Commonty on King's Law, Parish of Carluke

An Investigation into its legal history, current status and future.

FINAL REPORT

by Andy Wightman
February 2012

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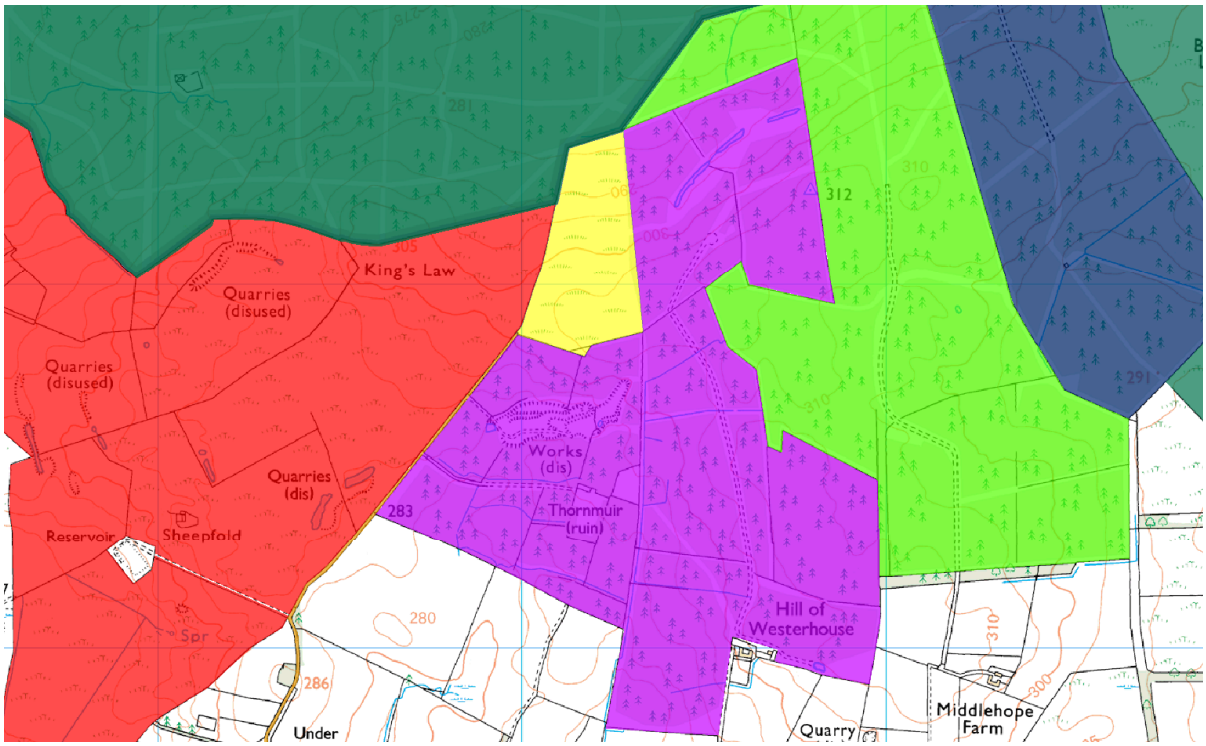
BACKGROUND

My brief is to investigate the legal history of the parcel of land on King's Law referred to as "the commonty", determine its ownership status and to provide advice on appropriate strategies for recording any rights the community might possess in this land. The research aims to answer two key questions.

Is the land in question a commonty?

If it is, how might Carluke Development trust (CDT) assert control over the land for the benefit of the community?

