

COMMON GOOD PROPERTY SOME FUNDAMENTALS

Scott Blair, Advocate



What is Common Good?

The common good is a fund of money or assets administered by a Scottish local authority in respect of each former burgh within the area of the local authority.

Common good is owned by the local authority although it is administered separately from other local authority funds for accounting purposes. Ownership is absolute in the strict sense that the authority holds legal title to it. However what the authority can do with the property is subject to a system of statutory control. This control has the potential to limit the extent to which the authority can dispose of or deal with the property and on what terms.

Some notion of common good has existed since at least the middle ages. Most common good is in the form of land although some common good property could be in the form of assets other than land. In one old case a set of books by a local historian was said to be part of the common good. Recently Angus Council was in the news in relation to the common good status of very valuable paintings by the artist Pieter Brueghel the Younger, which are on display in Arbroath Library.

However for the purposes of today, land/buildings are what we are about as they are by far the most common form of common good property.

When is something Common Good?

Identifying what is and what is not part of the common good is not always easy and has been the subject of much litigation. Common good is not owned by the community nor is it held in trust for the community-at least in the strict legal sense of trust. It is not owned by the Community Council nor does the Community Council enjoy any special legal status in relation to decisions made in relation to common good land. At the same time the Community Council has been recognised by the courts as having a potential role to play in cases about disposal of common good assets.

Ownership and trust are legal concepts and there is no doubt that common good land is owned by the local authority albeit that ownership is subject to legal restriction. It is not owned in trust in the sense recognised in trust law which is that the beneficial ownership is vested in the trust beneficiaries. The public are too wide a class to be regarded as a class of trust beneficiaries.

There is though something of the notion of fiduciary duty in common good-and that is something that arises in trust law-albeit it is not just limited to trust law. For example company directors owe fiduciary duties to shareholders as do partners in a partnership.

In the *Portobello* case – *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69; 2013 SC 184, the Court of Session had this to say (with my emphasis added), interestingly under reference to an earlier case which involved a property in Gatehouse of Fleet- *Waddell v Stewartry District Council* :-

“[24] As the Lord Ordinary (Lord Wylie) observed in Waddell v Stewartry District Council 1977 SLT n.35, at p. 36:

“... in this context what constitutes alienation must be liberally construed and would include any action which effectively deprives the community of something which, by custom or dedication by direct grant, they are entitled to have. If an authority cannot deprive the community of the use of property which is inalienable by disposing of it in the ordinary commercial sense of the term, or by making a gift of it, it would only be in accordance with the underlying principle that they could not deprive the community of its use by destroying it, except in the highly special circumstance of imminent danger to the public.”

That observation reflects the fact that the beneficial right in such common good land rests with the inhabitants of the locality and that, correspondingly, the local authority holds the heritable title subject to important fiduciary obligations.

[25] These principles are well settled. In Sanderson v Lees 1859 22D 24, a case concerning the proposed feuing of inalienable common good land forming part of the Musselburgh Links, the complainer's title, as an inhabitant, to resist such encroachment on community rights was upheld. At p.27, the position was summarised by LP McNeill as follows:

“In the first place, the verdict establishes that for time immemorial the Links and the piece of ground in question have been possessed and used by the inhabitants for the purposes specified. That is established as a matter of fact.

*It appears to me that with that fact established, and looking to the terms of the verdict, the right of the complainer and the other inhabitants is not to be regarded as a servitude right at all. **The magistrates held the property all along for the community, but the purposes for which it had admittedly been possessed by the inhabitants are not inconsistent with the right of property in the magistrates. These uses have been co-existent with the property from the first; and the property, as I look upon the case, was in the magistrates for the community, for the purposes in question as much as for other purposes; and I think that the possession contended for and established by the verdict was all along a quality of the right which the magistrates had in this property, and that the inhabitants are entitled to protect it from encroachment.***"

[26] Twenty years later, the well-known case of *Grahame v Magistrates of Kirkcaldy* 1879 6R 1066 concerned plans by the local authority, this time without disposal in favour of any third party, to build town stables on inalienable common good land which, through their own mismanagement and neglect, had become so unattractive for recreational purposes that it was not much used. **Nevertheless, as a matter of legal right, the complainer as a local inhabitant was held entitled to take action to prevent the Council, in breach of their fiduciary obligations, from encroaching on the subjects to his prejudice.** As LJC Moncrieff explained, at p.1073:

"If this ground was by grant or ancient use appropriated, or, as English lawyers would say, dedicated, to the purposes of recreation, drying clothes, and the like, the magistrates were bound to see that it was kept in such order as to be suitable for these purposes. If it has been allowed to become unfit for these uses that only shews that to that extent the duty of the magistrates has been neglected. That the ground was anciently used for these purposes I can have no doubt. The possession of the ground as a drying-green has indeed been of late years much interrupted, and has in fact well nigh come to an end all together, owing chiefly to the neglect of the magistrates, to say nothing of their abuse of the ground by turning it into a public dung-stance. But there has been some possession as a drying-green even during more recent years, and there was ample evidence of the use given in 1854 in (an earlier case). Therefore, on the whole matter, though I cannot doubt that the corporation have acted in their judgment for the best interests of the community, I am of opinion that they were wrong in point of law, and that the community are entitled to vindicate their rights in this ground, however valueless those rights may be."

When the case reached the House of Lords, although for various reasons the remedy of interdict was withheld, the underlying legal principle was affirmed by Lord Watson (1882) LR 7 App Cas 547, at p.563 in these terms:

"As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes....".

*[27] More recent judicial observations along comparable lines may be found in McDougal's Trs v Lord Advocate 1952 SC 260 (esp. per LJC Thomson at p.266 and Lord Patrick at p.278), as subsequently affirmed by LJC Grant in Glasgow Corporation v Flint 1966 SC 108, at p.121. **Indeed these observations went so far as to describe the common good as "... the property of the citizens" which it was the duty of elected representatives to administer "... not for themselves but for their constituents".***

That case also held that as the law stood at that time appropriation to a use other than the existing use was not open in relation to Common Good land. That has now been reversed by the changes introduced by the Community Empowerment (Scotland) Act 2015-on which more later.

Taken as whole the case make it clear that the courts will have in view the notion of fiduciary duty when they come to consider whether and to what extent a disposal of common good property should be permitted.

It also follows from this, that the courts will expect to see evidence that a local authority has had regard to this duty when it seeks to justify a decision as being in the best interests of the inhabitants of the area.

I would pause to add that this still means that common good land can be sold even if at some point in the dim and distant past the donor of the land declared that it could never be sold. We will look at more of this later.

Broadly speaking then common good is a fund of money and assets, formerly owned by the burgh, and now owned by the relevant Scottish unitary local or islands authority. The fund is in turn administered under rules both in relation to the interests of the people who live in the former burgh and in relation to the disposal of the common good.

Common good can include former burgh buildings, common land, gifts and essentially any property which is administered as part of the common good. The common good is subject to the fiduciary duty of the local authority.

