

Common Good Law – The Basics

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Introduction

1. Common good law is about common good property. Common good property is certain property held by local authorities. It is not property which is held by some form of trust, which the local authority, or some of its members, hold as trustees for the authority, or for some other community body or interest. (*Magistrates of Banff v Ruthin Castle Ltd* 1944 SC 36, 1944 SLT 373).

Such trusts do exist, and there has frequently been confusion over whether some property is held in a trust, or by the local authority in its own capacity. To decide such a question, it will normally be necessary to examine the relevant title. That may include not just dispositions, but also trust deeds, burghal charters, and perhaps other evidence such as minutes of local authority meetings.

2. Common good property can best be regarded as the property of a local authority, which is held by them under a special legal regime, but ultimately it belongs to the local authority. There are specialities as to how it can be disposed of and how it can be managed, but apart from those, the general rules as to how a local authority manages and can dispose of its property, for example in the application of rules regarding best value, or good practice in decision making.
3. Common good property may be either moveable or heritable. Most common good property is heritable, and certainly most legal questions about it have arisen in cases where the property is heritable.

However, many instances of moveable common good property certainly exist. Typically these may be civic regalia inherited from older local authorities, antique furniture, works of arts, and the like, but no doubt there may be other items in store rooms or even in daily use, and it is reasonable to assume that there will be some such items held within the common good property of every local authority in Scotland.

Disputes over such property rarely arise, however, and I will pass on to the questions concerning heritable common good property which have featured more frequently in court cases, and which arguably have become more frequent in recent years, due to a combination of greater awareness of common good property, and recent legislation concerning common good property.

Historical origins of common good property

4. Common good land holdings in the possession of local authorities today derive principally from the common good held by former burghs. A list of these can be found in Schedule 1 to the Local Government (Scotland) Act 1947, comprising Counties of Cities, Large and Small Burghs. Therefore, local authority heritable property which is situated outside the area comprised by one of those former royal burghs is unlikely to be common good property (although it may be if it was derived from other types of local government unit, e.g. burghs of barony, police burghs, and others). In addition, common good property of an authority may be located outside its boundaries.

When will local authority heritable property be part of the common good?

'All property of a royal burgh or a burgh of barony not acquired under statutory powers or held under special trusts forms part of the common good.' (p.60)..

'Special circumstances would, of course, apply to a case which, by the express terms of a disposition or deed of gift to a burgh, the granter had impressed the transfer with specific conditions affecting the management, control or use of the subjects ...for subjects so transferred and accepted might not fall into common good. (p.67)

Magistrates of Banff v Ruthin Castle Ltd, 1944 SC 36, 1944 SLT 373

5. What will be the burgh property which falls within the common good, because it was not excluded as a result of having been acquired under statutory powers, or because it was in reality held in trust? That question has to be answered by considering from where the ownership of that property that has been derived. (It should also be noted that buildings etc erected on common good land will also normally become part of that common good property by application of principle of accession, as a recent case has confirmed. (*Guild v Angus* 2021 S.C. 83, 2020 S.L.T. 939).
6. The following extracts from two cases explain the position.

...there are at least three ways in which a public use of burgh property may be acquired. The land may be appropriated to public uses in the charter or original grant; the land, after it is vested in a public body, such as a town-council, may be irrevocably appropriated to public uses by the act of the town-council itself; and again it may be so appropriated, or rather the inference may be drawn that it was originally appropriated to public uses from evidence that the land has been so used and enjoyed for time immemorial. (pp. 918-919).

Murray v Magistrates of Forfar (1893) 20 R 908, (1893) 1 SLT 105.

The conclusion which I have reached is that I should follow the broad approach exemplified by the observations of Lord Wark which I have quoted. [see above] ... I am confirmed in that view by a passage in paragraph 1250 of volume 2 of Green's Encyclopaedia to the effect that the class of common good property usually consists of public lands or buildings, such as churches, town halls, market-places, and

common greens or ground set apart for the general use or enjoyment of the inhabitants. As Lord Wylie put the matter in Waddell v Stewartry District Council , the property was that which 'by custom or dedication by direct grant' the community was entitled to have. (p. 221).

Cockenzie and Port Seton Community Council v East Lothian District Council
1997 SLT 81, 1996 S.C.L.R. 209

7. In essence, local authority property acquired from former burghs is likely to be common good property, if the exceptions described above do not apply, if it derives from one of the following:
 - royal charter (or other method of creation e.g. statute, baronial grant)
 - gift, donation or dedication (including by burgh itself)
 - custom, “time immemorial”

Ascertaining whether land is common good property

8. In order to ascertain whether land is held on the common good, it will be necessary to examine the title under which the local authority and its predecessors has acquired the property in question.
9. A royal charter will normally specify the grant of an area of land to a burgh , although it may not be clear as to boundaries and reference may need to refer to extrinsic evidence if there is a question as to whether land in dispute was part of the area of the former burgh. It may well be in Scots rather than English, or if particularly old, in Latin.
10. It can be more difficult to decide whether a deed, typically a disposition, is a grant of land for the common good, or for a trust purpose. It is necessary to closely examine the title deeds. Ferguson, Common Good Law, 2nd ed (p. 70) quotes an example from South Lanarkshire:

I do hereby give, grant, and dispose to and in favour of the Provost, Magistrate and Town Council of the Burgh of Hamilton and as such representing the community of the said burgh and their successors in office for behoof of the whole body and community of the said burgh...It shall not be lawful to nor in the power of my said disponees or their foresaids to sell, alienate, or dispone the said subjects hereby conveyed or any part thereof but the same shall be held in trust always for the behalf of and solely for the use, recreation, and enjoyment of the inhabitants of the Burgh of Hamilton and shall be used as a public park or recreational ground only..