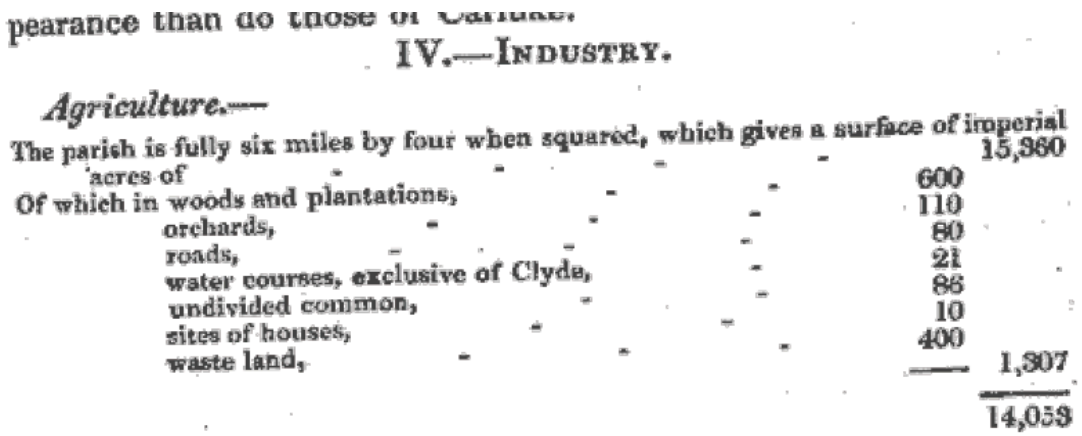


Map 1. King's Law Commonty (yellow)
National Grid Reference NS 882530
Extent - 13.56 ha

THE LAND

In Map 1, the commonty is highlighted in yellow with lands of The Gair to the west (red), Thornmuir & Hill of Westerhouse to south and west (purple), Middlehope Woods to east (bright green) and Scottish Ministers (FC) land to the north (dark green). Between the red and purple is a brown tinted access that runs south to the minor road running from Carluke to Yieldshields. This road is an adopted public road as far north as Under Thorn (see Photo 5, Annex VI)

The first indication of the existence of a commonty in the Parish of Carluke is given in the statistical account 1834-45 provided by the Reverend John Wylie (Fig. 1). This indicated that in 1840 or thereabouts, there was in the parish 86 acres of undivided common - most likely a commonty.



pearance than do those of Carluke.

IV.—INDUSTRY.

Agriculture.—

The parish is fully six miles by four when squared, which gives a surface of imperial acres of 15,360

Of which in woods and plantations,	600	
orchards,	110	
roads,	60	
water courses, exclusive of Clyde,	21	
undivided common,	86	
sites of houses,	10	
waste land,	400	
		1,307
		14,053

Fig. 1 Statistical Account of 1834-45 for Parish of Carluke (page 587)

Contemporary evidence of its existence is contained in a title (LAN54715) in the Land Register (Annex I). This title relates to 122.6ha of land (purple in Map 1) together with a "*right of common grazing on the hill of commonty tinted yellow*." In addition, the title contains "*a heritable and irredeemable servitude right of access for foot and vehicular access over the road tinted brown*". See Annex VI for photographs.

TITLE INVESTIGATIONS

The titles of the parcels of land highlighted in Map 1 have been examined in the Registers of Scotland and these are summarised in Annex II. I have also investigated the Inland Revenue cadastral landownership survey of 1910 and other sources of historical information.

From an examination of the titles of the neighbouring properties, the following observations can be made.

- there appears to be an area of common land which remains "undivided".

- There is a "hill or commonty" delineated on an OS sheet in a disposition of 7 April 1920. No copy of this map is in the public record but it is almost certainly the map from which the extent of the commonty has been derived by the Keeper of the Registers of Scotland in title LAN54715 (see Map 1).

- No evidence has been found of any division (under the 1695 Division of Commonties Act) having taken place. This is reflected in the Statistical Account noted above and in the description of an "undivided" commonty in 1919.

- The Land register titles of Gair and Thornmuir & Westerhouse (red and purple in Map 1) delineate an access road (coloured brown) to the common which is not owned by either of the neighbouring properties. See Annex III for detailed extracts. This is consistent

with the access outlined in LAN54715 being a loan and also raises some questions about the basis for Scottish Power's servitude rights).[1]

From this evidence, it can reasonably be concluded that King's Law is common land. It is described as such in recorded titles, it has not been divided, and a commonty is the most prevalent type of commons of this scale.

