

Agenda Item	10.b
Report No	NC/09/22

THE HIGHLAND COUNCIL

Committee: Nairnshire Area Committee

Date: 8 August 2022

Report Title: Nairn Common Good Fund – Consultation on disposal and associated change of use at West Links, Nairn

Report By: Acting Depute Chief Executive and Executive Chief Officer – Performance and Governance
Executive Chief Officer – Communities and Place

1. Purpose/Executive Summary

- 1.1 This report provides information on the outcome of the public consultation under section 104 Community Empowerment (Scotland) Act 2015 in respect of the proposals to dispose, by lease, of 178m² of land at West Links, Marine Road Nairn (existing Links Kiosk lease footprint plus additional area of 40.5m²) and to change the use of the additional area of land from amenity land to land leased for kiosk seating.

2. Recommendations

- 2.1 In respect of the consultation concerning the existing and proposed additional land to be leased at West Links, Members are asked to:
- i. Note the outcome of the consultation process undertaken as contained in the analysis at **Appendix 1**.
 - ii. Approve the responses to the issues raised in connection with the proposal which can be found at **Appendix 1** for publication on the Council's website.
 - iii. Agree the proposal to dispose, by lease, of the area of 178m² of land at West Links, Marine Road, Nairn.
 - iv. Agree to change the use of the additional 40.5m² area from public amenity to kiosk seating.
 - v. Note that, if agreed, it will be necessary to seek Sheriff Court consent in respect of the proposal.

3. Implications

- 3.1 Resource – The proposal for the Links Kiosk (existing and additional area) relates to the creation of a long lease to the existing tenant. This will safeguard and increase income for the Common Good from the rental of this asset and allow for future investment by the tenant to the improvement and benefit of the Common Good. The tenant has agreed to meet the costs associated with the consultation and Court proceedings.
- 3.2 Legal – The statutory requirements to consult have been complied with. Where land is also considered to be inalienable, there is a statutory requirement to seek Court approval for disposal and appropriation. West Links is considered to be inalienable Common Good land and therefore, should the proposals be agreed, the requirement to seek Sheriff Court approval for both disposal and appropriation (change of use) must also be complied with.
- 3.3 Community (Equality, Poverty, Rural and Island) – The existing tenant wishes to be in a position to invest in the Links Kiosk and a long lease will provide him the security to do so. Inclusion of the additional area of land will allow for increased seating to be available. Community views have been sought through the public consultation which have helped to inform the recommended approach.
- 3.4 Climate Change / Carbon Clever – none.
- 3.5 Risk – none.
- 3.6 Gaelic – none.

4. Consultation on proposal to dispose, by lease, of 178m² of land at West Links, Nairn (existing Links Kiosk lease footprint plus additional area) and to change the use of the additional area of land to kiosk seating.

- 4.1 The Links Kiosk and an area of surrounding land at West Links, Nairn is currently leased to James's Limited until 2029 for the purposes of a retail outlet selling ice cream, cakes, tray bakes, cold sandwiches, savoury slices, crisps and hot and cold drinks. The lease began in 2015.
- 4.2 The tenant has approached the Council with a request to consider granting a long lease extension of 30 years (until 2052) and also seeking an additional area of land of 40.5m². This will give him the security to commit to a programme of investment in the site as well as provide for increased outside seating space. The longer length of lease proposed would allow him to see a return on his investment. This investment may include the future replacement of the building with a more modern structure in keeping with the overall development proposals of the Links. However, there are no plans for this as yet and any such plans would need to comply with all necessary planning and building permissions and consents.
- 4.3 An increase in the passing rent attributed to the additional area of land has been discussed and this would be subject to the same rent review provisions as the existing lease.
- 4.4 In Highland a long lease of 10 years or more is considered to be a disposal of Common Good property and triggers the requirement to conduct a public consultation under section 104 Community Empowerment (Scotland) Act 2015. The proposal was put to Members by email and confirmation to commence a consultation on the proposal as

contained in the consultation document was confirmed by Members individually in December 2021 and January 2022.

