

The Highland Council

Agenda Item	10
Report No	ERA/27/23

Committee: Easter Ross Area Committee

Date: 30 October 2023

Report Title: Invergordon Common Good Fund - the bust of Sir John Gordon by Edmé Bouchardon

Report By: Executive Chief Officer, Performance & Governance

1. Purpose/Executive Summary

- 1.1 This report details the response to a decision from the Members at Easter Ross Area Committee on 17 February 2022, for work to be undertaken on an options appraisal and outline business case for the use of any capital receipt in the event that a proposal is approved to sell the bust of Sir John Gordon on behalf of Invergordon Common Good Fund.
- 1.2 The report also addresses an approach received by Sotheby's from a private party interested in purchasing the bust.

2. Recommendations

- 2.1 Members are asked to:
 - i. Consider and note the update on the work undertaken to explore the potential of selling the Bouchardon Bust;
 - ii. Consider the assessment of the various sale options and note the advice from Sotheby's that a sale by private arrangement may be most beneficial in financial terms;
 - iii. In light of this information, consider whether to agree to commence a Community Empowerment consultation to inform the decision making in respect of a proposal to sell the Bouchardon bust.

3. Implications

- 3.1 Resource – The resource implications are set out in the report. In the event that a sale of the bust is proposed and approved, it would recover a significant capital receipt for Invergordon Common Good Fund which would provide investment opportunities for income generation and rejuvenation of the Common Good fund. This is detailed further in the report.
- 3.2 Legal – as it is a Common Good asset, the Council is required to conduct a public consultation under section 104 Community Empowerment (Scotland) Act 2015 before

any decision to sell could be made. In addition, it would be necessary to obtain Court approval for the sale pursuant to section 75 Local Government (Scotland) Act 1973. Further details in connection with these processes are contained at paragraph 9.

- 3.3 Community (Equality, Poverty, Rural and Island) – There are no specific equality, poverty, rural or island implications. Invergordon Common Good Fund is a small fund containing the Town Hall, the bust and a few other pieces of art and artifacts. It has little by way of usable reserves or income generation opportunities and cannot afford to operate a community grants budget. Realising the value of this capital asset, if sale is approved, would provide a significant capital receipt that would allow the opportunity of investment for income generation and reactivate the fund for the benefit of the community, that could in turn lead to a positive impact on equalities and inequalities within Invergordon.

It will be important that the community of Invergordon is involved in the decision making process and the Community Empowerment consultation will provide full opportunity for this to happen.

- 3.4 Climate Change / Carbon Clever – none.

- 3.5 Risk – Edmé Bouchardon currently remains very collectable, but this may not always be the situation. This is supported by the recent development that Sotheby's have been approached by a private individual seeking them to put forward an offer to the Council to purchase the bust. It is the view of the experts at Sotheby's that the bust of Sir John Gordon has now reached its peak value.

It is important that any procedure for sale is conducted on an ethical basis. This is referred to in more detail in paragraph 8 below and it is considered that this risk can be successfully managed.

Advice is being sought from the Council's procurement advisors to understand if there are any risks in procurement terms to proceeding with private versus public methods of sale.

- 3.6 Health and Safety (risks arising from changes to plant, equipment, process, or people) – none.

- 3.7 Gaelic – none.

4. Bouchardon Bust - background

- 4.1 The bust is of Sir John Gordon, landowner and MP, and said to be founder of Invergordon. It was sculpted by Edmé Bouchardon in the early 18th century whilst the artist was resident in Rome and Sir John Gordon was on his Grand Tour. It represents an innovative creation in a style not to be more widely seen until the later part of the 18th century. It is described by experts at Sotheby's as being "brilliant in execution".