In the absence of any evidence of division and with reference to the titles that have been examined, I am of the opinion that the area coloured yellow in Map 1 is an extant commonty.

COMMONTIES

Commonties represent, in the words of John Rankine, "*a state of possession already subsisting beyond the memory of man*."[2] The introduction of feudal tenure necessitated a new legal understanding of their status and commonties became to be regarded as the undivided common property of the heritors (landowners) of the parish. In a typical rural parish in the 16th and 17th century there were but a handful of heritors, all of whose land would abut the commonty. In the Parish of Carluke in 1840, for example there were 54 heritors.[3] Most inhabitants of the parish would enjoy use rights (servitude) over the commonty. An act of 1695 allows for the division of commonties and remains on the statute book.

However, Scots law (unlike English law where the legal framework underpinning commons has been kept up to date[4]) does not look favourably upon commons, being pre-occupied with their elimination in favour of private rights. Thus the body of law concerning commonties is both archaic and probably unworkable. Moreover, feudal tenure has been abolished. Given that the precise nature of the rights over the commonty is partly a consequence of the superior-vassal relationship, the abolition of the system arguably renders these fine distinctions null and void. Abolition of feudal tenure also removes the feudal assumptions of undivided common ownership which developed to replace the pre-feudal concept of a parish commons.

The context within which commonties existed has thus changed considerably. There are now, for example 7000 or so heritors (landowners) in the parish of Carluke. Commonty rights will not be easy to definitively establish and commonties are no longer managed for traditional uses.

The task faced by CDT is to find a way of generating a good marketable title in the name of the common interests of the inhabitants of the parish. This is a novel task without precedent. The closest precedent in recent years is the Forest of Birse commonty where

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[1] A loan is an access route to and from an area of common or some public place. Unlike a right of way which represents a right of servitude over privately-owned land, a loan is itself common land. Annex III shows how, at the north end of the loan, Scottish Power have a right of access properties as illustrated in extracts 2 and 3 but do not in fact have a recorded right of access across the width of the loan. See Photo 2 in Annex VI.

[2] Rankine, The Law of Landownership, 4th Edition 1909

[3] Statistical Account page 579. James Bell of Westerhouse was one of the 54 heritors (see Hill of Westerhouse deeds in AnnexII).

[4] See http://www.defra.gov.uk/rural/protected/commons/

the community succeeded in having all known rights of use vested in the community business, Birse Community Trust.[5]

OPTIONS for OWNERSHIP

Given the history of commonties and the neglect of the legal framework surrounding rights to them, securing a title in favour of CDT may not be straightforward and a strategy needs to be devised which will meet the various requirements of the Registers of Scotland and property law more generally.

The following represent five possible options.

1. Secure a Judicial Division

A petition could be raised in the Sheriff Court to divide the commonty between all who have an interest and to then transfer all such shares to CDT. As part of the petition, it could be argued that, since the commonty is not of great extent and that division is impractical, the solution being sought is the most expedient.

Pros:- A statutory legal process (at least as far as division is concerned)
Cons:- Risk that some interest may object to subsequent transfer.

2. Declarator that commonty belongs to Parish

A declarator could be sought in the Sheriff Court to the effect that the commonty is common land belonging to the parish and that title should be granted to Carluke Development trust. If successful, a title could then be recorded in the Land Register.

Pros:- Offers a clear legal route
Cons:- May not be successful
May be stymied by competing interests

3. Record an a non domino title in favour of CDT

An a non domino title is one where the granter is not the owner (see Annex IV for further information). This would involve recording a title in the name of CDT and asking the Keeper of the Registers of Scotland to accept it for recording in the Land Register. The justification will be that the commonty is properly the property of the parish but has no title as a result of its long history as an undivided parcel of common land.

Pros:- CDT will (if the the Keeper agrees) be granted a title.
Cons:- CDT will have to wait for 10 years until the prescriptive period is over for the title to be unchallengeable.

