

**REPORT TO:** East Lothian Council

**MEETING DATE:** 25 June 2019

**BY:** Depute Chief Executive (Resources and People Services)

**SUBJECT:** Review of the Governance of Common Good

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## **1 PURPOSE**

- 1.1 To report on progress of the Review of the Governance of Common Good to Council and to seek approval to undertake further work.

## **2 RECOMMENDATIONS**

- 2.1 That Council delegates authority to officers to employ a surveyor to carry out a repairing survey on all currently listed Common Good Assets and to prepare a schedule of repairs and maintenance required that can then be included in the Common Good budget setting process to ensure that all such assets are kept in a good state of repair.
- 2.2 That Council agrees that the fees and associated costs of said surveyor be met from the Common Good Funds proportionately based on the value of the Common Good funds for each of the four Common Good areas, namely Musselburgh, Haddington, North Berwick and Dunbar.
- 2.3 That Council agrees that Legal and Procurement undertakes an exercise to determine by examination of title deeds etc. whether those properties that currently appear on the list of Common Good assets are correctly so listed and whether any other properties or other assets owned by the Council should be added to the list.
- 2.4 That the Council agrees that the cost of either outsourcing this work to a legal firm or employing a solicitor on a temporary basis at Grade 9 for a period of six months to carry out this work is proportionately met by the Common Good Funds as at 2.2.
- 2.5 That a Register of Common Good Assets is established, maintained and published to fulfil the legal requirements of s102 of the Community Empowerment (Scotland) Act 2015 (CESA) including a full public consultation.

### **3 BACKGROUND**

3.1 In the 2016/17 East Lothian Annual Audit Report it was recommended that the Council ensured that the Trusts it administers were promoted more widely amongst the public and that consideration be given to whether any Trusts could be consolidated. This recommendation was repeated in the 2017/18 Audit Report at which time a completion date for this piece of work was set for June 2019.

3.2 An undertaking was given to Councillors that a review of the Governance of the Common Good Funds would be undertaken in parallel with the review of Trusts.

3.3 A project brief was developed in June 2018 and was given approval on 25 July. Kirstie MacNeill, the then Service Manager – Licensing Administration and Democratic Services, was appointed as project manager and an original project team was established consisting of :

Liz Denovan, Service Manager – Corporate Finance

Carlo Grilli, Service Manager – Legal and Procurement

Caitlin McCorry, Service Manager – Community and Area Partnerships

Sarah Fortune, Service Manager – Business Finance

Tracey Brown, Finance Business Partner

Kim Brand, Corporate Development Accountant

Janet Placido, Team Manager – Estates

The Project Team was supported by Caroline Rodgers, Transformation Programme Manager.

There were 6 Project objectives in the brief:

- Compile a definitive list of Common Good assets and Trusts
- Create a mechanism so that such a list is regularly reviewed
- Review the governance arrangements in place for Trusts and Common Good and make recommendations for improvement
- Propose changes to the management of the Common Good Funds and Trusts
- Ensure that Elected members and relevant staff are aware of the restrictions that apply to the management and use of Common Good Funds and Trusts
- Propose any refresh of Standing Orders that might be required by any project recommendations

3.4 The Project Team first met on 17 July 2018. At the outset it became apparent to the Team that in reality it was dealing with two separate work streams.

Although Trusts and Common Good Funds had become conflated in general discussion, in fact they each presented quite different challenges and were subject to separate legislative regimes. It was clear that they had little in common and the Team decided that they should be dealt with separately. This report is restricted to matters related to Common Good Funds and Assets.

