
NOTE BY SENIOR COUNSEL

for

Portobello Park Action Group

Re: The future status of the land at Portobello Park

2014

Patrick Campbell & Co,
Solicitors, Glasgow
Ref: FM/HC/PORT1/4

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Introduction

1. I refer to the letter of instruction dated 8th April 2014 on behalf of the Portobello Park Action Group (“the Group”) concerning the further consideration by the Scottish Parliament of the City of Edinburgh (Portobello Park) Bill (“the Bill”). I am aware that there is to be a session on 23rd April at which the Group intend to be present.
2. The particular concern which is raised for my consideration relates to what is being said about the future status of the land which is the subject of the Bill, and which is defined in section 3(1) of the Bill as “Portobello Park”. That is the area of land upon which the construction of the new Portobello High School (“the School”) is being proposed by the City of Edinburgh Council (“the Council”) who are the promoters of the Bill. For the sake of clarity, it is to be emphasised that what is said in the Bill, and what I say in this Note, relate only to the land upon which the School is to be built. The remainder of the overall area of land at what is known locally as Portobello Park, and which is primarily a golf course, is not the subject of the Bill and the status of that remaining land will not be affected by the Bill.
3. I refer also to the Opinion which I gave dated 23rd June 2013 (“my previous Opinion”) in which I discussed the future status of the land which is subject to the Bill. In paragraphs 7 to 14, I considered what had been said by the Council in particular in the Promoter’s Memorandum, and I expressed doubt that what the

Bill then provided in section 1(1) and (2) would ensure that the land upon which the School would be built would thereafter remain “inalienable” common good land as the Council had asserted. At paragraph 11 of my previous Opinion, I expressed the view that:

“Once the land has been appropriated for the purpose of [the Council’s] education functions, the land will cease to be common good land and will be held without restriction as a part of the general landholding of the Council. The land cannot be held for the purpose of the education functions whilst at the same time being part of the common good. Once the Council have been relieved of their duties to the local community in respect of the land, and that will be the situation following the appropriation of the land, the land will cease to be part of the common good.”

4. As a result of consideration of my Opinion by the Council, and although they do not concede that my interpretation is correct, the Council have proposed an amendment to the Bill which would add subsection (3) to section 1. In a letter dated 31st January 2014 which was addressed to the Convener of the Committee which has been appointed to consider the Bill (“the Bill Committee”), and in which this amendment is suggested, the Director of Children and Families of the Council said the following in support of the amendment:

“The intention of this new subsection is to preserve the current status of the Park notwithstanding any future appropriation by the Council. The subsection does not specify what the current status is, as the intention of underpinning the whole Bill is to interfere with the status quo as little as possible. This follows the approach taken at section 1, which deems the Park to have the status already provided for in Part VI of the 1973 Act [the Local Government (Scotland) Act 1973] rather than attempting to give it some new and unique statutory status.

The advantage of this approach is therefore that the general law of common good would continue to apply to the Park, and so would impose exactly the same restrictions on what could be done with the Park following appropriation as it does now (ie if any question ever arose in future about what the Council was entitled to do with the Park, that question would have to be answered as if the Bill had never been enacted and the appropriation for educational purposes had never taken place). So, for example, the terms of the 1973 Act would ensure that it could not be appropriated to another use, and could only be disposed of with the

consent of the Court...

...

The Council believes that this amendment should address any concerns that using the Bill to appropriate the Park for educational use would then result in the Council being subject to fewer restrictions in respect of the land in the future than it is now. This should put beyond doubt that the inalienable common good status of the Park would be preserved in circumstances where it was no longer to be used in an educational purpose, which is the Council's intention..."

5. Other statements have been made in support of the position of the Council. At a meeting of the Bill Committee held on 12th March 2014, a solicitor acting on behalf of the Council, Mr Charles Livingstone, said:

"The council's view is that the inalienable common good status is not being taken away. The committee has seen the opinion of Gerry Moynihan QC, which confirms that. There [sic] is a difference of opinion between Mr Moynihan and Roy Martin QC on that issue but, in the council's view, the bill does not remove the inalienable common good status of the land. It simply creates an exception to the restrictions that that status would otherwise create.

As far as the council is concerned, notwithstanding the fact that an amendment has been proposed to address any concerns about that question, the status of the land has not been changed in essence. The bill is simply creating a power for the council to do something that it would not otherwise be able to do."

6. From what is said in these passages, the Council appear to consider that the land referred to as "Portobello Park" and upon which the School would be built would remain as inalienable common good land notwithstanding the appropriation of the land by the Council and the building of the School. This is apparent not only from what has been said directly but also because the Council say in the letter above that "the terms of the 1973 Act would ensure that it [the land] could not be appropriated to another use, and could only be disposed of with the consent of the Court." That is a reference to section 75(2) of the 1973 Act which applies only to inalienable common good land. The issue which arises is whether the Bill would

have that effect and whether it is the case that once the land had been appropriated for the education functions of the Council that land would still remain as inalienable common good land and would have that status if the Council decided in the future to cease to use it for the School. In order to address this issue, I consider section 1 in the form in which it would be including the proposed amendment.