History and Statutory Framework

There has been some form of statutory control of the common good since at least the end of the fifteenth century. The first piece of legislation was the Common Good Act 1491 which is still in force. More modern controls came in the nineteenth century under the then prevailing local government legislation and many of the leading cases on common good were decided under the nineteenth century statutory framework.

The modern statutory framework is contained in the Local Government (Scotland) Act 1973. This abolished the old burgh system, county councils, and district councils and so on. A two tier system of government was set up consisting of district and regional councils.

Of course as a result of further reforms under the Local Government etc (Scotland) Act 1994 the regional councils have been abolished and local authorities are now entirely unitary.

Under section 222 (2) of the 1973 Act the Secretary of State had power to transfer property held as part of the common good to islands or district councils. Separate provision was made for the cities of Aberdeen, Dundee, Edinburgh and Glasgow. The detail of the transfer is contained in the Local Authorities (Property Etc) (Scotland) (Order) 1975.

There may be properties that could be said to form part of the common good which did not transfer to district councils under section 222 (2) and the Order such as former reservoirs of burghs transferred to the Water Boards or Harbours.

The former are now in the hand of Scottish Water and the latter were the responsibility of regional councils. In the event of dispute the wording of the Order would need close interpretation.

Note also section 15(4) of the Local Government Etc (Scotland) Act 1994 which provides that:-

“in administering the funds the Council must have regard to the interests of the inhabitants of the area to which the common good formerly relates.”

Have regard to is not the same as “obliged to follow”. We also now have the provisions in the 2015 Act as an additional and important overlay on the scheme of general local government legislation.

The administration of Common Good Funds

I can only provide an overview in the time available. This is a complex topic.

At the close of each burgh's accounts in 1975, each common good fund was transferred to the local authority, as a separate account.

Section 1 of the Local Government in Scotland Act 2003 places a continuing duty on local authorities to improve local authority functioning. This is the "Best Value" duty-see section 1(4), (5). This embraces the notions of efficiency, economy, effectiveness, equality of opportunity and the achievement of sustainable development. This area is policed by the Accounts Commission and Controller of Audit.

There is an arguable tension between this duty and the requirement that in administering the common good, local authorities are also under a duty to have regard to the inhabitants of the former burghs. How does one square Best Value for all local residents over the whole area of the authority with the interest of the interests of the inhabitants of the former burghs which relate to a specific use of property in a now historic geographical area? One answer, suggested by Andrew Ferguson, in his book on *Common Good Law*, is that the maintenance of the common good fund is in itself a function for the purpose of the 2003 Act.

Another approach is that "have regard to", is not the same as follow. On that view of the law, a local authority can spend money from the common good fund outwith the area of the burgh, provided it "had regard to" the interests of the inhabitants of the former burghs, in pursuing a scheme which is advanced under the Best Value banner.

I would make one final point. That a property is listed in the common good account does not make it (a) common good and (b) even if common good, common good of the type that may need the consent of the court to disposal. Ultimately, a listing in the account is a factor, albeit not a determinative one, in deciding if something is common good.

The same can be said for listing in the new Common Good Register.

Maintenance of Common Good Properties

There are no specific legal duties on local authorities to maintain land and buildings held on the common good account. That, however, is to state matters in an unduly narrow way.

This is because common good was frozen as at the demise of the burghs. Property, including moneys held on the account, may generate rental income, interest and the like as ongoing receipts. Sale of a common good asset may generate a capital receipt.

As no new common good assets can be created an issue can arise in relation to the possibility that the ongoing repair and maintenance of common good properties, could reduce the value of the account.

Practice varies, but a common approach is that the occupier of the building pays for ongoing maintenance. That could be a local authority department or a private entity like a commercial tenant of council property. The case of *Kirkcaldy District Council v Burntisland Community Council*, 1993 SLT 753 would seem to sanction the view that such sums could be regarded as an augmentation of the common good account. Equally other authorities fund the repair of common good property from the common good. Much depends on local practice and of course the health, or otherwise, of the common good account.

Some properties are not capable of being occupied. They may not be readily adaptable to modern needs.

Others may have planning issues such as being “Listed”. One should also be aware that a local authority is may not always be able to rely on the state of a building or neglect of it as a way of seeking to dispose of it.

Title Conditions (Scotland) Act 2003 and the Common Good

Can a former Superior’s personal contractual right to enforce the Title Conditions subsist alongside the quality of the land being Common Good?

In my view, yes. Common Good is a quality of title. While title condition relate to that quality, there is a presumption of statutory interpretation, property rights cannot be abolished without clear wording to that effect.

There are two rights here, the real right and the personal right and as section 75 of the Title Conditions (Scotland) Act 2003 is clearly aimed at abolishing the real right, if the superior and vassal still continue to subsist, then there remains in place a personal contract as between the superior and vassal even if the real title burden was abolished by s. 75. The principle that the personal element of real burden is enforceable as between superior and vassal was established by the case of *Scottish Co-Operative Wholesale Society v Finnie* 1937 SC 35 and I am not aware of any subsequent case law which has disapproved or departed from that reading of the law. The ECHR would also support this line. Personal rights under contract are possessions for Article 1 of

the First Protocol and the 2003 Act, to be ECHR compliant, could not be read in way which took rights away unless that was clearly “prescribed by law.”

The former Superior’s contractual right will prescribe only 20 years from the date of any breach of the Title Condition. This in my view flows from the provisions of the Prescription and Limitation (Scotland) Act 1973. Of course there may be other questions arising such as acquiescence or personal bar if the relevant project proceeds in the knowledge of the superior without any action being taken to prevent it. That exists independently of any argument based on prescription.

The former Superior’s contractual right will not terminate automatically should the court grant an application under s. 75(2) of the 1973 Act. The land having the quality of it being inalienable common good and the rights of the superior are distinct matters. As Ferguson notes in his book on *Common Good Law* (second edition) there is a distinction between the rights of the superior and the quality of common good and that caution dictates that prior to the abolition of the feudal system it was appropriate to secure a minute of waiver in respect of any transaction which could cut across a real burden. Whilst that is no longer necessary given the terms of the 2003 Act it does seem to me that on the basis that there remains in place a personal contract that the superiors may have to be asked to grant a discharge of their rights under that contract.

Title Conditions, variation and appropriation

The question of title conditions raises an interesting point. Take a common example, a park dedicated to recreational use with title conditions on the lay-out and design of the park and on the uses to which the park might be put. Let us assume a use was the playing of games such as football on a grass solum. Would action by the council to set aside a specific area of the park such as in an enclosed artificial all-weather pitch engage common good considerations?

As to the question of appropriation there is an argument that while the public have an interest in the inalienable quality of the title i.e. dedication to use as a park but as regards the question of the title conditions which specify in some detail what may or may not be done with the park, that they are feudal burdens and they are distinct from the general nature of the park as a whole as common good.

In other words while the public have an interest in ensuring the inalienability of the title they do not have an interest – at least in common good terms – in enforcing the specific title conditions which deal *inter alia* with matters such as the construction of buildings on the park or that the park be turfed with grass or where football might be played.

