



Nairn West & Suburban Community Council

NAIRN COMMON GOOD – Proposal to dispose of land adjacent to Seamens' Hall

Response to consultation, March/April 2023

Summary

1. NW&SCC objects to the proposal outlined in the consultation document dated March 2023 on the following grounds:

- Timing – a decision is not urgent;
- Procedure – the consultation document is misleading and inadequate;
- Legal imprecision – the status of the land is not properly defined;
- Lack of options – the consultation fails to identify options other than a giveaway;
- Best value – the fiduciary duty of trustees is not being fulfilled;
- Precedent – the current proposal would set an unacceptable precedent;

Each of these is explained in detail below.

Timing

2. There is no urgency and no deadline for a decision on the future use or disposal of the land, and there is clear justification (see next para) for deferral of consideration of the proposal and any consequent action.

3. A policy decision has been made to establish a local Common Good Engagement Group (CGEG) to assess and provide input into the process of options-appraisal in relation to any decision on management, change of use or disposal of CG assets. This should be done before a consultation exercise is launched.

4. For that reason, any proposal put before the public on CG change of use or disposal should await consideration by the CGEG. This has already been agreed in relation to other proposals (eg the McDermotts Memorial). It should therefore apply to this proposal too. It follows that the current exercise should be suspended or withdrawn pending referral to the CGEG.

Procedure

5. Aside from the timing objection, the current consultation document is misleading, deficient and inadequate in a number of respects as a basis for informed consideration by the public. This reinforces the case for suspension, deferral and withdrawal of the present exercise.

6. The document is imprecise on the legal status of the land concerned (see next section). There are material inaccuracies. The document is incorrect in stating that the land “... *does not constitute a public thoroughway...*”; it has been used as such for many years. The assertion that the land “... *is considered to have a negligible rental value...*” is unsupported by any evidence. The assumption that “...*there is unlikely to be any general market interest in such a strip of land...*” is similarly unsubstantiated. At the very minimum, due diligence would require the potential interest of the proprietor of the adjacent site (the former gasworks) to be ascertained.

7. The reference to the purchase price of the Seamens’ Hall is totally immaterial. The statement that “*It would seem inequitable to assign the area of land in question a value higher than that paid for the Hall ...*” is twisted logic. It is as untenable as it is irrelevant, the more so as the source of this opinion is not identified.

8. The claim that “... *full consideration of all the options...*” has been carried out is patently untrue and again, not substantiated. There is no explanation of what other options (if any) were considered, and if so why they were discounted. A public consultation should be both transparent and comprehensive: it should therefore present for comment all the possible options with in each case the relevant cost/benefit analysis. The present document puts forward a single option: disposal at nil value – ie a gift. This is completely unacceptable, for reasons set out in paras 14-21 below.

Legal imprecision

9. The consultation document asserts that “...*The Council does not consider that a question of alienability is raised in this case*”. No evidence and no research is offered to underpin this judgement. There is historical and documentary evidence that this land was originally granted under Charter, which by definition makes it inalienable Common Good. Old maps show that subsequently gasworks, a sawmill and other property (Wellington Square) were situated on this area of land prior to the construction of the Seamens’ Hall.

10. The only information provided - “... *the use of the area of land in question has been for private rather than public use, namely access to the rear of the property*” - is quite simply untrue. There is first-hand evidence from local residents that the specific piece of land in question was used for many years (indeed generations) as a public pathway to access the riverside. This option is now constrained by the more recent erection of a flood-protection wall. But this does not invalidate its status as public – common good – land, and inalienable. The consultation is therefore based on a false prospectus, inaccurate information, and a misguided opinion.

11. It follows that a change of use or disposal would require sheriff court consent. The public document should make this clear. For clarity and to avoid dispute, it should also record that all costs of consultation, administering the disposal process, and seeking court consent, fall to the person or body using or acquiring the land.

Lack of options

12. The consultation seeks comments on a single option: disposal at nil value. As noted in para 8 above, it fails to identify what other options were possible and were appraised. At the very least, these should include retention (the status quo); lease (for a period that would need to be justified and costed); disposal by sale (which would imply inviting offers); or disposal as a gift. All these should be set out for public comment so that comparative assessments can be made.

13. Consulting on a single recommendation ('Hobson's Choice') is inappropriate and inefficient – especially if the response, and public requests for alternative arrangements, lead to further, new, public consultations at additional cost.