- 4.2 The bust had been in the physical possession of the Council for in excess of 60 years although the precise ownership details were not clarified until 2019. In 2019 evidence was found of ownership in the Invergordon Town Council minutes held at Inverness Archive Centre. Details are as follows:

- Town Council minutes 06.01.1930 – *“The Provost, Councillor Macleod and the Town Clerk were asked to visit Kindeace House Sale and endeavour to purchase the Bust of John Gordon said to be the founder of Invergordon and to offer up to £5 for same.”*
- Treasurers Ledger entry dated 14.01.1930 – reads *“Paid S R Beauchamp Bust Sir John Gordon”*. Figure shown is £5.
- Town Council minutes 03.02.1930 – *“The Council agreed to have the Sir John Gordon bust placed in the Town Hall, the position to be pointed out.”*

- 4.3 The original purpose for the acquisition of the bust was because of who it was, namely Sir John Gordon believed to be the founder of Invergordon, rather than who the sculptor was.
- 4.4 The bust has been assessed as a Common Good asset. There is case law that states that any property acquired by a burgh not for statutory purposes or held on special trusts is Common Good. The Common Good assessment is supported by the fact the acquisition was because it was believed Sir John Gordon was the founder of Invergordon and there was clear intent that it should be on public display.
- 4.5 The bust is currently in secure storage at Inverness Museum & Art Gallery (IMAG). However, it is only there for storage and has not been accessioned into the Museum’s collection. With the exception of being loaned to the Louvre and the Getty Museum under special arrangements, it has not been possible for the bust to be on public display due to its high value and the associated security implications. No change is anticipated to this position.

5. Sotheby’s involvement and role

- 5.1 Sotheby’s have been involved with Highland Council for nearly 40 years both in respect of specific projects and with more general advice for insurance purposes. They have an extensive knowledge base in sculpture and fine arts and a knowledge of the Bouchardon bust from previous insurance valuations. It was for these reasons that officers sought their advice in this matter.
- 5.2 The advice provided has covered matters such as current valuation, marketability, issues relating to ethical sale and how to manage it, and the pros and cons of public auction versus private sale.
- 5.3 They have confirmed that the bust remains very collectable and therefore, marketable but this is entirely dependent on the market and level of interest.
- 5.4 Sotheby’s have acknowledged the Council’s concern that any sale must be ethical and they have provided advice, with real life examples, to explain how this would be addressed. This is set out in paragraph 8.
- 5.5 In the future, if sale was approved, it will be necessary to consider whether the bust should be offered for public or private sale. Sotheby’s have expert experience of managing both situations in respect of notable items of sculpture. At this stage, advice has solely been sought from Sotheby’s due to the history of their involvement with the Council and they have confirmed that they are acting on the Council’s behalf in this matter. The current focus on actual sale has resulted from the unsolicited offer they have received. However, Members may wish to consider whether other auction houses

should be approached in order to comply with due diligence before accepting Sotheby's as the Council's agent in this matter.

5.6 Public sale – pros

- If there is more than one interested party the bidding may achieve over the reserve price;
- Provides transparency in satisfying best value by testing in the open market;
- Sotheby's now host a specific, dedicated Master Sculpture auction which attracts attention from interested parties.

5.7 Public sale - cons

- A reserve price would be set at the lower end of the insurance estimate (which is considerably less than the private sale offer) to stimulate bidding, but the actual price would be dependent on interest on the day which may result in a lower than hoped for price;
- Unpredictable nature of the international auction market presents a greater risk that the item could go unsold;
- Whilst it may test it in the open market, it may not actually achieve best value;
- The Council would need to pay auction costs in excess of 10% (could be as high as 40% with associated costs such as insurance, advertising etc) which would reduce the cash realised (Sotheby's would also receive a purchaser's fee from the successful bidder);
- No opportunity to negotiate a replica as part of the deal;
- Some prospective buyers may prefer not to bid at a public auction.

5.8 Private sale – pros

- Sotheby's already have a knowledge base of potential buyers who could be offered the chance of buying privately which would allow a premium to be charged and maximise the return for the Council;
- The issues concerning ethical sale and any publicity could be better managed;
- Sale price would be pitched at the highest defensible level without the risk of a disappointing sale at a low auction estimate in the saleroom;
- Allows for the opportunity of provision of a high quality replica to be negotiated as part of any deal;
- If a sale is pursued, Sotheby's have agreed to waive the costs for the Council and only recover purchaser's fees from the interested party.

5.9 Private sale – cons

- Could attract criticism for not testing the open market;
- It needs to be considered whether it satisfies best value principles.