- 4.5 The public consultation commenced on 12 January 2022 and concluded on 11 March 2022. An analysis of the outcome of the consultation has been prepared and can be found at **Appendix 1**.
- 4.7 A total of 5 responses were received including responses from both Nairn town Community Councils and local residents. The responses were broken down as follows:
- 3 were supportive of the proposal as contained in the consultation document.
 - The 2 Community Councils were supportive but also raised issues/comments for response.
- 4.7 **Appendix 1** provides examples of supportive comments received at section 2a. A table detailing the representations received in connection with the proposal and the proposed responses from the Council for publication on the Council website is contained at section 2b.
- 4.8 The issues raised by the Community Councils include: the importance of ensuring the common good asset is protected, guarding against sub-letting, guarding against change of use and the need to regularly review the lease. All issues raised have been responded to in **Appendix 1**.

5. Options for next steps

- 5.1 Members are now asked to note the outcome of the consultation on proposed disposal and associated change of use in respect of 178m² of land comprising existing Links Kiosk lease footprint and additional area.
- 5.2 As the value of this property is less than 10% of the value of Nairn Common Good fund the governance for making this decision rests with Members at Area Committee.
- 5.3 Members are asked to consider the options for dealing with the proposal. The available options for the next steps are:-
- Agree that the proposal to dispose, by lease, and change the use of the additional area should go ahead in the terms of the consultation document.
 - Amend the proposal (any significant amendment would require a new consultation process).
 - Decide that the proposal should not go ahead.
- 5.4 West Links, Nairn where this property is located is considered to derive title from the Burgh Charter of 1589. Title to the Links Kiosk follows title to the land. It is necessary to consider if the proposal raises a question of inalienability. If such a question is raised, then it is necessary to apply to the Sheriff Court for permission to appropriate (change use) of the property under section 75 Local Government (Scotland) Act 1973.
- 5.5 The West Links, Nairn has been public access amenity land for time immemorial and the Links Kiosk is a facility for public purposes. As a result it is considered that a question of inalienability exists and therefore, a Court application is required seeking approval of both the disposal by long lease and the appropriation (change of use) from public amenity to defined Kiosk outdoor seating. How long such an application will take to conclude will be entirely contingent upon Court timescales.

Designation: Kate Lackie, Acting Depute Chief Executive and Executive Chief Officer –
Performance and Governance
Allan Gunn, Executive Chief Officer – Communities and Place

Date: 6 July 2022

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Background Papers:

Appendix 1 – Analysis of consultation

NAIRN COMMON GOOD

ANALYSIS OF COMMUNITY CONSULTATION ON:

- PROPOSAL TO DISPOSE, BY LEASE, OF 178M² OF LAND AT WEST LINKS INCORPORATING THE EXISTING LEASE FOOTPRINT OF THE LINKS KIOSK (137.5M²) TOGETHER WITH AN ADDITIONAL AREA (40.5M²) LOCATED ON THE WEST LINKS AT MARINE ROAD, NAIRN.
- PROPOSAL TO CHANGE THE USE OF 40.5M² (ADDITIONAL AREA) FROM PUBLIC AMENITY LAND TO LAND LEASED FOR KIOSK SEATING.

1. Number of responses received

The public consultation period ended on 11 March 2022 with a total of 5 responses having been received. Responses were received from both Nairn town Community Councils and local residents. These responses are broken down as follows:

- 3 were fully supportive
- The 2 Community Councils were supportive but also raised comments for response by the Council (see table at 2b below)

2. Representations, questions and issues distilled from the responses received

a. Supportive comments received

The types of supportive comments received can be summarised in the following examples:-

- The proposed changes will enhance the facilities being offered to the benefit of residents and visitors alike. It will encourage increased footfall attracting visitors.
- The business is an asset to Nairn and should be supported. It is a popular business.
- The premises are well kept and generates little litter despite being a takeaway presumably due to the tenant's responsible actions. Use of recycled and biodegradable products is noted.
- The Kiosk has brought an empty building back into use becoming popular and successful in a short time and despite the constraints of the pandemic.
- The suggested change of use of the additional area for seating is in keeping with the general use of the surrounding park which has seats and picnic benches.
- It is a local business creating employment. Enabling and encouraging investment will support the improvement of the recreational and environmental facilities in the area. The longer lease will provide the incentive and security for investment.
- A longer lease brings the Kiosk in line with the other comparable businesses on the Links.
- Proposed rent increase is fair and proportionate with additional land.

b. Objections or issues raised for response

Both Community Councils raised comments for response whilst still supporting the proposal. Some of these comments are specific to the lease proposal for the Kiosk and will be answered below. Other comments are more general to Common Good as a whole and are being answered within separate correspondence.