Best value

14. The CG trustees have a fiduciary duty to secure best value for the Common Good. Any official dealing with CG matters is bound by the same obligation. This is fundamental. It reinforces the requirement not only to consider, but to explain and assess, all possible options. Self-evidently it would require, at the very least, a comparative assessment of the relative value of a disposal by sale (to deliver a one-off capital gain to the CG fund) as against the possibility of a lease (to deliver an ongoing revenue stream to the fund). In this particular instance, such due diligence has not been done. It should form part of the information presented in the public consultation.

15. By definition a disposal at nil cost – a gift of the land for free – delivers no value at all to the Common Good fund, so cannot be demonstrated to have met the “best value” criterion.

16. Recent and current policy and practice in relation to other disposals is directly relevant. It is important as a matter of principle to ensure consistency of approach to all potential CG disposals, in order to ensure equitable treatment and fairness. It is also essential to demonstrate proportionality in valuations.

17. All CG disposals in Nairn since the 2015 CEA have been by lease. One specific and recent (2022) disposal provides a very precise example and analogue: the lease of an area of 40sqm of public CG land beside James' Kiosk at the leisure park, at a rent of **£400pa**. This provides a current and appropriate yardstick. On that basis, a potential lease of the 51.8sqm of public CG land adjacent to the Seamens' Hall should be subject to a rent of approx **£500pa**.

18. Equally, if the option of permanent disposal (divestment/sale) were to be pursued, this would at the very least require the exploration of alternative bids – not least from neighbouring site owners – as part of the requirement to secure best value. Again, there is recent local practice which is directly relevant.

19. In May 2022 the Highland Council consulted on the disposal of a strip of CG land at 8 Well Street, Dornoch. Like the Seamens' Hall (in Fishertown) this land is in an old residential part of Dornoch (Littleton). Like the land beside the Seamens' Hall, the Dornoch land is a strip beside a building, used as a path or track giving access. Its total area is about 56sqm. The piece by the Seamens' Hall is of almost the same area, 51.8sqm. The land in Dornoch was handed over to the adjacent property owner, by negotiated agreement, for the sum of **£8,000**. This represents a guide price, and further underlines the lack of justification for handing over the strip of land beside the Seamens' Hall to the adjacent property owner (Green Hive) for **£0** – free of charge, as a gift.

Precedent

20. It does not require imagination or analysis to grasp the fact that giving away Common Good land – or indeed any CG asset – for nothing, as a gift, would set a profoundly alarming and detrimental precedent. If this CG land is given away to Green Hive, it would then be very much harder to deal with any subsequent application or request for similar treatment and a gift from the CG. It opens the door for anyone who might want other CG land, property or assets to ask and expect that they too should get it free. Why charge some applicants and not others?

21. To illustrate by example, what if the Sailing Club for example were to ask to be given an area of land at the harbour free of charge? What if the Sports Club, which provides facilities for the community, asked to be given Viewfield for free? Both are local community organisations providing amenities and services. There is an obligation on trustees to demonstrate fair play and equitable treatment for all. It would be very difficult to resist such pressures if Green Hive have already been given CG land for nothing.

Conclusion

22. To sum up, NW&SCC objects to the current proposal and calls for a review and re-think, for the following reasons:

- the present consultation exercise and document is flawed and inaccurate. It should be withdrawn, and the question of whether to progress any action on disposal referred to the Common Good Engagement Group (CGEG);
- the available evidence indicates that the land concerned is inalienable, and thus *prima facie* any disposal-proposition would require a submission to court at the expense of the prospective tenant/purchaser. This should be made clear in any consultation document;
- if a consultation on disposal is to proceed, now or at some future time, it should not propose a single course of action but should set out all possible options with supporting cost/benefit analysis;
- those options should be based on the fundamental obligation to secure best value for the CG Fund. The giveaway of an asset for free fails that test;
- and the options proposed should take account of the evidence from relevant and current local comparators and analogues in order to ensure consistency and fairness;
- a give-away of an asset at no charge is unacceptable, not least because it would set an undesirable and indefensible precedent which would be to the detriment of Nairn's Common Good.

23. So in terms of action, and for the avoidance of doubt

- any disposal (whether change of use or sale) should be considered by the CGEG before a consultation document is issued;
- under no circumstances should the asset be given away free of charge;
- if disposal is considered, this should include the possibility of lease as well as sale, in order to secure best value for the Common Good; and opportunity should be offered for alternative bidders;
- since the land is considered to be inalienable, any disposal should be referred for court approval, with all costs of consultation and court action borne by the prospective tenant [or buyer].