, Legal and Democratic Services can now more easily, quickly and comprehensively provide advice in response to land ownership, development and other legal enquiries from within the Council and from key partners such as RCH.

- 6.3 As the Title checks have involved a review of a number of the stock transfer deeds, there has been an opportunity to re-check and verify the extent of the transfer and confirm retentions.
- 6.4 Whilst not essential for the completion of this project, the possibility of plotting the Council's titles on the OS map was discussed with the Regeneration and Planning Service and in the course of these discussions it became apparent that they also see a benefit in such an exercise. This process has been initiated although as it is labour intensive it is envisaged it will take a significant period of time to complete. At present, as many of the older titles lack plans, identification of the extent of the Council's title can cause delay in the provision of advice. On completion of this plotting process a set of plans will be available providing the most accurate possible definition of the extent and boundaries of the individual sites again improving the service provision by Legal and Democratic Services.

7.0 IMPLICATIONS

7.1 Financial Implications

Assuming the treatment in paragraph 4.9 is adopted then income and expenditure for the majority of Common Good properties will remain within the General Fund and there will be no financial impact.

For the small number of sites which generate a marginal net income, that income will require to be recognised within the Common Good and will be a loss to the General Fund. The impact is estimated to be in the region of £20,000 to £30,000 per annum.

7.2 This report has been considered in detail by the CMT and has been approved.

Appendix 1

Inverclyde Council - Common Good Heritable Asset Register by Burgh

It should be noted that the scope of the register includes only those properties meeting the legal tests for the common good property. There are properties where although the nature of the Council interest is such that such property is held for the good of the public, as the interest does not meet these strict legal tests they are not common good property. They have therefore not been included in this register. An example would be properties held under specific trusts stated to be for public benefit, such as the McLean Museum and Art Gallery, Greenock or the Birkmyre Park, Kilmacolm.

<u>Gourock</u>	UPRN Number	Description	Address
	119049833	Albert Road Boat Platform	Albert Road
	119001633	Albert Road Toilet	Albert Rd, Gourock, PA19 1NW
	119014089	Ashton Boat House	Ashton Road
	119000037	Cove Rd Boat Yard & Slipway	Cove Rd
	119052179	Darroch Park	
	119000015	Gourock Pool	Albert Road
	119001135	Shore Street Toilet	Shore Street
<u>Greenock</u>	Code	Description	Address
	119050206	Battery Park	Battery Park
	119049897	Broomhill Park	Broomhill Park
	119149888	Caddlehill Land	
	119001687	Dalrymple Street No 95	95 Dalrymple Street, Greenock, PA15 1HU
	119049873	Drumfrochar Road No 18 Land	Drumfrochar Road No 18, Drumfrochar Road No 18
	119001729	Drumfrochar Road No 18b	18 Drumfrochar Road, Greenock
	119000082	Esplanade Toilets	Esplanade
	119042993	Greenock Municipal Buildings	Municipal Buildings, Clyde Square, Greenock
	119049839	Hillend Bowling Club	Border Street, PA15 2EF
	119051703	Lady Alice Park (including former Hector McNeil Swimming Pool)	
	119050190	Lady Octavia Park	Bridgend Road
	119043147	Larkfield Industrial Estate	Earnhill Road, PA16 0EG
	119050189	Port Glasgow Road No 74	Port Glasgow Road
	119049838	Wellington Park Bowling Club	Wellington Park
	119049869	Wellpark Park (including former Wellpark Nursery)	
	119049893	Whinhill Golf Club	Beith Road

Gourock

UPRN Number	Description	Address
119046690	Bay Street	Shops at Nos.2, 4, 6, 8, 10, 12 and 14
119001175	Fyfe Shore Depot	Fyfe Shore Road, PA14 6RR
119052966	Highholm Street/Balfour Street Land	
119047585	John Wood Street	Shops at Nos. 1, 4, 5-13, 6, 8, 10, 15, 16, 17, 18, 21 and 22
119000760	Port Glasgow Baths	19 Bay Street
119000294	Port Glasgow Town Hall	Shore Street

Port Glasgow