Wording along such lines will tend to indicate that the land has been granted for the common good.
11. Deciding whether land has become part of the common good as a result of custom, or use, through time immemorial will normally require evidence of that use over a lengthy period of time, but also documentary evidence – perhaps deeds for the property, or minutes or reports from the local authority of the time.

Acquisition of land under statutory powers

12. As we have seen, land will not normally become part of the common good if it was originally acquired by an authority under statutory powers. There is a long list of pieces of legislation whereby local authorities were historically able to acquire property (see Ferguson, p.87 ff). It is important to examine whether some property might have been acquired under such powers. It may not be obvious at first sight whether that is the case. The narration of a disposition may refer to the statutory powers under which an authority has acquired some land, but it may be necessary to refer to local authority minutes of the time to ascertain the basis under which it acquired property, or even to extrinsic evidence e.g. the use of the property at the time of acquisition. Note also that some legislation gave authorities much more extensive powers than its name might indicate, n.b. the Burgh Police (Scotland) Acts.
13. It is important when taking decisions affecting common good property, whether that be a proposal for disposal, or questions of use, and even matters of day-to-day management that an authority is aware of the original source of the funds or property. That is because of the following provisions, still in force, of the Local Government etc. (Scotland) Act 1994 :

s. 15 Transfer of property.

(1) Subject to subsection (5) below; the Secretary of State may by order provide that any property vested in one or more existing local authorities immediately before 1st April 1996 shall on that date be transferred to and vest in such new authority or authorities as may be specified in or determined under the order.

.....

(4) The power to transfer property conferred by this section includes power to transfer property which is held by an existing local authority as part of the common good, but such property may not be transferred to a residuary body and, in administering such property, any authority to which it is transferred shall—

(a) except in the case of the councils for Aberdeen, Dundee, Edinburgh and Glasgow, have regard to the interests of the inhabitants of the area to which the common good related prior to 16th May 1975; and

(b) in the case of the councils for Aberdeen, Dundee, Edinburgh and Glasgow, have regard to the interests of all the inhabitants of their areas.

These provisions may raise issues for those local authorities who have simply amalgamated their historical common good properties and funds into one fund, from which funds are then expended on activities (or given as grants) across the authority.

Is the common good property ‘alienable’ or ‘inalienable’

14. The issue which most frequently results in legal questions arising is whether some specific common good property has the character of being ‘alienable’ or ‘inalienable’.

'Alienability' means that the local authority has the power to sell or dispose of its interest in the property.

In theory, common good heritable property can have the character of being alienable or inalienable. In practice, it is likely that there will be at least a question as to whether the common good heritable property concerned has the character of being inalienable, as it is likely to be either property which has derived from some gift or donation of land, and that typically occurs when a person or organisation wishes to transfer some land, e.g. a park or civic hall, for public use in the future, or it has been provided by the local authority for the benefit of the public in some way (although if that is done under statutory powers it will probably not be common good property).

It should be noted, however, that some older cases have held that local government buildings, which are replaced by alternatives, may then no longer form part of the common good. *Magistrates of Kirkcaldy v Marks & Spencer Ltd*, 1937 SLT 574, *Cockenzie and Port Seton Community Council v East Lothian District Council* 1997 SLT 81, 1996 S.C.L.R. 209. However, such decisions appear to be somewhat incompatible with more recent cases, which have tended to take the view that any change of use of an existing common good property will at the very least constitute an "appropriation" of common good property.

How can a local authority "dispose" or "appropriate" inalienable" common good land?

15. If a local authority wants to dispose of common good land, or use it for another function than that for which it became part of the common good, then it may apply to the court for permission to do so. The relevant legislative provisions can be found in section 75 of the Local Government (Scotland) Act 1973.

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

(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.

(2) Where a local authority desire to appropriate or 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 appropriate or dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to [appropriate or]¹ dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to appropriate or 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 appropriated or disposed of other land to be used for the same purpose for which the former land was used.

Ferguson defines (p.94) "appropriation" as meaning a local authority using common

good land for another function but not transferring the land out of its ownership, and “disposal” as being a transfer of land out of the hands of the local authority, by sale, lease, or by otherwise giving a third party ascertainable rights of beneficial occupation.

It should be noted that the court has the power to impose conditions if it allows disposal or appropriation, and also for substitute land to be provided to make up for land disposed of or appropriated. In most cases, it appears that applications under these provisions tend mainly to be for the use of a particular property to be used for another purpose by the local authority, such as the construction of a school, a sports facility, or a community centre on an area which had been granted for use as a park.

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