6 **Current Position**

6.1 The existence of the bust is known in the art world and was featured in the local press following the Area Committee meeting of 17 February 2022. Sotheby's have recently received unsolicited contact from a private buyer asking that an enquiry be put forward to ascertain whether the bust is available. A best and final offer has been made to Sotheby's which is in excess of £2.5m. In conjunction with the offer, the buyer has offered to pay for a museum quality replica to be made which could then be displayed within the local area, without the current restrictions.

In these circumstances, Sotheby's is acting on behalf of the Council and providing advice and guidance to the Council not the prospective buyer.

6.2 In assessing the offer and providing advice to the Council, the experts at Sotheby's have compared it to work by the same artist and also works by other artists. The current auction record for Bouchardon was achieved in 2012 when a bust was pre-empted by the French state for €3m (equivalent to £2.4m). The current offer is also close to the price achieved for the last major work by Canova sold at public auction in 2023 which was £2.9m. This is significant as Canova is an iconic 18/19 century sculptor whose works command a premium over other 18th century sculptors including Bouchardon. As a result, it is the considered opinion that the current offer received is at the top level of the market and represents peak value for the bust of Sir John Gordon.

7. Should the Council consider selling the bust?

7.1 It is for Members to balance all of the information received and consider whether or not a proposal to sell the Bouchardon bust should be prepared. This will include seeking views from the Invergordon community. A number of points need careful consideration in reaching any decision and, if required, the experts at Sotheby's are prepared to meet Members to discuss, advise and answer any questions.

7.2 Some points to be considered include:-

- The purpose of the original acquisition – namely that it was of “*John Gordon said to be the founder of Invergordon*”. There is no reference to the sculptor within Burgh minutes relating to the acquisition which indicates that this was not a factor.
- Original intention was that the bust be “*placed in the Town Hall, the position to be pointed out*”. It is not known when it was last on public display in the Highlands. Apart from the 2 loans to the Louvre and The Getty Museum under special arrangements, it has been kept constantly in storage due to its high value and resulting security issues. See reference to pros of a private sale above where it is proposed that provision of a museum quality replica form part of any negotiation. This would allow the original purpose to be fulfilled as it would allow the bust to be on public display.
- Question of ethical sale – see paragraph 7 below.
- Community Empowerment consultation and consequent Court application – see paragraph 8 below.
- “Waverley Criteria” – see paragraph 9 below.

8. Ethical sale

8.1 The direct question of whether what is being proposed is an ethical sale or not is of most relevance where an item has been accessioned into a museum collection. There is a Code of Ethics that covers operations including financially motivated sales from collections. In such cases, and where an asset has been accessioned into an accredited Museum, there is a clear process to be followed involving deaccessioning and approval from the Museums Association.

8.2 Whilst the Bouchardon bust has not been accessioned into IMAG or any other Museum and therefore is not covered by this process, it would still be sensible to base any

assessment of the pros and cons of a potential sale on the requirements of the Code of Ethics and the toolkit for disposal of accessioned items.

8.3 One of the concerns expressed is that if any sale is seen as being unethical funding such as Heritage Lottery could be withdrawn from the Council. This issue was specifically discussed with the experts from Sotheby's. They were able to produce a number of case studies from across the UK of which only one from each perspective is quoted below (in both cases the items were accessioned into museum collections):-

- **Northampton Borough Council (2014) – not handled by Sotheby's** – sale of an Egyptian statue from its museum collection to raise funds for the restoration of Delapre Abbey, improvements to the museum service and/or other cultural or heritage projects. The proposal was considered by the Ethics Committee who noted, amongst other things, a lack of clear proposal for expenditure of funds, it was not clear that other possible funding sources had been fully investigated and the fact the collection area was no longer within the core collection was not reflected in the acquisition and disposal policy. The disposal was considered to be unethical. As a result Northampton Museum and Art Gallery (Council run) had its accreditation status removed for 5 years.
- **Royal Borough of Kensington & Chelsea (2019) – handled by Sotheby's** - sale of a painting by Joseph Wright of Derby to raise funds for renovations to Leighton House Museum (run by the Council). The painting did not form part of the museum's core collection and was not on public display. However, the Council complied diligently with the de-accessioning process and the sale was approved by the Museums Association. There was no loss of funding or museum accreditation status.