4. Persuade the Crown to accept the commonty as bona vacantia

Bona vacantia refers to land with no owner which by law falls to the Crown and is administered by the Queen's and Lord treasurer's Remembrancer (QLTR), a department of the Crown Office in Edinburgh. This approach would involve QLTR taking possession,

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[5] For a brief description, see www.caledonia.org.uk/land/birse.htm

recording an a non domino title and agreeing to a subsequent transfer of ownership to CDT for a nominal sum plus legal expenses. Such an approach might involve seeking the consent of Scottish Ministers. Preliminary discussions are underway with QLTR.

Pros:- Secures a title
Crown provides a more impressive granter
Cons:- QLTR need to be convinced that commonty can be regarded as bona vacantia.

5. Private Legislation

A private act of Parliament could be sought which would vest the commonty in the ownership of CDT.

Pros:- Provides an unambiguous title.
Cons:- Would be time-consuming

DISCUSSION

The best way forward is to be found in the approach that offers a line of least resistance, is modest in its cost, is relatively quick and easy, is well understood and which offers the best prospect of success. There is, however, no established method by which to record a title to a commonty and therefore no method that meets all of these criteria.

However, it is possible to exclude a number of the options outlined above.

Option 1 is not in the best interests of the community and would lead to an uncertain outcome. it is excluded.

Option 5 would be hugely time-consuming and expensive and, frankly, an excessive response.

Options 2, 3 and 4, however all present possible ways forward. The purpose of Option 2 would be to seek a court ruling to the effect that the land is a commonty and that the community in the Parish of Carluke have a legitimate claim to title. However, such a move would only be necessary if Options 3 and 4 were to be unavailable since both these options would lead directly to a title being granted.

So, what are the prospects for Options 3 and 4?

Option 4 was explored in discussions with the QLTR during October 2011. it was made clear that the QLTR would only have a locus if it could be shown that the land was bona vacantia - in other words, that there was no true owner (and that thus, the Crown was the owner). Andrew Brown, the QLTR solicitor, was not familiar with the concept of commonties and some time was spent trying to reach a consensus. Discussion focussed around the distinction between servitude rights and ownership rights and the possible operation of negative prescription (whereby, through lack of use, any true owners could be considered to have surrendered their ownership rights)

He was clear that any involvement of QLTR would have to be founded on a clear legal opinion as to the status of the land as commonty and clear evidence that there were no parties who could come forward and challenge any claim that the land was bona vacantia.

QLTR has to be careful that whatever claims it entertains are not then challenged by others.

The conclusion of these discussions was that there were risks associated for QLTR in accepting a claim of bona vacantia and due to the uncertainties surrounding the definition of a commonty and its associated rights, they would require much more evidence before they could play a role. Option 4 is thus not an option to be pursued any further at this stage. Which leaves Option 3 which is my recommended option.

I met with Professor Robert Rennie of Glasgow University in November 2011 and sought his views on the situation and the way forward. He was of the view that an attempt to record an a non domino disposition was a valid way forward and agreed with my view that in the circumstances, it represents the best chance of securing a title.

On 25 November 2011, I had a meeting with Registers of Scotland staff including John King, Director of Registration and Martin Corbett, Director of Legal to discuss the possibility of making an application to register an a non domino title. The following key conclusions arose from the meeting.

1. The Keeper would be happy to consider an non domino application (this is not a surprise - she is obliged to consider all applications made to her) and any application would be considered on its merits and according to the current rules contained in the Registration of title Practice Book.[6]

2. Register of Scotland staff have examined the titles relating to the commonty and "do not disagree" with my findings. This is reassuring.

3. No obvious impediment to recording an a non domino disposition was put forward by Registers of Scotland staff. However, there was discussion on one point relating to the reasons why CDT (in preference to any other body) should be permitted to record a title. See Annex IV for further discussion.

RECOMMENDATION

I recommend that Carluke Development Trust instruct its legal advisers to draft and submit for recording to the Registers of Scotland, an a non domino disposition which will convey the King's Law Commonty to Carluke Development Trust.