On that view there may be an argument whilst there is an appropriation in the general sense it is not an appropriation of common good and that any issue that arises is as between the feudal superior and the local authority. In turn that may raise issues over the need for a consultation with the community under s. 104 of the 2015 Act.

If that is the case then on that view the consent of the court would not be required. However as can be anticipated this is an argument that may not be favoured by those opposed to the proposal and it would be open to them in principle to bring interdict proceedings against a local authority on the basis that there has been a failure to seek the permission of the court. There are precedents for this in case law -for example *Waddell v Stewartry District Council* 1977 SLT (notes) 35. This also seems to have been accepted in older law -*Crawford v. Magistrates of Paisley* 1870 8M 693 (interdict of demolition of a church steeple). We also have the clear statement in *Guild v Angus Council* [2020] CSIH 50 ; 2020 SLT 939

Disposal of Common Good Land

The main problem that arose as a result of the 1973 legislation was what to do with the disposal of common good land. Very few cases had been decided between 1947 (when local government law had last been reformed in Scotland) and 1973.

The current law is found in section 75 of the 1973 Act as amended by the Land Reform (Scotland) Act 2016. The amendment reversed the decision in the Portobello case.

It provides:

“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 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.”

The effect of section 75 (1) is to enable a local authority to appropriate land into the common good but not to acquire it for a common good purpose. It is therefore at least possible for a local authority to increase the common good land holding even although the old burgh system under which common good developed no longer exists.

Equally the provisions of section 74 regarding disposal of land apply to common good land where ***no question arises*** as to the right of the local authority to alienate that land. It provides:-

“74 Disposal of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.”

Section 74 allows a local authority to dispose of land held by it in any manner it wishes except that without the consent of the Scottish Ministers, it cannot dispose of land for a consideration which is less than the best consideration that could be reasonably obtained. Note now the Disposal of Land by Local Authorities (Scotland) Regulations 2010. This requires the consent of the Scottish Ministers where the value exceeds the current threshold limit of £10,000.

Accordingly, where no question arises as to the right of an authority to alienate common good land, it is disposed of under section 74, subject to the question of ministerial consent in appropriate cases.

Where a question does arise-where the land is inalienable common good-then court consent may be required. I say “may be”, because legally a local authority can dispose of such land without the consent of the court. Of course if it does so, it may risk legal challenge. Prudence suggests that the consent of the court should always be sought.

Community Empowerment Act 2015-Consultation and Common Good Register

Assets held for the common good – such as parks, monuments and statues – are owned by local authorities, who must manage the assets in accordance with existing statutory and non-statutory duties. As part of the Community Empowerment Act 2015, local authorities have certain duties in relation to common good property. The purpose of these duties is to increase:

- transparency about the existence of common good assets
- community involvement in decisions regarding them, including their identification and how they are used and disposed of

The Act dictates that local authorities must:

- 'establish and maintain a register of property which is held by the authority as part of the common good', and engage with local communities in setting up these registers under section 102; and
- publish details of any proposals to dispose of or change the use of common good assets, and open these proposals to community councils and community bodies for consultation under section 102
- 'have regard to any guidance issued by the Scottish Ministers' in terms of section 103 and as regards:
 - the process of creating common good registers
 - the process of disposing and changing the use of common good property
 - the management and use of common good property

In compiling the register under section 102 the authority must consult and this can include receiving representations from the Community Council and any community body of which the authority is aware (as defined by section 106), as to what property is included in the common good. Of course inclusion in the Register does not in law make it common good. I have assumed that the Park is on the Common Good Register albeit that is not determinative.

Ultimately it will be for the Court to determine if property is common good and whether it is alienable or inalienable common good. The aim of the Register is transparency but it does not seek to define what is or is not common good in law or whether it is disposal (etc) –that being for the Courts.

In addition section 104 imposes a duty of consultation in relation to disposal and use. It is worth setting out-

“104 Disposal and use of common good property: consultation

(1) Subsection (2) applies where a local authority is considering—

(a) disposing of any property which is held by the authority as part of the common good, or

(b) changing the use to which any such property is put.

(2) Before taking any decision to dispose of, or change the use of, such property the local authority must publish details about the proposed disposal or, as the case may be, the use to which the authority proposes to put the property.

(3) The details may be published in such a way as the local authority may determine.

(4) On publishing details about its proposals under subsection (2), the local authority must—

(a) notify the bodies mentioned in subsection (5) of the publication, and

(b) invite those bodies to make representations in respect of the proposals.

(5) The bodies are—

(a) where the local authority is Aberdeen City Council, Dundee City Council, the City of Edinburgh Council or Glasgow City Council, any community council established for the local authority's area,

(b) where the local authority is any other council, any community council whose area consists of or includes the area, or part of the area, to which the property mentioned in subsection (1) related prior to 16 May 1975, and

(c) any community body that is known by the authority to have an interest in the property.

(6) In deciding whether or not to dispose of any property held by a local authority as part of the common good, or to change the use to which any such property is put, the authority must have regard to—

(a) any representations made under subsection (4)(b) by a body mentioned in subsection (5), and

(b) any representations made by other persons in respect of its proposals published under subsection (2).”

The Scottish Government’s Explanatory Notes to the Bill for this Act say as follows -

“367. Section 65 ensures that communities are consulted before a local authority disposes of any common good property or changes its use. As with establishing the common good register, the local authority must publish its proposals, notify community councils and community bodies, and take account of any comments made by them or anyone else. In this case the local authority only needs to consult community bodies which it knows have an interest in that particular property. They must also, where the local authority is Aberdeen, Dundee, Edinburgh or Glasgow City Council, consult any community council in the local authority area. Apart from Aberdeen, Dundee, Edinburgh and Glasgow City Councils, many local authorities have one or more common good funds that are used for the benefit of different former burgh areas, and they are required to administer these funds with regard to the interests of the inhabitants of the relevant area. It would not be appropriate to consult community councils from other parts of the local authority area. Therefore section 65(5)(aa) provides that the local authority must notify and invite representations from community councils whose area covers or overlaps with the area to which the common good property related prior to the abolition of burgh councils in 1975.”

There is now a statutory obligation to consult when a local authority is disposing of any property which is held by the authority as part of the common good or changing the use to which it is put.

I would make a number of observations. Section 104(1) does not mirror the language of section 75(2) of the Local Government (Scotland) Act 1973. It does not refer to “alienation” but only disposal or change of use. However it does seem to me that the intention is that alienation must be taken to be included in a disposal in the same way that change of use might be read as a reference to appropriation.

I would further observe that section 104(1) does not appear to limit the need to consult to property in relation to which a “question arises” under section 75(2).

It would also be open to the Court (even if any application was not opposed) to consider the adequacy of any consultation process as part of their consideration of the application.

Guidance-Community Empowerment and Common Good Property and in particular Chapter 5 is the Statutory Guidance to which the authority must have regard. This

Guidance is also something the judge might have regard to in assessing the adequacy of the process.