- 3.5 Common Good Assets and the Common Good Funds are owned by the Council and require to be administered by the Council subject to specific rules in relation to the interests of the inhabitants of the Burghs that formerly owned the assets and other rules in relation to the disposal by sale or lease of the assets.
- 3.6 The Common Good Act of 1491 determined that the revenues from Burgh property and income from various taxes and levies was to be used for the Common Good of the town – it was effectively the town’s general fund. The funds therefore comprise not only buildings and land but also some other items such as paintings, artefacts and historical items. There has been and continues to be across Scotland considerable debate over what is and what is not part of the Common Good.
- 3.7 In East Lothian, while Estates holds a list of properties and some items that it considers are Common Good Assets, this does not appear to be comprehensive and it has not been possible to establish when this list was prepared and by whom. The list contains at least one property that Legal Services considers doubtful as being a Common Good property. Accordingly it is important that an exercise is carried out by Legal and Procurement Services in conjunction with Estates and the Museums Service to identify and list all of the Common Good Assets so that the Register can be consulted upon and published as required by law.
- 3.8 There are a number of misconceptions that surround Common Good Funds and it should be noted that:
  - The four Common Good Funds and all Common Good Assets in East Lothian are owned by East Lothian Council. They are not held in trust on behalf of the four towns but are administered by the Council having regard to the interests of the inhabitants of the particular Common Good areas.
  - Common Good Funds are entirely separate from Trusts and Bequests.
  - The Council can dispose of or lease Common Good property where no question arises as to its right to do so but it may have to obtain a court order where there is such a question.
  - Local Councillors have no specific legal rights in respect of the Common Good Funds for their ward, although their views and opinions are of course valuable. Community Councils and other local bodies such as the Area Partnerships on the other hand now do have a statutory role in relation to the disposal or change of use of Common Good Assets.
- 3.9 The primary use to which any Common Good Fund should be put is to ensure the repair and maintenance of its assets. It appears that no recent survey has

been carried out on the state of repair of the Common Good properties and that repairs have been carried out on an ad hoc basis as and when required rather than through a rolling schedule of repairs. On some occasions the Council's general fund has met these costs and on other occasions applications have been made for grants. Neither of these is an appropriate way of dealing with the cost of repair and maintenance. It is therefore proposed that the Common Good Funds meet the cost of a surveyor who can assess the state of repair of the assets and prepare a repairing/maintenance schedule that can be applied with funding being allocated through the budget setting process from the appropriate funds.

- 3.10 Common Good Funds should also be properly recharged by Legal Services, Estates and Council Resources for all work undertaken in connection with Common Good matters. The Council's general fund should not subsidise the Common Good Funds by not charging for these services. There should be a central support charge applied as well as direct recharge.
- 3.11 The project manager undertook some research into the legal constraints on the use of Common Good Funds. Consideration was also given to the way some other councils have adopted different approaches to the governance and administration of their Common Good Funds. It became clear that several councils were also struggling to produce and verify accurate lists of their Common Good Assets.
- 3.12 The annual refresh of the Common Good budgets is carried out annually and it is appropriate to align that with the identified cost of repairs and maintenance and the verification of the Common Good Asset register to ensure that those costs are appropriately allocated to the correct budget. It is therefore important to have the proposed surveyor and solicitor carry out the work proposed in 2.1 and 2.3 within the current financial year so that the budgets for 2020/21 can take the cost of repair and maintenance into account.
- 3.13 It is estimated that the fees for a surveyor could amount to up to £20,000 given the number of currently listed Common Good Assets. That cost is roughly equivalent to the cost of employing a solicitor for a period of 6 months or outsourcing this legal work. A sum of up to £40,000 is therefore sought to be allocated from the Common Good Funds budget for 2019/20. Officers will of course seek to minimise the costs involved by obtaining competitive quotations and closely monitoring the workload of any employed solicitor.

## **4 POLICY IMPLICATIONS**

- 4.1 None

## **5 INTEGRATED IMPACT ASSESSMENT**

- 5.1 The subject of this report does not affect the wellbeing of the community or have a significant impact on equality, the environment or economy

## **6 RESOURCE IMPLICATIONS**

- 6.1 Financial – £40,000 to be allocated from the Common Good Funds to meet the cost of instructing a surveyor and firm of solicitors or employing a temporary solicitor
- 6.2 Personnel - potentially creating a temporary 6-month post at Grade 9 for a specific piece of work with the option of terminating that contract earlier if the work is completed sooner
- 6.3 Other -

## **7 BACKGROUND PAPERS**

- 7.1

<b>AUTHOR'S NAME</b>	Kirstie MacNeill
<b>DESIGNATION</b>	Service manager People and Governance
<b>CONTACT INFO</b>	kmacneill@eastlothian.gov.uk
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