The Land Registration etc. (Scotland) Bill is currently before the Scottish Parliament. it purposes (among other things) to provide a statutory set of criteria for the recording of a non domino titles including evidence that the land has not been possessed by the owner during the 7 years prior to submitting an application and that the applicant or the seller has been in possession for at least one year prior to making an application. These new requirements make any claim for an a non domino title much harder and, I would suggest, near impossible for Carluke Development Trust to fulfil. It is thus advisable that, if CDT wish to pursue an a non domino approach, that they commence the process within the next 6 months.

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[6] Available here http://www.ros.gov.uk/foi/legal/text/ch36.htm

ANNEX II TITLE INVESTIGATIONS

Title LAN54715 is derived from Search Sheets 13500 (Thornmuir) and SS 14018 (Hill of Westerhouse). Three titles have been investigated in detail - the lands of Gair to the west (red on Map 1) and Thornmuir and Hill of Westerhouse to the east (purple on Map 1).

The Gair
The farm of Gair is registered on title LAN108867. It has been owned by the Prentice family since 1922 when it was acquired from the Earl of Home in a title recorded 17 November 1922. Neither the 1922 title nor subsequent to it makes any reference to a commonty.

Thornmuir SS 13500
Thornmuir lies to the south of King's Law and the following are extracts of titles (bold and italic are mine).

18 Dec 1847 (recorded 2 May 1856)
"James Smith to George Spence ..... tertio 24 acres 2 roods and 36 falls of Thornmuir bounded ..... on the north and north east ***by that part of the common muir on the top of the King's Law herein after described as specially reserved*** .. and ***declaring that the said George Spence should have no right to that part of the common muir which is still undivided.***"

In 1893, the daughter of George Spence, Mary Spence or Sommerville grants Thornmuir to her husband in liferent and sons in feu.

28 July 1893 (recorded 4 June 1919)
"Mary Spence or Somerville (heiress-at-law to her father George Spence) to her husband James Somerville in liferent and to sons William & George Sommerville in fee .... all and whole the .... lands described in the disposition dated 18 Dec 1847.. as follows ... viz. (tertio) all and haill that part and portion of the Yieldshields Muir after described and consisting of 24 acres, 2 roods and 36 falls now called Thornmuir as the same is bounded as follows .....on the west and north-west **by the road which divides the lands and others hereby disponed from the lands belonging to the Right Honourable Lord Douglas of Douglas ..... *on the north and north east by that part of the common muir on the top of the King's Law hereinafter specially reserved*** which lands and others hereby disponed are parts and portions of all and haill that part of the lands of Yieldshields ..... but reserving from this conveyance that piece of said muir on the top of the King's Law on the south end thereof consisting of 1 acre 3 roods and 11 falls and 34 ells or thereby lying on the north and north east side of the lands hereby disponed and as the same is separated thereform by the old Carnwath meal road and declaring that my said disponees ***shall have no right to that part of the Common Muir which is still undivided*** ....."

In 1920, William and George sell Thornmuir to John Watson (deed recorded 22 Nov 1922). This deed adds nothing of relevance to the description of the subjects. In 1952, the heir of John Watson sells Thornmuir to John Hepburn (deed recorded 14 August 1952). In 1963, 8 acres were sold to the Glasgow Iron & Steel Company Ltd.

In 1989 Thornmuir was then sold to Rasoak Ltd and recorded in the Land Register LAN54715. It subsequently changed hands once more before being acquired by the current owners, the Firm of Thornmuir Woodlands. The 8 acres sold in 1963 was re-acquired in 1989 as part of the LAN54715 title.

Hill of Westerhouse SS 14018

5 March 1847 (recorded)
Sasine Settlement of James Bell in favour of Andrew Bell ... "All and Whole that Forty Shilling land of old extent of Westerseat of Hospitalshields with houses buildings yards mosses muirs meadows parts pendicles and hail pertinents thereto belonging lying within the ten pound land of old extent of Saint Leonards parish of Carluke and Sheriffdom of Lanark ..."