This is Statutory Guidance which the Council must “have regard” to in terms of the 2015 Act-just like any the consultation responses. It is no more than that. Although as was said the expression “... *have regard to*’ involves a greater degree of consideration than merely to ‘consult’”—see *R. (on the application of London Oratory School Governors) v Schools Adjudicator* [2015] EWHC 1012 (Admin), equally it is a duty to have regard to and no more than that. For example in other contexts the following has been said that a requirement to have “particular regard” to specified matters does not require those matters to be given greater weight than others but it requires them to be considered separately and carefully (*Ashdown v Telegraph Group Ltd* [2001] Ch. 685).

In other statutory contexts where there is a statutory duty to have something which can, broadly, be regarded as having greater than ordinary regard (and arguably we are in “ordinary regard territory”), that “extra” may give content to what this might mean.

For example in relation to due regard “*it is well established that the duty to have ‘due regard’ involves a ‘conscious approach and state of mind’*” —see Scott Baker LJ in *Brown v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin) and *Meany v Harlow District Council* [2009] EWHC 559 (Admin) “*conscious directing of the mind to the obligations*” per Davis J. However that was an Equality Act case where there was a statutory duty which “drove” the nature of what regard was to be had. The duty here is somewhat weaker. It is not a rigorous duty.

Further for a consultation to be legally adequate it must meet the tests set out in *R(on the application of Moseley (in substitution of Stirling Deceased)) (AP) v London Borough of Haringey* [2014] UKSC 56.

There it was said that-

“First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

We now have specific judicial consideration of the scope of s. 104.

Guild v Angus Council

I am conscious this case will be looked at in more detail today by Denis and I want to confine my comments to the consultation issue and not the wider issues he will cover, including the interesting dissent of Lord Malcolm.

S. 104 was considered in this case. Reported at [2020] CSIH 50 and 2020 SLT 939, here a reclaiming motion by town residents against the refusal of their petition for judicial review of a decision by the local authority to demolish a leisure centre would be allowed where s. 104 of the 2015 Act applied and the local authority had failed to comply. The centre formed part of the common good, the demolition of which would amount to disposing of it, and the decision by the authority would further involve a change of use.

Town residents reclaimed against the refusal of their petition for judicial review of a decision by the local authority to demolish a leisure centre which had fallen into disrepair. At first instance they lost-see [2020] CSOH 16 before the Lord Ordinary. They reclaimed (appealed) to the Inner House of the Court of Session.

The reclaimers were interested in purchasing the buildings on the basis that there was public support for their retention and had submitted that the respondents had failed to comply with s. 104 but the Council as respondents maintained that s.104 did not apply.

The Lord Ordinary sustained the respondents' arguments, concluding that neither s.104(1)(a) or (b) applied to the respondents' decision where the common good property was the land, and not the building; demolition of the building would not result in disposal of the land; further, that the respondents' decision would not result in change of use because the common good land was used for leisure purposes, which would remain the case following demolition.

The reclaiming motion allowed and decision of the Council was reduced.

On the scope of the 2015 Act - The Act was not about prohibiting, preventing or regulating the actual disposal of, or appropriation of, common good property, rather s.104 thereof was about transparency and encouragement of community involvement which might mean that a broader interpretation of some of the terms used therein would be appropriate compared to how they might be otherwise applied in different contexts (see paras [28-33](#) of judgment).

The Lord President said-

[28]. When considering the proper construction of s.104 of the Community Empowerment (Scotland) Act 2015 it is, I think, important to bear in mind the underlying purpose of the legislation (as indeed it is in any exercise of statutory construction). Part 8 of the Act, which deals with common good property, is concerned (as the title of the Act suggests) with empowering communities. Section 102 requires a local authority to establish and maintain a common good register, and before establishing it, to publish a list of property that it proposes to include in it, which must be notified to the relevant community council and other community bodies, and the local authority must have regard to any representations made by any community council, community body and other persons. Section 104 requires the local authority to publish details about any proposed disposal of, or as the case may be, the use to which the authority proposes to put the property, and on publishing details about its proposals to notify the relevant community council and other community bodies. Again in deciding whether or not to dispose of any property held as part of the common good or to change the use to which any such property is put, the local authority must have regard to representations made by the relevant community council, other community bodies, and other persons.

[29]. The aim is transparency, and encouragement of community involvement. As the policy memorandum to the Bill put it at para.87: “the aim of Part 6 of the Bill is to increase transparency about the existence, use and disposal of common good assets, and to increase community involvement in decisions taken about their identification, use and disposal” and again at para.92: “The requirement for consultation before common good property is disposed of or its use is changed will similarly increase transparency about common good assets, and fits with the general aim of ensuring that communities are fully involved in decisions that matter to them.”

[30]. What the 2015 Act is not about is prohibiting, preventing or regulating the actual disposal of, or appropriation of, common good property: that is dealt with elsewhere, by the common law, or by s.75 of the Local Government (Scotland) Act 1973, and the requirement to apply to the court for authority. Section 104 is all about publication and consultation at an earlier stage, before any decision has been taken by the local authority to dispose of or change the use of property held as part of the common good, and when the local authority is only considering disposing of or changing the use of such property.

[31]. The fact that this relatively new statutory provision is about transparency and encouragement of community involvement, and not (or at least not directly) about the identification of common good property or about the authority to dispose of or appropriate such property may mean that a broader interpretation of some of the terms used in it than would be applied in different contexts is appropriate.

[32]. In deciding whether s.104 is engaged in the circumstances of the present case, I consider that it is helpful to consider three issues:

- (1) Are the buildings of the leisure centre held by the respondents as part of the common good?
- (2) If so, is demolition of those buildings encompassed within the term “disposal of any property”? and
- (3) If the answer to (1) is yes, and the answer to (2) is no, does demolition of the buildings and returning the land to open parkland amount to changing the use to which the property is put?

I shall consider these in turn.”

He went on-

“[40]. In the context of the present case there is no suggestion of the respondents considering disposing of the land. What is in issue is whether they are considering disposing of the buildings, which comprise “any property” for the purpose of s.104(1)(a) .

[41]. The demolition of the leisure centre will have the result that the inhabitants of the burgh will no longer have indoor sports facilities, toilet facilities and café facilities on this site. Bearing in mind that s.104 is concerned with involving the community and making such decisions more transparent by requiring publication and notification, I consider that when the respondents are considering demolition of the leisure centre they are indeed considering disposing of it. If the decision is implemented, the leisure centre will have gone; the public will no longer enjoy the use of such an asset on this site, and it will have been disposed of. Before taking any decision to demolish it, the respondents required to publish details about the proposed disposal.”