8.4 In Sotheby's experience, they are not aware of any previous disposals from non-accredited collections made by other councils that have resulted in any loss of funding. Therefore, it is the considered opinion of the experts at Sotheby's that, handled appropriately, any sale of the bust would not result in any consequential loss of funding to the Council. Similarly, it has not been accessioned into any of the Highland Council/Highlife Highland accredited organisations so any sale should not impact on these accreditations.

9. Community Empowerment consultation and consequent Court application.

9.1 Section 104 Community Empowerment (Scotland) Act 2015 requires the Council to conduct a public consultation when considering a disposal or change of use of Common Good property. This process must be undertaken before a formal decision to dispose is made. In addition, if it is considered that a question of alienability arises, an application to approve disposal must be made to the Sheriff Court pursuant to section 75 of the Local Government (Scotland) Act 1973.

9.2 If Members wish to proceed with a proposal to consider the disposal of the bust, a consultation document containing all the information in connection with the proposal will be prepared. This will cover details including the options appraisal and business case. Information regarding any negotiation, possible sale price and potential purchasers will depend on whether a private or auction sale is favoured. In the event of a private sale, it would not be unusual for the purchaser to wish to remain anonymous.

- 9.3 The consultation must remain publicly open for at least 8 weeks and be advertised and published on the Council website. Community Councils and community bodies must be notified directly and invited to make representations. In light of the nature of the asset, consideration should also be given to a newspaper advert of the consultation and utilising public meetings to answer any questions.
- 9.4 Following the conclusion of the consultation period, any representations received will be analysed and included in a report to be presented to Easter Ross Area Committee. It is only at this point would a decision be taken on whether or not to dispose of the Bust. The governance in respect of decision making is that any disposal of Common Good property with a value of 10% or more of the total area fund sits with full Council. Therefore, Members at Easter Ross Area Committee will be asked to consider the outcome of the consultation and make recommendations to full Council in relation to the decision.
- 9.5 The question of alienability arises where there is some kind of restriction or prohibition on alienation (disposal). In such cases, the Council must seek Court approval of the decision before it can proceed. Although section 75 specifies disposal of land, there has been a case that extended the provision to moveable property. As a result, it would be recommended to undertake an application to Court in the event that the proposal to sell is recommended by Council. The question of inalienability centres on public use – from direct grant in the deed, from dedication after acquisition or by uninterrupted public use for time immemorial. The basis for extending the provision to the bust would be the original purpose of the acquisition – believed to be founder of Invergordon and intention it be on public display.

10. “Waverley Criteria”

- 10.1 Sotheby’s customer base is worldwide. The Bouchardon bust has already attracted international interest as evidenced by its loans to the Louvre and The Getty to form part of exhibitions at those locations. It is likely that any offer for sale would also attract international interest. It is understood that the unsolicited offer received by Sotheby’s has come from an international purchaser.
- 10.2 All applications for export licences for cultural objects which have been in the UK for more than 50 years and valued above certain thresholds must be referred to expert advisors to determine whether they are potentially of national importance.
- 10.3 In assessing any item, the “Waverley Criteria” is used. These are as follows:-
- Is it closely connected with our history and national life?
 - Is it of outstanding aesthetic importance?
 - Is it of outstanding significance for the study of some particular branch of art, learning or history?

If it is considered that the departure of the item in question from the UK falls into one or more of the above criteria, it will be designated as a national treasure and referred to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA).

- 10.4 The RCEWA is a committee of the United Kingdom government that advises the Department of Culture, Media and Sport (DCMS) on the export of cultural property. If the committee agrees with the expert advisor, a deferral period is imposed in which a UK

museum can express a serious intention to purchase. If no interest is forthcoming, the export licence will be granted, and the sale completed. If interest is expressed a second deferral will be imposed to allow the institution to raise funds for the purchase which would be at a level such as would match the price agreed with any overseas purchaser.

- 10.5 As the offer received has come from overseas, it is expected that the bust would be referred to RCEWA as a matter of course. In Sotheby's opinion it would meet all three of the Waverley Criteria.