10 March 1848
Sasine Charter of Confirmation & liferent Sir Norman McDonald Lockhart of Lee & Carnwath in favour of Andrew Bell & others "All and Haill" .... "the forty shilling land of Westerseat of Hospitalshields with houses biggings yards mosses muirs meadows parts pendicles and haill pertinents thereof whatsoever lying within the ten pound land of old extent of of Saint Leonards parish of Carluke and Sheriffdom of Lanark ..."

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7 April 1920 (SS 4179 carried out to SS 14018)
"303 acres James Bell (heir in trust of the last surviving Trustee of Andrew Bell) to Malcolm John Gilfillan Reid .... all and whole the lands known as the farm of Westerhouse extending to 303 acres ... as delineated and coloured red and marked Lot Number 1 (one) on the OS sheet containing the said subjects annexed and signed as relative hereto together also with the houses and buildings erected on the said subjects so far as belonging to me teinds parsonage and vicarage parts and pertinents and my said consenters whole right title and interest present and future therein ***including whatever right at present attached to the subjects hereby disponed of common grazings on the hill or commonty delineated and coloured blue and marked Lot Number 2 (two) on the said OS sheet annexed and signed as relative hereto*** which subjects hereby disponed are part and portion of all and whole the forty shilling land of Westerseat of Hospitalshields with houses biggings yards mosses muirs meadows parts pendicles and haill pertinents thereof ... all as described in (1) the instrument of sasine in favour of ..."

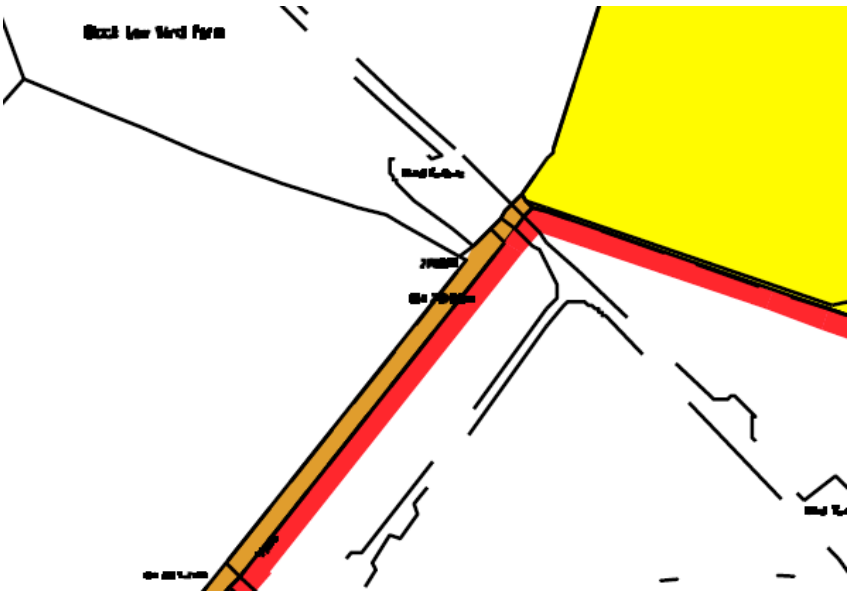
The farm of Westerhouse was then sold

- to William Reid in 1921
- to Alexander Allison in 1925
- to George E Blackhall in 1970.