Standing what I said earlier about variations within a Common Good “use” this was said and with my emphasis in bold-

*“[45]. In light of my conclusions on the first two issues, this issue does not arise. However, as the point was the subject of submissions, I give my views on it. The Lord Ordinary dealt with this point at paras 48–50 of her opinion. **I agree with her observation that whether a particular decision as to the use to which property is put amounts to a change of use will engage s.104 is a mixed question of fact and law which will require to be considered on the basis***

of the facts and circumstances arising in any particular case. I also agree that it is doubtful whether Parliament intended that every type of change of use — for example the substitution of a tennis court in a park with a basketball court — would engage s.104 . The issue needs to be approached with the application of that dangerous commodity, common sense. I am not sure that senior counsel for the petitioners and reclaimers’ analogy of demolishing Murrayfield Stadium and allowing rugby to be played on the bare land takes matters much further, but it does serve to underscore the point that a change of use may occur even when the present use and the proposed use both fall under the general heading of “leisure purposes” or “leisure and recreation”. That will not in my view do. If a local authority wished to demolish a sports and leisure centre containing a swimming pool, squash courts, keep fit area and other indoor sports facilities, and replace it with an opera house, concert hall or cinema, both the existing and the proposed uses might be described as use for leisure purposes, but I consider that the proposal would involve a change of use. Certainly it is a proposal for change about which one might expect the residents of Forfar to have views. In my view such a proposal would fall within the ambit of s.104(1)(b) , and one would expect that in order to promote transparency and community involvement in such decision making, there would be publication of such a proposed use.”

Per Lord Malcolm dissenting, that even if the leisure centre could properly be regarded as being held by the council as part of the common good, it did not follow that s.104 was engaged by the proposed demolition where it was linked with, and supplementary to, the pre-existing controls on an authority's powers over common good: an authority could manage common good land and the construction of the leisure centre in the country park was consistent with its dedication to the community for leisure and recreational purposes, it was not a disposal, alienation or appropriation of common good land and the same could be said of the desire to restore the site to parkland; neither the construction nor the demolition deprived the community of that to which it was entitled, namely the retention of the park for leisure and recreation; demolition of the centre neither involved a disposal or a change in the use of common good property in terms of s.104(1) where returning it to parkland was a management or administrative act of the steward of the common good, and did not trigger a statutory right to community consultation; the centre was a part of the common good in the sense of flowing from the council's title to the park but it was the result of a management decision and involved no separate endowment to the former burgh in the manner comprehended by the term common good property, and in agreement with the Lord Ordinary, the centre could legitimately be excluded from the common good of the town but not the part of the park on which it was built (paras 48-61).

Going to Court in a Common Good Case and Inalienable Common Good Land

The most commonly questions asked in a common good case is whether the land in question is indeed common good and if it is, whether it can be alienated-that is disposed of. Not all common good land has the legal quality of “inalienability”. If it does then a **question will arise** as to whether and on what terms it can be disposed of.

It is not always clear if the property has this quality and it has not been unknown for a local authority to go to court to have this point clarified and then if needs be to try to get court authority for disposal. Often the issue will turn on the origin of the fund or land in question and whether there was any restriction placed on the future disposal of the land. Sometimes this will be clear e.g. from a clear declaration by the donating party e.g. “*Shall in all time coming be used as a public park and place of recreation....*” -but that is not always so.

In legal terms this means either does the land form part of the common good of the burgh or is it subject to some kind of prohibition or restriction on alienation as a result of being part of the common good?

The starting point might be thought to be simple. In the case of *Ruthin Castle*, that is *Magistrates of Banff v Ruthin Castle Ltd* 1944 SLT 373, the Inner House of the Court of Session stated that all land classed as burgh land was part of the common good subject to defined exceptions.

These exceptions were special trusts or gifts with specific “anti-common” good purposes and property acquired under statute for statutory purposes. There is also a third possible exception, that is land dedicated to statutory purposes since the time of original acquisition. That is a fairly rare situation and I will not dwell on it.

Let us look at the other two exceptions in more detail.

The first exclusion is property which the burghs held as trustees for “*any charity, foundation or mortification*” as defined by section 97 of the Town Councils (Scotland) Act 1900. Where such trusts do exist they will be fairly well defined and established as separate entities administered by the council as trusts.

The next exception might be called the statutory powers or purposes exemption.

All of the judges in the *Ruthin Castle* case seem to have been of the view that such land was not part of the common good. The problem is of course that nowadays really all land is held by local authorities under statutory powers- and in general under section 74 of the 1973 Act- although there are other statutes.

Throughout the nineteenth century with the advent of the industrial revolution the burghs took on increasing power to regulate all sorts of matters which hitherto would not have been for them for example cleansing, markets, slaughter houses, fire stations, pleasure grounds, public baths and so on.

Prima facie land acquired for purposes under nineteenth century legislation will be an exception to common good.

The position is not always as straightforward as that though. There could be a type of statutory purpose which could be said also to be a common good purpose such as the provision of public recreation spaces and there the issue might be whether the property had fallen into that public use rather than having been specifically acquired under a statutory of power for that purpose.

The title deed for the property itself will not always make it clear what the position is and much digging might have to be done through other old records.

What does all of this come to mean?

Broadly speaking the case law is to the effect that all burgh property forms part of the common good subject to certain exceptions. Land held in special trust is something of a rarity, but the exception relating to land acquired for statutory purposes will often in fact take quite a lot of burgh land out of the picture as far as common good is concerned particularly land acquired from the middle of the nineteenth century onwards.

Appropriation, Alienation and Disposal of Common Good Land

Let us look at section 75 again. You will see that the three words in bold type relate to what a local authority might want to do with land.

Although they seem to be used interchangeably they mean different things and the words must be understood.

Alienation does not necessarily mean outright disposal. It could for example mean a year lease-see *Murray v Magistrates of Forfar* (1893) 1 SLT 109.

Disposal is covered under section 74 and a local authority can dispose of land held by it in any manner it wishes subject to the best consideration requirements.

Disposal is not defined in the Act but it is freely used in other statutes and really means a transfer out of the hands of the local authority whether by means of sale, lease or something that gives a third party rights of occupation.

It is clear from the case of *East Lothian District Council v National Coal Board*, 1982 SLT 460 that disposal includes lease as well as sale and accordingly if a local authority wishes to sell a common good property or to lease it for any substantial period then sections 75 (1) and (2) come into effect.

Is demolition a disposal?

In *Crawford v Magistrates of Paisley* (1870) 8M 693 the Court of Session held that the demolition of a steeple belonging to the burgh for the purpose of road widening was alienation. Mr Crawford obtained an interdict preventing the burgh from carrying out the demolition but because there was evidence that the building was a danger to life and property that interdict was lifted by the Court of Session. This old case was quoted with approval in *Waddell v Stewartry District Council* 1977 SLT (Notes) 35.

So it seems that a demolition is alienation at least. The Angus case plainly supports this.

It is less clear whether it is a disposal which would of course bring into effect the issue of whether the property, once demolished, could be disposed of. In most cases the authority may well wish to dispose of what is left of the property and accordingly a question might arise as to whether the authority was entitled to do so.

Appropriation on the other hand has its own section in the 1973 Act. Under section 73 the local authority may appropriate for the purpose of any function whether statutory or otherwise land vested in it for the purpose of any other such function. We will come to what this means later in more detail.

The question of appropriation arose in *Portobello Park Action Group Association v City of Edinburgh Council*, the case I mentioned earlier.

