

REPORT TO: East Lothian Council

MEETING DATE: 23 August 2022

BY: Executive Director for Council Resources

SUBJECT: Common Good Review

1 PURPOSE

- 1.1 To report back to Council on proposals following the review of Common Good.

2 RECOMMENDATIONS

It is recommended that the Council:

- 2.1 Notes the current position and progress regarding the Common Good Review;
- 2.2 Agrees the delegation to the Head of Infrastructure, as set out in paragraph 3.13 of this report.

3 BACKGROUND

- 3.1 At the meeting of the Council on 25 June 2019 it was resolved by Council that a working group with cross-party Member representation, supported by Council Officers, would be set up to review the manner in which Common Good property is managed within the Council. The objectives of the Working Group were as follows:

- compile a definitive list of Common Good Assets;
- create a mechanism so that such a list is regularly reviewed;
- propose changes to the management of the Common Good;
- review the governance arrangements in place for the Common Good and make recommendations for improvement;

- ensure that Elected Members and relevant staff are aware of the restrictions that apply to the management and use of the Common Good; and
- propose any refresh of Standing Orders that might be required as a consequence of any project recommendations.

The Working Group met frequently over the period with regular updates on the progress reported to Council (see background papers referred to in Section 7 of this report).

What is Common Good?

- 3.2 Common Good property is a special type of property owned by local authorities in Scotland, which is legally distinct from all the other property which they own. Income arising from these assets form the Common Good Funds. These Funds consist of property that previously belonged to one of Scotland's burghs. They include both moveable property (for example, cash, securities, civic regalia) and heritable property (land and buildings). The origins of these Common Good Funds go back to the establishment of Scotland's Royal Burghs in the 11th century. Royal charters by the Crown granted these burghs special rights and privileges, as well as tracts of land which typically extended for some distance around the medieval town. Then, in the 15th century, in response to maladministration, the Scottish Parliament passed the Common Good Act 1491. This Act, which remains in force today, stipulated that the common good of the Royal Burghs "be observed and kept for the common good of the town". The most concise statement of the purpose of the Common Good is contained within a judgement of Lord Kyllachy who stated that:

"The Common Good is corporate property and falls as such to be administered by the Council – and applied by them for the benefit of the community in such manner as, and using reasonable judgement as, they think proper."

There is no formal definition of Common Good property, although there is significant guidance within case law. Therefore, this means that in deciding whether an asset is part of the Common Good, the Council must consider each case on its own merits, primarily looking at how and when the property came into ownership of the Council.

A key objective for the group was firstly identifying all Common Good assets.

Identifying Common Good Assets

- 3.3 A full review of all Common Good assets held by the Council under Common Good Funds was undertaken and a list of all identified Common Good assets was published for consultation on 4 June 2021 as required in terms of the section 102 of the Community Empowerment (Scotland) Act 2015. This list included both moveable and heritable property. The

consultation closed on 20 August 2021. The responses to the consultation were reported in the Members' Library (see Background Paper 7.4).

- 3.4 This list identified whether the Common Good assets were deemed to be capable of disposal without first seeking permission from court or if they required court approval prior to any proposed disposal. Notwithstanding the fact that after 1976 no new Common Good property could be created this does not prevent the Common Good Funds growing as a result of returns from investments. This may mean that over time the Common Good assets listed may change by either the addition or subtraction of assets.
- 3.5 As a consequence of the review, a number of land sites previously recorded on East Lothian Council's general services balance sheet have now been transferred to Common Good Fund balance sheets. Where a building is on such a site but is being occupied and used by the Council for the provision of public taxpayer-funded services the building is still recorded on the Council's general services balance sheet on the basis that the use is equivalent to a finance lease.
- 3.6 [Audit Scotland's Annual Audit Report on the Council's 2020/21 annual accounts](#) stated "Having recognised that the council is using common good assets for the provision of council services, an appropriate lease arrangement must be set up." Lease payment arrangements from taxpayer funds to the Common Good Funds already exist for three of the buildings (Haddington Town House, Dunbar Town House and the Brunton Hall). For other buildings, however, no specific arrangements are in place. These include a number of park buildings and memorials, some of the more notable building assets involved are Stoneyhill Community Centre Musselburgh; Port Seton Community Centre; Bleachingfield Centre Dunbar, and the community facility building at Musselburgh Racecourse.

Reviewing the List of Common Good Assets

- 3.7 It should be noted that while all endeavours have been made to identify all Common Good assets it may be that there are certain areas of land that may in the future be considered to be part of the Common Good Fund. It is also possible that the Council may utilise Common Good funds to acquire property, which would then be considered to be part of the Common Good Fund. Further, it may also be the case that the Council is permitted to dispose of Common Good assets. It is therefore proposed that Estates Services will be responsible for maintaining, reviewing (in consultation with Legal Services) and updating the Common Good asset register on a regular basis.
- 3.8 To ensure a comprehensive mechanism is in place to continue to monitor and review the Common Good asset list it is proposed that:
- on any dealing with any property held by the Council which has not already been identified as Common Good (or reviewed as part of this review process) a title check is instructed to be carried out by Legal Services which will include consideration as to whether or not that

property should be considered to be Common Good. If the answer is yes then the property will be added to the published Common Good Asset Register.

- any approved acquisition of property utilising Common Good monies or disposal of a Common Good asset will result in that asset being either added or removed from the list at the point of acquisition or disposal, as appropriate.
- an annual audit of all moveable assets will be carried out to ensure that the moveable Common Good assets remain in good repair and condition, and remain capable of being identified. Following this review the Common Good Asset Register will be updated as appropriate.