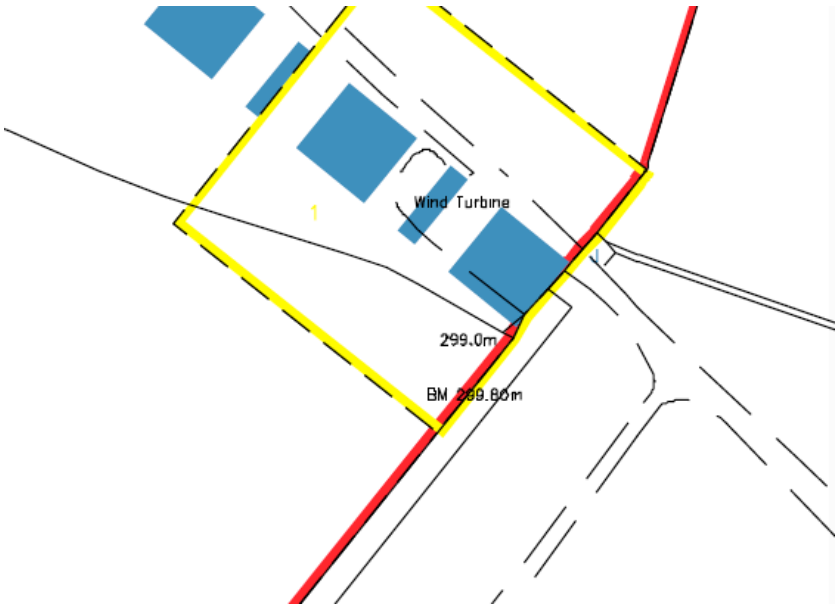
Two parcels (16 & 34 acres) were sold to David Attey in 1973 and now form part of LAN74701 to the east. The remaining part of Westerhouse was sold in March 1992 and transferred to the Land Register as title LAN83419. The northern part of this was then sold and became part of LAN54715.

ANNEX III

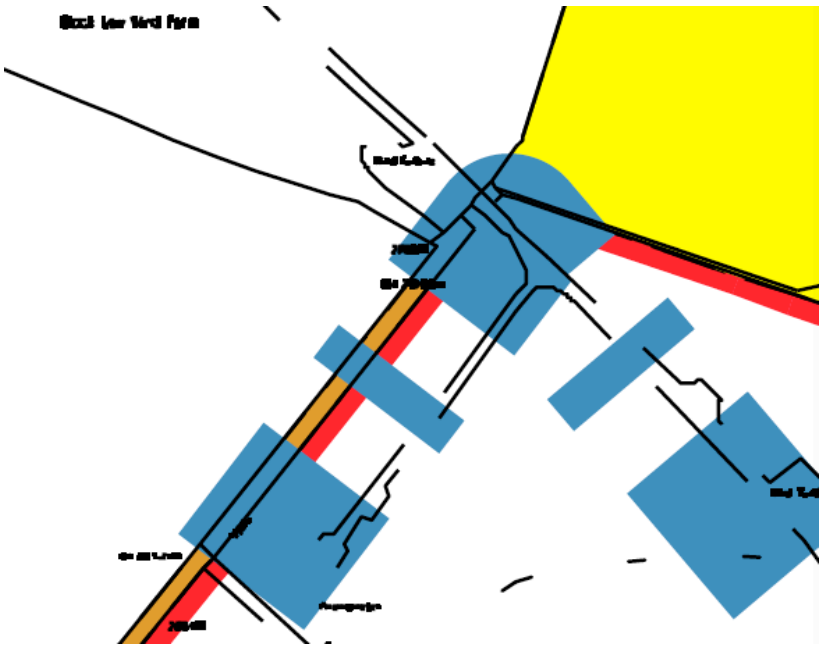
(1) LAN54715
Thornmuir & Westerhouse



(2) LAN108867
Farm of Gair



(3) LAN178527
CRE Energy lease of
LAN54715



ANNEX IV CDT PROTOCOL

Carluke Development Trust is seeking to secure ownership of Kings' Law commonty by obtaining a marketable title from the Registers of Scotland. If successful, this will make CDT the owner of the land. Given however, that the land in question is a common, it is arguable whether any organisation should become the owner. A more satisfactory state of affairs would be to have the land registered as a common and managed by a local organisation like CDT.

However, because Scots property law makes no provision for this (unlike in England), taking title in the name of a community organisation is the only practical means of bringing the land into community use.

The Registers of Scotland expect a case to be made as to why it should be CDT rather than any other body that should be granted a title. This is a fair question and I recommend that CDT prepare a case to convince the Keeper that they are representative of the residents of the parish of Carluke, are an open and democratic body, and can be relied upon to look after the interests of the parish. it might help if CDT were to consider adopting a resolution specifically stating that its ownership of the commonty was on behalf of the parish. Such a resolution might be worded as follows.