This case appears to have established that where property is inalienable common good, the local authority does not have the power to appropriate it for a purpose other than the original purpose for which the property was given to the burgh-as here where the Council intended to change a park into a secondary school. The provisions of the 1973

Act do not permit this to happen. There is no scope for getting the consent of the court either.

There a local Action Group, composed of concerned local residents, appealed against an earlier Court of Session decision dismissing their petition for judicial review of a decision of the local authority to appropriate part of a public park, which was inalienable common good land, for a new school.

The Action Group sought declarator that the Council had no power, under the Local Government (Scotland) Act 1973 or otherwise, to appropriate for use as a school any part of the inalienable common good land at the park, and reduction or quashing, as being unlawful, of Council's decision to appropriate the park as the site of the new school. The Inner House, on appeal, overturned the earlier decision which had held that the Council had an unfettered power under the 1973 Act to appropriate inalienable common good land.

The Council had argued that since the 1973 Act did not expressly bar the appropriation of inalienable common good land it was entitled to rely on the power in section 20(1) of the Local Government in Scotland Act 2003 the Council to do anything which it considered likely to promote or improve the well-being of part of its area.

The appeal was allowed. The Inner House said that a local authority's right to appropriate inalienable common good land was not unfettered, on the contrary, for so long as inalienable common good land remained within the ownership of a local authority, Parliament had to be taken to have intended all pre-existing fiduciary obligations and corresponding community rights to remain extant and enforceable; it would be unreasonable if, by the mere expedient of appropriating inalienable common good land to some function other than parks and recreation, a local authority could free itself from all common law restraints and, having done so, perhaps also facilitate onward disposal without any need to obtain the sanction of the court under section 75(2) and so the Council could not claim a statutory power of appropriation under the 1973 Act.

The Inner House also said that it could not be said that Council's proposals did not involve a breach of its fiduciary duties at common law as the construction of the school would physically eliminate a substantial proportion of a section of the park and the community's use of the park for open space amenity and recreational purposes would suffer grave and permanent encroachment.

The reference to "anything" in section 20(1) of the 2003 Act could not be understood as conferring on a local authority the right to act in breach of contractual, trust or title obligations, or to the detriment of established third party rights, and could not

constitute a blanket entitlement to disregard planning or other administrative constraints, or the general provisions of Scottish or European law; it was inconceivable that section 20(1) could have been intended, while sections 73-75 of the 1973 Act remained in force, to allow a local authority in pursuit of "well-being" to bypass any need for sanction and dispose of inalienable common good land without recourse to the court. The 2003 Act therefore conferred no relevant power on the Council.

On the main point in issue Lady Paton, for the Inner House, said:-

[29] The short point for determination in these proceedings is whether, as the Lord Ordinary has held in a brief obiter addendum to her sustaining of the Council's plea of mora, "... (the) power to appropriate (the affected) land remains unfettered", or whether, in the alternative, the former common law restrictions on appropriation to the prejudice of community rights still subsist. If the Lord Ordinary were correct, of course, members of the local community would no longer have any legal right or title to prevent such encroachment; so long as a local authority's plans involved a transfer of the land from one of their functions to another, they could proceed unhindered and at will; and for practical purposes the future of every piece of inalienable common good land in Scotland, notably public parks and other open space recreational and amenity provision, would be in jeopardy. Subject only to planning constraints, local authorities would be free to appropriate open space common good land, even if nominally inalienable, away from dedicated recreational or amenity use. They could construct over the land housing, offices, schools or slaughterhouses, or use it for sewerage or waste disposal purposes. All or any of these would fall within the ambit of one or other of their statutory functions.

*[30] Properly construed, do the relevant provisions of the 1973 Act have that result? In our opinion that question falls to be answered in the negative. By way of background, as acknowledged by the Lord Ordinary (Lord Maxwell) in *East Lothian District Council v National Coal Board* 1982 SLT 460, the relevant statutory provisions must be construed with due regard to the pre-existing fiduciary obligations of a local authority with respect to common good land, and the corresponding rights of the local community to prevent encroachment. A relevant general presumption in that connection is that a statute does not interfere with public or private rights without compensation, and where deprivation of common law rights is in issue a strict construction of statutory provisions will ordinarily be appropriate. Along similar lines, Parliamentary legislation is presumed not to alter the pre-existing common law unless that is the subject of clear provision. In our judgment there is no obvious reason why general considerations of that sort should not equally apply to the rights of members of the community in common good land which a local authority hold for their benefit. At the very least one would expect to*

find some express provision to divest local inhabitants of long-established and valuable rights.

[31] As regards the disposal of land, to begin with, the general power of a local authority is conferred by s.74(1). That power does not, however, stand alone. Section 75 contains discrete provisions which apply specifically to land forming part of a local authority's common good. In that context, subsection (1) extends the general power of disposal to such land "... with respect to which ... no question arises as to the right of the authority to alienate", and subsection (2) completes the picture by requiring the sanction of the court for any disposal of such land "... with respect to which land a question arises as to the right of the authority to alienate". In the East Lothian District Council case, at pp.467-9, Lord Maxwell found the precise meaning and scope of the latter clause to be somewhat elusive. What seems clear, however, is that under the express provisions of section 75(2) all issues concerned with the disposal of inalienable common good land are referred to the jurisdiction of the court which can, if it thinks fit, grant authority with or without imposing conditions. Taking subsections (1) and (2) together, therefore, and under the conditions there set out, all pre-existing common law rights and obligations quoad the disposal of common good land would appear to have been superseded.

[32] In sharp contrast, as it seems to us, are the provisions of the 1973 Act relative to appropriation. Along parallel lines to section 74(1), section 73(1) bears to confer on local authorities a general power to appropriate "... for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function". As in the case of disposal, this general power does not stand alone. Section 75 contains special provisions where common good land is involved, thereby confirming the limited ambit of the general power, and in the context of appropriation the precise terms of that section are in our view of particular importance. As has already been seen, subsection (1) is expressly confined to circumstances where "... no question arises as to the right of the authority to alienate". In terms, that subsection applies to both appropriation and disposal alike. Thus, in any case where common good land is undoubtedly alienable, the relevant local authority may either appropriate or dispose of it by virtue of the extended powers derived from sections 73(1), 74(1) and 75(1) read in conjunction.

[33] Significantly, however, Parliament enacted no equivalent of section 75(2) relative to appropriation. The latter subsection covers disposal alone, and in the result the appropriation of common good land "... with respect to which ... a question arises as to the right of the authority to alienate" is simply not provided for. No statutory power to appropriate such land is conferred, nor has Parliament provided any mechanism whereby appropriation, with or without compensation, may be sanctioned by the court. There is thus nothing in the 1973 statute to remove, alter or diminish the relevant pre-existing common law rights and obligations as they apply to the appropriation of inalienable common good land.

