HIGHLAND COUNCIL

PROCESS FOR THE DISPOSAL AND/OR CHANGE OF USE OF COMMON GOOD PROPERTY

A. INTRODUCTION

The Community Empowerment (Scotland) Act 2015 came into force on 27 June 2018. Part 8 of the Act promotes transparency in relation to Common Good property and seeks to ensure that communities are involved in decisions concerning the identification, use and disposal of Common Good assets.

The Act places duties on local authorities to establish and maintain a register of Common Good property (section 102) and to undertake consultation before making any decision to dispose of, or change the use of, Common Good property (section 104).

This document, which is guided by Section 104 of the Community Empowerment (Scotland) Act 2015 and Scottish Government guidance – Common good property: statutory guidance for local authorities – sets out the process to be followed by the Highland Council ("the Council") when considering the disposal of, or a change of use relating to Common Good property. Arrangements for the establishment, maintenance and review of the Common Good Asset Registers are set out in a separate procedure – Process for establishing Common Good registers and reviewing registers.

B. DEFINITIONS

1. Disposal

1.1 Disposal means the transfer of Common Good property out of the ownership or control of the Council. The most common example is the sale of an asset. However, a lease or other arrangement that grants a third-party identifiable right of occupation, use or benefit may also constitute a disposal.

1.2 The Council will treat the grant of a lease for a period of 10 years or more as a disposal requiring consultation. For the avoidance of doubt, this is a Highland Council policy position for determining when consultation will be undertaken.

1.3 Demolishing Common Good property is regarded as disposal (including change of use).

2. Change of use

2.1 In earlier legislation and case law relating to Common Good property, a change of use has sometimes been referred to as "appropriation". A change of use arises where there is a proposal to change the use of a Common Good asset from one purpose to another.

2.2 The Community Empowerment (Scotland) Act 2015 does not define the term "*change of use"*. The Council will consider each case on its individual merits, having regard to the particular circumstances, relevant legal advice and any applicable statutory guidance.

2.3 Scottish Government guidance confirms that, in relation to Common Good cash funds, a change of use does not include routine payments, grants or investment decisions. However, it may include changes to the purposes, criteria or rules governing how the fund may be used.

2.4 Whether consultation is required will depend on the circumstances of each case. In general, consultation will usually be required if the proposed use of the land is significantly different from its current use.

2.5 The following examples of change of use are illustrative only and are not exhaustive:

Examples of changes of use that may require consultation

- Change of retail premises to industrial or manufacturing use.
- Change of a public park or open space to a school site.
- Change of a public building or space for commercial enterprise.
- Change of a town hall, former civic building or community facility to private residential accommodation.
- Redevelopment of Common Good land for a materially different purpose.
- Demolishing a building is considered a disposal of Common Good property. If the land would then be used for a different purpose, this would also be regarded as a change of use.
- Erecting a new building, or extending an existing building, on land that was previously open space.
- Change of land used for recreation or public enjoyment to a car park, depot, or other operational use.
- Permanent closure of a public amenity where the land or building is subsequently used for a different purpose.
- A change to the purposes, eligibility criteria or objectives governing the use of a Common Good cash fund.

Examples of changes that would not normally require consultation

The following examples would not normally constitute a change of use, provided the character and purpose of the existing use remain substantially unchanged:

- Change from one tenant to another where the nature of the use remains the same.
- Change from one type of retail business to another.
- Refurbishment, repair, maintenance or operational works that do not alter the principal use of the existing property.
- Improvements to accessibility, energy efficiency or building standards that do not affect the property's primary purpose.
- Temporary closures to facilitate repairs, maintenance or improvement works.
- Routine management and decisions relating to Common Good cash funds that do not alter the purposes for which the fund may be applied including decisions relating to the management, maintenance and operation of Common Good assets.
- Temporary events, markets, exhibitions or community activities that support the existing use of the property.
- Landscaping, environmental enhancement or biodiversity projects that are consistent with the character of the land.

3. Alienable Common Good Property

3.1 Alienable Common Good property is property that the Council can generally manage, lease, sell or change the use of without seeking Court approval. This is usually property that has not been dedicated for the use and enjoyment of residents of the former Burgh and is not subject to any legal restrictions. Before making such decisions, the Council must comply with the relevant consultation requirements.

3.2 Examples of property that may be alienable include:

- Commercial or investment properties that are utilised for generating income for the Common Good Fund;
- Fishing rights and other heritable rights held as assets of the Common Good Fund; and
- Buildings or land that have not been dedicated to a particular public or community purpose.