11. Financial considerations

- 11.1 In the event of a sale going ahead, consideration has to be given to how the funds received should be held. The bust is considered to be a heritage asset, however it is not this categorisation that may result in the use of any proceeds being restricted. It is because it is a capital asset that may result in any sale proceeds being categorised as a capital receipt which may result in restrictions in its use. If this regard, the bust is the same as any other capital asset owned by the Council.
- 11.2 The bust is an asset of Invergordon Common Good fund. As such any sale proceeds received must be managed having regard to the interests of the inhabitants of the former burgh. Officers have been considering the implications the capital receipt for Invergordon Common Good fund and, in doing so, have investigated how such funds should be held and whether any restrictions on use may apply. As well as considering relevant legislation, guidance, policies and commentaries, advice has also been sought from the Council's external auditors and Scottish Government.
- 11.3 Capital receipts are mentioned in a number of publications as follows:
- Council's Common Good Policy – this document is published on the Council's website. Paragraph 6.2 of the policy states *“Capital assets are used to generate income. Any proceeds from capital sales should be used to increase the capital held by the relevant fund. It may be appropriate to fund the purchase of any capital assets from the capital fund but it should not be used to finance any revenue expenditure”*.
 - Community Empowerment and Common Good Property – statutory guidance in respect of part 8 of Community Empowerment (Scotland) Act 2015. Chapter 1 on establishing the register states at paragraph 8 *“When a common good property is sold, the income received becomes a common good income fund.”*
 - Scottish Government statutory guidance on capital receipts states *“capital receipts, i.e. money received from selling land, buildings or other capital assets (capital receipts may only be used to fund new capital expenditure or the repayment of debt principal)”*.
- 11.4 It can be seen from the above quoted sections that there is a potential conflict between the Common Good Policy which follows the wider Council position that capital receipts can only be used for capital expenses (or reduction of principle debt) and the Community Empowerment Act guidance which implies capital receipts can be used for income/revenue purposes. This disparity has implications and as a result, the Council's finance team have sought advice from the Council's external auditors as well as Scottish Government. The auditors have confirmed that any Common Good specific guidance does not seem to impose restrictions though they gave a caveat that the Council's own Common Good governing documents may do so which is indeed the case.

- 11.5 The advice received from Scottish Government is that, after considering the Council's query and Scottish Government guidance, they can find no substantiation in legislation for treating the disposal of a capital asset as income. The advice was silent on the apparent inconsistency between regular accounting statutory guidance and that provided for the Common Good. It may be that this inconsistency has resulted from unclear terminology as local authorities are required to record their fund assets as a separate entry in the asset register. There is no stated requirement to differentiate whether these are revenue or capital funds though. If this is the case, the use of the word "income" may simply be a general use to indicate receipt.
- 11.6 Any sale proceeds received could not be used to establish a loans fund nor could they be used for revenue expenditure. The use of any capital receipt for the purchase of other capital assets as an income generating asset for the fund would be acceptable. Any income earned on the investment of the capital receipt would be available for future use to benefit the community. Any investment of the capital receipt must be carefully managed to ensure the sum received is protected as far as can be possibly assured.
- 11.7 The Council already manages investment performance for Inverness Common Good Fund through the Council's Investment Sub-Committee, with an external Investment Advisor appointed to support the sub-Committee. This would provide a route for detailed advice to be sought in relation to potential investment options, which would need consider a range of factors including:
- Investment Objective (capital growth vs income return or both)
 - Income Requirement (ie a targeted level of annual % return)
 - Investment Time Horizon (short vs longer-term)
 - Attitude to Risk (ranging from Nil risk and capital sums guaranteed, through lower risk investments, through to equity and other investments where there capital is at risk)
 - Any investment restrictions/ethical policy considerations that may be applied.
- 11.8 It is proposed that subject to members' considerations of this report, the Council's Investment Advisor is commissioned to explore and provide recommendations in relation to investment strategy and investment options for funds arising from the potential sale.

Designation: ECO Performance & Governance

Date: 23 October 2023

Author: Sara Murdoch, Common Good Fund Officer