Noting that the commonty on King's Law is an ancient parish common;

Noting that the commonty has no recorded title in the Registers of Scotland;

Noting that all residents of the Parish of Carluke have an interest in the common;

Considering the benefits of securing title to the common on behalf of the Parish of Carluke;

Resolves to secure ownership of the common in the name of Carluke Development Trust to be held on behalf of the residents of the Parish of Carluke for all time;

Further resolves to fully consult the residents of the Parish of Carluke on all proposals for the management of the common;

Further resolves that this resolution may only be amended by a Special General Meeting called for this purpose and to which all residents of the Parish of Carluke shall be notified, have a right to attend, to address the meeting and to vote.

ANNEX V A NON DOMINO

(Note prepared by Lionel Most, Burness, 10 November 2011)

An a non domino title is a title where the person takes a title, but without the person granting it to them having had any real title to do it. So, it is a title on the face of it, but it has no real right to it. The title sits on the Land Register open to challenge usually with no indemnity from the Land Register (I explain this below) for a period of ten years. At the end of the ten year period the grantee can apply for such an exclusion to be removed and the title can become good. (I explain this below also).

However, before the title can appear on the Land Register, even with no such indemnity, the Keeper of the Land Register needs to be satisfied that there is no other owner.

The Keeper has a discretion as to whether or not to accept the initial application for registration, and it would be up to you to satisfy the Keeper that she should take it on for registration.

The Keeper has quite strict rules on this aspect. For example, she requires the “owner” to ensure that there is no competing title, and to have no suspicion as to the identity of a possible prior title holder. She requires the applicant to make enquiries and to try and trace anyone who might have a right. However, I assume that Andy has been through that process with the Keeper already.

I see from James' note of the meeting that Andy has had a discussion with the Keeper and that the Keeper has confirmed to Andy that she is prepared to take on the title of the Blacklaw Site in favour of the Trust.

Even if she does take it on, however, the Keeper will exclude indemnity (that is the state guarantee of title which pays out compensation if you are evicted). The title remains subject to challenge by the "real" owner at any time during at least a 10 year period.

At the end of that 10 year period, it is then up to the “owner” (in this case, the Trust) to satisfy the Keeper that the land has been possessed openly, peaceably and without judicial interruption. The Keeper will require affidavit evidence at the very least and may require even a court declarator, but they may also require something in between, to show that the land has been possessed in that way.

In the meantime, since the matter is subject to a challenge then insurance can be obtained to compensate the “owner”. I assume that at the very least the funders will require this insurance. The insurance should be for a value to make good the loss to all parties, and so would have to cover the amount of funding.

I have come across three recent cases. Two of these were for access (where the ground was owned but not freely accessible) and another where there was a part of the ground for which they could not trace title.

Case 1

There was no access which would make the property usable (the planning authority would not allow access at the other end). The level of insurance was a one-off premium for £1,500 for a value of £1,500,000, but that was for a specific risk (the loss of access and value).

In this case, there was the right to compensate tenants for £50,000 per tenant, up to an aggregate of £1,000,000 for their loss. This cost an additional premium of £1,500.

The insurers also agreed in this case to increase the amount of cover in accordance with the market value, subject to a maximum of 5% per annum.

Case 2

In this case, there was just no access to the property and the value was seen to be £700,000, for which a £700 premium was paid.

Case 3

In the third case, there was no title at all to a small part of the ground, extending to approximately 900 sq.m. The value of that part of the development was £1,500,000. The plot was to be developed for affordable housing, and the premium was £3,300.

I hope this gives you an idea of the procedures.

Kind regards

Lionel

Lionel Most
Partner

ANNEX VI PHOTOGRAPHS

1. Looking north along loan leading to Commonty

2. North end of loan crossed by Scottish Power access

3. Commonty

4. Looking south from north end of Loan.

5. South end of Thorn Road.