4. Inalienable Common Good Property

4.1 Inalienable Common Good, is property that is subject to a legal restriction on disposal or change of use, or where there is uncertainty as to whether such a restriction exists.

4.2 Property may be regarded as inalienable where:

- the restriction or purpose is expressly stated in the title deeds, deed of gift, Royal Charter, or other governing documents;
- the property has been specifically dedicated to public use; or
- the property has been used for a particular public benefit over a substantial period of time, such that it may have acquired an inalienable character through long-established use.

4.3 In determining whether property is inalienable, regard should be had to its history, title conditions, original purpose, and the extent to which it has been dedicated to, or used for, the benefit of the inhabitants of the former Burgh. Property that has been dedicated to public use or held for a specific public purpose will generally be regarded as inalienable Common Good property.

4.4 Where property is considered to be inalienable, or where there is uncertainty regarding its status, the Council will seek authority from the Sheriff Court or the Court of Session before proceeding with a proposal. Interested parties will have an opportunity to make representations as part of the court process.

4.5 Examples of property that may be inalienable include:

- Town halls and other civic buildings;
- Public parks and gardens;
- Markets and market squares;
- Recreation grounds, playing fields, and open spaces;
- War memorials and associated grounds; and
- Other land or buildings held for the benefit, enjoyment, or use of the inhabitants of the former Burgh.

C. PRINCIPLES GOVERNING COMMON GOOD PROPERTY

In exercising its functions in relation to Common Good property, the Council will act in the interests of the Common Good Fund and the inhabitants of the former Burgh.
The Council will:

- have regard to the interests of the residents of the former Burgh to which the property relates;
- safeguard and maintain Common Good property for the benefit of current and future generations;
- comply with the requirements of Part 8 of the Community Empowerment (Scotland) Act 2015;
- have regard to any statutory guidance issued by the Scottish Government;
- seek to secure Best Value in the management and use of Common Good assets;
- ensure decisions are transparent, proportionate, evidence-based and capable of public scrutiny;
- have regard to the nature, history and purpose of the property, including any restrictions affecting its use or disposal;
- encourage appropriate community engagement and participation in decisions affecting Common Good property; and
- ensure that Common Good assets are managed in a manner that supports the interests and wellbeing of the inhabitants of the former Burgh.

D. CONSULTATION

5. First step

5.1 Where the Council is considering the disposal of, or a change of use relating to, Common Good property, it will first develop a proposal setting out the nature of the proposed transaction or change and the reasons for it.

5.2 The decision to commence the consultation process will be taken in accordance with the Council's Scheme of Delegation and governance arrangements. Area Committees may determine proposals relating to Common Good assets where the value of the asset does not exceed 10% of the value of the relevant Common Good Fund. Proposals involving assets with a value exceeding this threshold will be referred to Full Council for determination.

5.3 Before commencing consultation, consideration must be given to whether the asset is alienable or inalienable Common Good property, as this will determine the legal processes that may be required. Reference should be made to Section 3 and 4 of this document.

5.4 The Common Good consultation process is separate from, and does not replace, any planning, licensing or other approvals that may be required for a proposal.
The Council will seek to carry out the Common Good consultation before applying for any related permissions. However, in some cases, planning applications or other consent processes may begin before, or at the same time as, the Common Good consultation.
Proposals are not always developed by the Council and may be put forward by organisations, businesses or community groups that lease or occupy Common Good land or buildings.
A decision made through the planning process does not determine the outcome of the Common Good process, and vice versa. Each process is considered and decided separately.

6. Publishing and Advertising the Proposal

The following section is guided by the two documents noted in Section A above.

6.1 The proposal will identify the property concerned using the same information as is contained within the Common Good Asset Register.

6.2 The proposal will include sufficient information to enable meaningful consultation, including details of the property, the proposed disposal or change of use, the reasons for the proposal, the anticipated timescales for implementation and any anticipated benefits or impacts on the Common Good Fund and the inhabitants of the former Burgh.

6.3 The Council will publicise the consultation through appropriate channels, including the Council's website, social media platforms, engagement and consultation platform (Engage Highland), and relevant publications. The Council may also place advertisements in local newspapers and arrange public meetings, drop-in sessions, or other engagement events where the nature of the proposal or the level of public interest warrants additional consultation. The extent of publicity and engagement will be proportionate to the scale of the proposal and its likely impact on existing public use and benefit of the asset.