3.9 In addition to the recorded assets there are also cash balances attributable to the Common Good Funds. These will continue to be reviewed by finance with an annual budget for each Common Good Fund prepared and presented to Council for approval.

Management of Common Good

3.10 Members should note that, in terms of case law, the first call on Common Good cash balances must be the maintenance of Common Good properties.

3.11 Through the review it was identified that there was an ongoing requirement to review the condition of the buildings and the General Fund may have been utilised at points to support the maintenance of Common Good assets.

3.12 It is therefore proposed that there will be a full review of the condition of all assets recorded on the Common Good Asset Register. This review will record the condition and provide suggested works to bring or keep the property into good repair.

3.13 A maintenance schedule will then be compiled and the annual Common Good Fund budgets will incorporate the amounts required to carry out such repairs and maintenance of the Common Good assets as identified in the maintenance schedule. Required maintenance/repairs will be brought forward on a priority basis in line with the annual maintenance schedule.

3.14 The maintenance schedule will then inform the annual Common Good Funds' budgets which will be put before Council for approval. Such budgets will prioritise the maintenance of the properties (which may also include maintaining land as well as buildings) prior to setting budget levels for the award of grants through the Common Good Committees.

3.15 In the event there are insufficient funds to accommodate such maintenance/repairs then consideration will be required as to whether or not the asset is disposed of. If the property is sold or retained for other purposes then this may require a petition to Court to declare the asset as no longer being part of the Common Good Fund.

- 3.16 There remains an obligation on the Council to achieve best value for the Common Good Fund. In achieving best value this does not always need to be a full financial value but should demonstrate benefit to the people of the royal burgh area to which the Fund applies. In dealing with the letting of Common Good properties it is suggested that this is delegated to the Head of Infrastructure following consideration of relevant representations received from a full public consultation as required in terms of the Community Empowerment (Scotland) Act 2015. The decision to dispose of any Common Good property must be taken by Council.
- 3.17 The Common Good monies will continue to be invested in line with the Council's treasury management strategy as approved by Council on an annual basis.

Common Good Governance

- 3.18 Common Good is corporate property and falls as such to be administered by the Council and applied by them for the benefit of the community. It is this principle that should drive the governance and utilisation of the Common Good Funds. As part of the Governance Review, conditions surveys were undertaken on all Common Good properties. This identified a significant amount of maintenance required across the Common Good portfolio (see background paper referred to at 7.3) and to date has informed the Council's current building maintenance programme. It is the recommendation of this review that the first call on the Common Good Funds should be to maintain, repair and preserve existing Common Good assets. In order to ensure good financial governance over the Common Good Funds, a five-year maintenance programme of all Common Good assets will be prepared and presented along with the annual Common Good budgets for Council approval. This will seek to prioritise the funds to maintaining the current Common Good assets and provide a framework in which applications from the public for Common Good funding can be reviewed and approved.
- 3.19 The current arrangements for dealing with Common Good Funds are that each Common Good area has a committee established within the Scheme of Administration. The remit of these Common Good Committees is to determine applications seeking Common Good funding up to Ten Thousand Pounds (£10,000). Applications received for sums which are greater than £10,000 are still presented for comment and noting by the Common Good Committee but are ultimately presented to Council for a decisions accompanied by a recommendation from the Council's Chief Finance Officer (s95 Officer). This process works well in practice and the review found no basis to alter it.
- 3.20 Through the review process it is noted that Common Good assets have been identified in Cockenzie/Port Seton and Tranent. This may, in the future, enable the establishment of two new Common Good Committees for these areas. At present, work is still being undertaken to establish whether any cash can be attributed to these Common Good Funds with the principle that any monies received from these assets would firstly be

directed towards their maintenance. Only in the event that the levels held on these accounts ever reach a sufficient level to permit grants to be awarded while being able to maintain the relevant Common Good Property, would Common Good Committees be established.

Common Good Knowledge/Training

- 3.21 The Common Good Review has been in process for over five years and as such there has now been greater awareness of management of Common Good property throughout the Council. The Council's Management Team are now aware of the requirements in dealing with Common Good property arising from Common Good Act 1491, Community Empowerment (Scotland) Act 2015, and case law. This has been taken on board and Council officers are now more aware of the governance around Common Good assets.
- 3.22 Members have been provided with Common Good training as part of the induction. There is also guidance provided by the Committees Team relating to the Common Good Committees, and Council officers will make available to Members refresher training on a regular basis. In addition, Members are also able to request refresher training (this can be one-to-one or in a group setting).

4 POLICY IMPLICATIONS

- 4.1 There are no policy implications arising from this report.

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 – There are potential financial implications arising from this review dependent on finalisation of arrangements for the Council's use of buildings on Common Good land. The report acknowledges a requirement to allocate Common Good Funds towards the maintenance of Common Good assets prior to any grants from the funds being made. The review may require an additional level of resource to manage ongoing maintenance programmes; it is likely this resource will be built into the Common Good budgets going forward.
- 6.2 Personnel – none.
- 6.3 Other – N/A

7 BACKGROUND PAPERS

- 7.1 Report to Council: Review of Governance of Common Good, dated 25 June 2019
- 7.2 Report to Council: Review of Governance of Common Good – Update, dated 27 August 2019;
- 7.3 Report to Council: Review of Governance of Common Good – Update, dated 20 October 2020;
- 7.4 Members' Library Report 119/21: Common Good Consultation – Update, dated November 2021

AUTHOR'S NAME	Carlo Grilli
DESIGNATION	Service Manager - Governance
CONTACT INFO	cgrilli@eastlothian.gov.uk ext 7770
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