The issues raised are summarised in the table below.

Questions/issues/concerns	Council's suggested response
<p>There is a need to safeguard the status of the site as Common Good. The lease should contain a clause safeguarding against the acquisition of additional "occupancy" rights and to ensure it remains under, and reverts to, Common Good ownership.</p>	<p>Such an additional clause is not necessary. Any new or extension to the existing lease will be granted for a stated period of time. The existing lease already contains a "yielding up" clause covering the return of the property to the landlord (Highland Council) upon expiry or sooner termination. Any new lease would also contain such a clause. If dealt with by extension of the existing lease, this provision would continue. Therefore, the Council's position as owner is protected.</p>
<p>There should be a constraint against sub-letting. The lease is specific to the tenant.</p>	<p>The existing lease already contains a tenant's obligation clause not to assign or sub-let the premises without the written consent of the landlord, which should not be unreasonably withheld. To prohibit assignation completely is a highly restrictive and onerous clause and would have a significant detrimental impact on the marketability of the asset for lease and future rent reviews. Highland Council on behalf of the Common Good will have the right to refuse an assignation provided the refusal is reasonable. In considering any request the Council must ensure the proposed assignee is respectable, responsible, of sound financial standing and capable of fulfilling the obligations of tenant.</p>
<p>The lease should include a clause ensuring that the premises are only used for the stated purpose and proposed change of use should be subject to public consultation under Community Empowerment Act.</p>	<p>The existing lease contains a very specific use clause which would be carried forward in any extension or included in any new lease. With regard to change of use, a consultation would only take place in the event of a significant change of use which is not in any way incidental to the current use. For instance, a request to use the premises for something other</p>

	than for the service of food and drinks. A change of use within the category of food provision would not be considered to be a significant change such as would trigger the requirement to consult.
There should be a condition that the lease is reviewed every 5 years to ensure the premises are being used appropriately within the terms of the lease and in compliance with Common Good legislation. This would enable improved management and ensure the rent is keeping pace with inflation.	In general the Council would ensure the tenant was complying with the terms and conditions contained in the lease i.e. use, maintenance etc. but would not formalise this into a regular 5 yearly review process. The lease contains explicit obligations on the tenant and there is also a provision for irritation of the lease for non-compliance that could be considered. Rent review – the existing rent review provision is for the rent to be reviewed 5 yearly on an upward basis only and to either the open market rent as at the review date or the Retail Price Index, whichever is higher.

3. Next steps

- Consider responses and agree responses to the above questions/issues raised. Once approved they will be included in a document for publication on the Council website and notifying to those who have responded within the consultation process.
- Members to consider the outcome following the consultation process. If the value of the proposed disposal is up to 10% of the Fund value, the decision in respect of the proposal rests with Nairnshire Committee. If the value exceeds 10%, the decision falls to full Council. In respect of this matter the value of the asset is less than 10% of the total value of Nairn Common Good fund.

4. Decision making options

Available options are as follows:-

- Decide proposal should go ahead in the terms of the consultation document.
- Consider if any amendments to the proposal may be necessary in light of the representations received – any significant amendments will trigger a fresh consultation process.
- Decide that the proposal should not go ahead.

5. Additional information

The proposal constitutes a disposal and a change of use or appropriation. As the area of land concerned is located on the West Links at Nairn which is considered to derive title from the Royal Charter of King James VI dated 15 October 1589 and to have been used as public amenity land for

time immemorial and the Links Kiosk is a facility for public purposes, it raises a question of inalienability and therefore an application to the Sheriff Court for permission to dispose and change the use is required. The timescales for such an application are dependant upon the Court listings.

The Community Empowerment consultation and Court application are separate to any process and consultation under planning legislation.

Sara Murdoch
Common Good Fund Officer
19.05.2022