6.4 The Council may also attend Community Council meetings.

6.5 The Council will make every effort to ensure information is available at appropriate public buildings such as Council offices, service points, libraries, or leisure facilities. Access to information may be provided through paper copies, assistance by staff to view the documentation, or notices directing members of the public to where the proposal and supporting information can be viewed.

6.6 The proposal will be made available in alternative and accessible formats on request, including large print, translation, audio, and other formats required to meet accessibility needs.

6.7 Where the proposal relates to land or buildings, the Council will, where appropriate, display public notices on or near the property and may place notices in other suitable locations within the local area.

6.8 The Council must notify any Community Council whose area includes all or part of the property concerned. The Council must also notify any community body or organisation known to have an interest in the property and invite them to consider the proposal and make representations. The Council will take all reasonable steps to identify such bodies and organisations.

6.9 Representations will also be accepted from any individuals, other organisations, or interested parties wishing to comment on the proposal.

6.10 The consultation period will normally be open for a minimum of eight weeks. Where the Council considers it appropriate, a longer consultation period may be provided especially if any public holidays fall within the consultation period.

7. Making Representations

The purpose of the consultation is to seek views on the potential impact of the proposal on the current use, enjoyment, and benefit of the Common Good property. The consultation is not intended to assess the technical merits of any development proposal itself, as these matters will be considered separately through the planning process and any other applicable regulatory procedures.

7.1 Representations on the proposal must be submitted in writing, either online via Engage Highland, by email, or by post. Details of how representations should be submitted, including the relevant contact information, will be included within the proposal document.

7.2 The proposal will specify the date on which the consultation period opens and the closing date by which representations must be received.

7.3 The Council will publish representations received in response to the consultation on its website and/or via Engage Highland, subject to applicable legal requirements relating to confidentiality, data protection, and freedom of information legislation. The names and personal contact details of individual respondents will not be published.

7.4 Representations received from Community Councils, community bodies, and other organisations will normally be published together with the name of the organisation submitting the representation. Personal contact details and other personal data will not be published.

7.5 Personal information will be processed in accordance with the Council's Privacy Notice and applicable data protection legislation.

8. Responding to Representations

In accordance with section 104(6) of the Community Empowerment (Scotland) Act 2015, the Council must have regard to any representations made when deciding whether to proceed with the proposed disposal or change of use of common good property.

8.1 All representations received during the consultation period will be recorded and considered by the relevant decision-making committee before any decision is taken on the proposal.

8.2 The Council will seek to publish responses to representations within eight weeks of the close of the consultation period. Where this is not practicable, publication will be aligned with the timetable for consideration by the relevant decision-making committee. Responses will be published alongside the representations where appropriate.

8.3 Following consideration of all representations, the Council will publish its decision on the proposal together with a summary of the issues raised during the consultation and the Council's response to those issues.

8.4 Where the proposed disposal or change of use requires the approval of the Sheriff Court or Court of Session, the Council's decision will be subject to the outcome of those proceedings. Consultation responses and the Council's consideration of them will be submitted to the court as part of the application process. The proposal will not proceed unless and until any required court approval has been obtained.

8.5 The final decision, together with the consultation responses, representations, and, where applicable, the outcome of any court proceedings, will be published on the Council's website alongside the proposal.

8.6 Community Councils, community organisations and bodies notified of the proposal, including all individuals that submit representations will be informed of the Council's decision and, where applicable, the outcome of any court proceedings.

9. Further Consultation

Where a proposal is amended significantly as a result of representations received, changing circumstances, or the emergence of new information, the Council may undertake a further consultation before reaching a final decision.

The Council will determine, having regard to the nature and extent of any changes, whether a further consultation is required and, if so, the scope and duration of that consultation.

E. FURTHER ACTIONS FOLLOWING COMMITTEE APPROVAL OF A PROPOSAL

- Where the property is **alienable** Common Good, the Council will take the necessary steps to implement the approved disposal or change of use in accordance with its statutory duties, governance procedures and any other relevant legal requirements. No Court approval is required.

- Where the property is **inalienable** Common Good, the Council will need to obtain the consent of the Sheriff Court or the Court of Session before proceeding with the disposal or proposed change of use. In such cases, the consultation undertaken, including the representations received and the committee decision-making outcome, may be relied upon by the Council in support of any application to the Court.
- Any court proceedings relating to inalienable Common Good property are separate from the statutory consultation process. Interested parties have the opportunity to make further representations to the Court in accordance with the relevant court procedures.
- No disposal or material change of use of inalienable Common Good property will take place unless and until the necessary court authority has been obtained.