[34] Before us, senior counsel for the Council sought to draw a contrary inference from the decision of the Lord Ordinary (Lord Drummond Young) in North Lanarkshire Council, Petitioners 2006 SLT 398, and from an unreported decision of the Inner House in South Lanarkshire Council, Petitioners, dated 11 August 2004. No opinions appear to have been issued in the latter case, but it was common ground that, although unopposed, both applications were simply refused as unnecessary under section 75(2) on the ground that the relevant plans involved no disposal of inalienable common good land. No issue of appropriation seems to have arisen, or to have been discussed, in either case, and the outcome of each can therefore be seen as purely jurisdictional. Under section 75(2) it is only where disposal is in prospect that the court's jurisdiction arises; in any other situation the court has no statutory locus to intervene; and in the two cases cited this would appear to have been the sole basis of the court's ruling. In our view, therefore, neither of these decisions is of any assistance to the Council on the very different issue which arises here.

[35] With the foregoing considerations in mind we are, with great respect, unable to support the Lord Ordinary's reasoning and conclusions in this area. To our mind there is no question of a local authority's right to appropriate inalienable common good land (such as the southern section of Portobello Park) being unfettered. On the contrary, the true position would appear to be that, for so long as inalienable common good land remains within the ownership of a local authority, Parliament must be taken to have intended all pre-existing fiduciary obligations, and corresponding community rights, to remain extant and enforceable. It would indeed be an extraordinary situation if, by the mere expedient of appropriating inalienable common good land to some function other than parks and recreation, a local authority could at a stroke free itself from all common law restraints and, having done so, perhaps also facilitate onward disposal without any need to obtain the sanction of the court under section 75(2). In the absence of clear authority requiring us to affirm such an apparently unreasonable state of affairs, we are not persuaded that we should go down that line. We therefore hold that, for present purposes, the Council can lay claim to no statutory power of appropriation under the 1973 Act."

In *East Renfrewshire Council, Petitioner* [2014] CSOH 129 the court refused a local authority's petition for an order authorising the disposal of part of a park which was inalienable common good land and on which they proposed to construct a new school, as the circumstances did not constitute a disposal for the purposes of the Local Government (Scotland) Act 1973 section 75(2) but was an appropriation which the court had no power to authorise.

A local authority (C) sought an order authorising the disposal of part of a park (P) forming part of C's inalienable common good land and on which they proposed to construct a new school.

It was proposed that the new school site would be leased by C to a company (S) which would in turn sublease the site back to C and grant a security over its interest under the head lease in favour of a private sector funder.

C submitted that the lease to be granted by C to S was a disposal for the purposes of the Local Government (Scotland) Act 1973 section 75(2) and not an appropriation.

Petition refused.

The only rights in respect of the new school site which would be relinquished by C were certain temporary rights of possession of the site during the construction phases, which were contractual and not real rights, and there was nothing in such circumstances which would constitute a disposal by C for the purposes of section 75(2), and C's proposals were properly characterised as appropriation; in essence all that would change was that the land would cease permanently to be used by C for the common good, and would be used instead for other purposes, namely the provision of education, and that could not reasonably be described as anything other than appropriation of inalienable common good land, which appropriation the court had no power to authorise. The Court noted *South Lanarkshire Council, Petitioners*, 11 August 2004, unreported and *North Lanarkshire Council, Petitioners* 2006 S.L.T. 398.

Opinion, that the court's view would have been the same if the draft agreement between C and S provided for the sublease in favour of C to be granted with effect from a slightly later commencement date, and hence for a shorter duration, than the head lease in favour of S.

On the back of these cases appropriation has been amended into section 75 to allow that to be treated as a disposal.

When Does a Question Arise under section 75(2)?

The types of land and property which could give rise to a question as to the right of the local authority to alienate or dispose of them falls into certain broad categories although these categories are not closed.

Where there has already been judicial consideration of the land in question the court will give weight to any previous interpretation on whether the land forms part of the common good which could not be alienated without the consent of the court. Even so as Lord Maxwell pointed out in the *East Lothian Coal Board* case the modern court still has a clear discretion to determine matters even if previous case law seems to have put the matter beyond question.

Where the burgh's title to land contains words of a grant which appear to give it a character of common good a question is likely to arise as to the right of the authority to alienate the land. So for example words such as "*a gift to be used for the general purposes of the town*" could give rise to a question as in *Fife Council, Petitioners*, (Kirkcaldy Sheriff Court 25 July 2001).

Where there has been a public building or area of land which has a public purpose then the question is likely to arise even if a replacement can be found. That was the situation in *Cockenzie and Port Seton Community Council v East Lothian District Council*, 1997 SLT 81. Another example is where there has been use from time immemorial by the public.

When Does a Question Not Arise?

There are a number of categories of cases.

The first is where land has no public use whatsoever as was held by *North East Fife District Council, Petitioners*, (Cupar Sheriff Court 1 March 1991). The area of land there was a pond in which newts lived and local objectors did not wish the newts to be disturbed. The sheriff was not satisfied that the land was held for a public purpose such that it was inalienable.

Another category is where there is a proposed disposal of land which has already been the subject of case law and the facts and circumstances remain the same. A previous judicial decision is likely to determine whether the land is or is not capable of being alienated without a court order.

Where the original purpose of the land or buildings has disappeared then a question may not arise or where the land and buildings have existed but public use has been interrupted for a substantial period of time – usually taken to be at least twenty years – a question may not arise.

Factors in Allowing Disposal

If a question does arise as to whether the local authority can alienate a piece of ground or dispose of it what factors will the court look at in deciding whether to grant or refuse such a request?

Again there are a number of cases which flag up possible considerations.

The first one is neglect. Broadly speaking where it can be shown that land has been neglected because of the failure of the local authority to maintain it and then the authority seeks to dispose of the land because of the state it is in the court may well look with disfavour on such a proposal. So for example in the *Grahame* case the failure of the local authority to maintain a drying green in a situation where they wished to build stables for police horses was held to be a situation where the authority were not entitled to rely on their own neglect.

More recently in *Stirling District Council, Petitioners*, (19 May 2000) a museum hall in

Bridge of Allan which had originally been in the hands of a trust but later came into local authority ownership in 1950 was the subject of consideration. The court found there had been a consistent failure to maintain the building during that time. In that case however neglect had not solely been due to the actions of the local authority. Had the neglect been only due to the failures of the local authority then the implication of the case is that the petition for disposal of the property would have been refused.

Slightly different was the situation where a local authority prioritises funding. The case of *Motherwell District Council, Petitioners*, 1988 GWD 15-666 suggests that where a local authority prioritises funding to the extent that common good land becomes derelict because funds which could be used to maintain it are diverted elsewhere then that will not necessarily mean that the local authority can be accused of benefiting from its own neglect. The approach in the *Stirling* case seems to be more about apportioning blame but in the *Motherwell* case the court seems to have been more concerned with establishing what was in the interests of the community as a whole.

Balance of convenience to the former burgh residents is a consideration.

In *Kirkcaldy District Council v Burntisland Community Council*, 1993 SLT 753 the council wished to dispose of a caravan park which had been bought as part of an estate of land in 1907 by the then burgh. It was to be used for recreation grounds and other municipal purposes. Basically the site was used less and less and ultimately the local authority wished to get authority to dispose of the land to British Alcan, then the largest employer in Burntisland. In that case the court seemed to take the view that there was a clear benefit to the community from the disposal and this suggests that where such an obvious benefit exists the court is likely to be minded to authorise disposal subject of course to the financial benefit being translated into the common good fund to the area.

This is to be contrasted with cases where there is no clear benefit. This arose in *West Dunbartonshire Council v Harvie*, 1997 SLT 979. This concerned an area of ground in the centre of Dumbarton known as Dumbarton Common which had been used for

public recreation for many years. A sports centre had been built on the common as well as a children's playground and there was a public footpath across it.

In 1995 the council entered into missives with the Secretary of State for Scotland to build a new Sheriff Court to replace the existing courthouse which was no longer fit for purpose. The site extended to 1.44 acres out of a total of 12.84 acres. Local residents opposed the petition to dispose of this common good land.

The Court of Session judge who heard the case held that the consent should not be given and his decision was confirmed on appeal. Broadly the court was not convinced that there was any clear benefit to locating the Sheriff Court on the site in question although it was accepted that Dumbarton should have a Sheriff Court. That was a question of location. Of importance to common good activists was the view that the existing recreational purposes were not of a minor nature or value. Even although all existing facilities could be reallocated or realigned the argument which impressed the court was that this was the only public park in Dumbarton town centre and was a “green lung” for the centre of the town.

There are some lessons from this case for all sides.

One weakness in the case for the council was that the Scottish Secretary was not served with the court papers and so did not enter the action to make his views known. There was a lack of information before the court on the question of justification.

The issue of benefit was also less clear cut in this case than in the *Burntisland* case.

There was no suggestion in the Dumbarton case that there would be a major loss of jobs if the Sheriff Court house could not be located at the site.

What is clear is that for parties arguing one of these cases it is necessary to present the court with as much information as possible when it is asked to examine the benefits or otherwise of a particular proposal.

Section 75 of the 1973 Act allows the local authority to petition either the Court of Session or the Sheriff Court to get authority to dispose of common good land.

The local authority has a choice. Court of Session proceedings are expensive compared to Sheriff Court proceedings as a general rule. If the case is of particular importance the local authority may wish to go to the Court of Session. A hearing in the local Sheriff Court might at least carry the advantage in that the sheriff may well be someone who knows the area and may live locally. On the other hand common good law is complicated and very few sheriffs will know much about it and there may be an

argument for going to the Court of Session. Court of Session proceedings can be slow though. They might still be seen as the best choice for high profile cases.

Cases concerning common good may come up other than under a section 75 petition.

For example if there is doubt as to whether what is proposed is a disposal the council may wish to raise an action known as a declarator to establish whether the land is common good at all and/or whether the authority of the court is required to dispose of it.

Objectors have sometimes tried different procedures. For example in the *Waddell* case an objector obtained an interdict to prevent disposal of land and in the *Cockenzie and Port Seton Community Council* case judicial review in the Court of Session was used by the Community Council to try to argue that the disposal of land was unreasonable and unlawful because no section 75 petition had been raised. There are however real procedural and other difficulties with going down that route. The court is not likely to hold that a local authority has acted unlawfully or unreasonably in judicial review proceedings because of the wide discretion afforded to a local authority in this type of court procedure and the choice as to whether to go down the section 75 route or to forge ahead and risk challenge.

If a common good petition is to be opposed then objectors must bear a number of things in mind.

First, the Scottish courts generally do not allow actions to be run in name of pressure groups subject to judicial review where there is a sufficient interest test which can allow “pressure group” led litigation.

Accordingly it will not in general be competent for a group of activists to defend a common good petition or Sheriff Court Summary Application (neither of which are of course judicial reviews) in the name of that group. Any defence would have to be in the name of individual parties. The problem here is that that this may expose individual persons to liability for expenses if their opposition is unsuccessful and the court is still quite conservative in the use of protective expenses orders.

An exception exists in relation to community councils. A community council would probably have the right to defend a petition and the liability for expenses would fall on the community council rather than on individual members.

Accordingly it can be difficult to find someone who is prepared to put their “head on the block”. Legal aid is in general not available for common good matters because the Scottish Legal Aid Board takes the view that an individual citizen defending a petition

is doing so in the interests of all persons in the community and accordingly it is reasonable to expect them to seek funding from the community.

Assuming someone who wants to defend the petition can be found the next stage is for written answers to be lodged with the court and thereafter the court may appoint a lawyer known as a “reporter” to investigate the facts and circumstances surrounding the petition. It is usually hoped that this procedure will help reduce the costs of the proceedings and will avoid the need for a long and complicated hearing at which witnesses are led and examined. However in my experience a reporter being appointed is rare.

If this procedure is followed parties will be given an opportunity to make submissions on the report and on the case generally before the court makes a decision.

Any decision made by the sheriff is capable of appeal to the Court of Session and any decision made by one judge in the Court of Session is capable of being appealed to three other judges in the Inner House of the Court of Session.

Scott Blair, Advocate
March 2021

About Scott

Scott specialises in licensing law, public law, administrative law, local government law, social work law, animal welfare law and human rights law.

Since graduating in 1991 from Glasgow University with a First Class Honours Degree in Public Law, Scott has developed an interest in the law as it applies to local authorities and has, over the years advised, local authorities and those affected by local authority decisions, on a whole range of issues arising from their functions including common good, licensing, land use and access rights, planning, social work and child law, FOI and data protection, human rights and equality law.

Scott has represented clients at every court level in Scotland, in the UK Supreme Court and in the European Court of Human Rights.

Scott is the author of the textbook, “Scots Administrative Law: Cases and Materials.” Scott is a Legal Convener of the Mental Health Tribunal for Scotland and is preferred A Panel counsel to the Equality and Human Rights Commission.

He is ranked Band 1 for Licensing in the latest edition of Chambers & Partners UK which highlights his 'extensive knowledge and attention to detail': ***"He brings real insight into cases involving complex administrative law problems and has years of experience with high-profile licensing work." "He is highly intelligent and able to present well thought-out, structured and persuasive arguments."*** He is also ranked as a leading Junior Counsel for Administrative & Public Law: ***"He's very creative, and does high-profile, interesting and novel work that navigates uncharted legal territory." "Friendly and approachable," and "very helpful and able." (Chambers & Partners UK, 2020).***

He is ranked Tier 1 for Planning, Environmental and Licensing plus Civil Liberties, Human rights, Public Inquiries, and Public and Administrative Law (including Local Government) in the latest edition of The Legal 500 (2020): ***'He has strong analytical and communication skills.'***

Scott is "A List" panel Counsel to the Equality and Human Rights Commission.

Common Good Work

His local government practice covers Common Good Law.

Scott has considerable experience of common good work acting for local authorities in both the Court of Session and Sheriff Court. Recent high profile cases have included Union Terrace Gardens in Aberdeen, Inch Park in Edinburgh and Calton Hill Observatory in Edinburgh (World Heritage Site Status) and King George V Park in Dumfries (The Learning Hub). He is currently instructed in a number of applications for judicial consent

He has advised on the interplay between Community Asset Transfers and Common Good.

Scott can be contacted via scott.blair@terrafirmachambers.com