The effect of section 1

7. In its amended form, section 1 would provide:

- “(1) Subject to subsection (2), for the purposes of Part VI of the 1973 Act Portobello Park is deemed to be land forming part of the common good of the Council with respect to which no question arises as to the right of the Council to alienate.
- (2) For the purposes of subsection (1), no question shall arise as to the Council’s right to alienate Portobello Park only to the extent that the alienation in question consists of the appropriation of Portobello Park for the purposes of the Council’s functions as an education authority...
- (3) For the avoidance of doubt, in the event that the Council appropriates Portobello Park for the purposes of its functions as an education authority, nothing in this Act shall permit any further alienation of Portobello Park by the Council that would not have been permitted but for
 - (a) the terms of this Act; or
 - (b) the appropriation of Portobello Park by the Council in consequence of this Act.”

8. In order to understand the significance of the amendment, it is necessary to identify the sequence of events which would apply if the provisions of section 1 were to be acted upon. The operative part of subsection (1) has the effect that the land at Portobello Park is deemed to be common good land “to which no question arises as to the right of the Council to alienate”. This means that where subsection (1) operates, the status of the land changes to land which the Council are free to alienate. The land ceases to be inalienable common good land and it becomes common good land which the Council are free to appropriate to another

function or to dispose of by reference to sections 73(1) and 74(1) respectively of the 1973 Act, and that is because it is land which has become subject to section 75(1). The words used in the operative part of subsection (1) do not suggest that that change in the status of the land is to be temporary or to be capable of being reversed. On the face of the operative words of subsection (1), and if that subsection becomes engaged, the land will cease to be inalienable common good land.

9. Where subsection (1) becomes operative, that will permit the appropriation of the land at Portobello Park and that appropriation will be done by an exercise of the power provided by section 73(1) of the 1973 Act. The appropriation itself will not be done by an exercise of any power provide by the Bill because all that subsection (1) does is to permit an exercise of the power of appropriation in a situation where that would otherwise not be lawful. The Bill itself does not grant any power of appropriation.
10. Subsection (1) of section 1 of the Bill is subject to the opening words which are “Subject to subsection (2)”. Subsection (2) provides “For the purposes of subsection (1), no question shall arise... only to the extent that the alienation in question consists of the appropriation of Portobello Park for the purposes of the Council’s functions as an education authority..”. The effect of subsection (2) is that it defines that there is a single circumstance in which subsection (1) will operate. If that circumstance does not come about, subsection (1) will not become engaged and the change in the status of the land which would be brought about by subsection (1) will not occur. But if subsection (2) does become engaged, subsection (1) will operate and the change in status of the land will occur.
11. The single circumstance in which subsection (1) will operate is that there is an appropriation of the land by the Council for the purposes of their functions as an education authority. If the Council makes that appropriation, it will be lawful to do so because the effect of subsection (1) is that the Council are free to alienate

the land because it is no longer common good land which is inalienable. At that point, the provisions of the Bill in section 1 will be exhausted. The Council will have completed the appropriation of the land for their education functions and the appropriation will have been lawful because subsection (1) will have rendered it lawful. There will be a completed appropriation of land and the land will then be held by the Council as a local authority for the purposes of their functions as an education authority.

12. As far as I can see, there is nothing within subsections (1) or (2) which deal with any future change in the status of the land or which prevents the Council dealing with the land in the future in the way in which they might deal with any other land held by them for any of their functions. Sections 73(1) permits the appropriation of land held by a local authority from one function to another function and section 74(1) permits a local authority to dispose of land held by them, in each case without restriction. There is nothing in subsections (1) and (2) of section 1 of the Bill which would have the effect of qualifying the act of appropriation which is necessary to bring subsection (1) into effect, and there is nothing to say that somehow that appropriation is not an appropriation like any other nor that the appropriation will not have the same consequences as any other appropriation of land from one function to another. Once the land at Portobello Park has been appropriated to the education function of the Council, there is nothing in subsections (1) and (2) which further regulates the way in which the Council will hold the land.
13. This means that the land would cease to be held as common good land, whether alienable or inalienable, because the Council would be holding it in the future for the purposes of their education functions. This is consistent with what would be the practical reality. Common good land is held and maintained for the benefit of the community and not for the particular functions of a local authority. In the case of the construction of the School, the ability of members of the community to use the land for outdoor recreation would be very substantially curtailed, and any

use which the public were allowed would be because the Council as education authority had decided that the public could use the land and not because the public were asserting their rights over common good land. As it was put in the opinion of the Court in *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69; 2012 SLT 944, which I quoted at paragraph 12 of my previous Opinion:

“... the construction of the new High School would physically obliterate a substantial proportion of the southern section of the park, and... the community's use of the park for open space amenity and recreational purposes would suffer grave and permanent encroachment. The Council's plans do not appear to us to concern the management or administration of Portobello Park for public recreation and amenity. On the contrary, they involve appropriation of the land to a different function altogether, namely the construction and operation of a school.”

14. It is therefore difficult to see how it could be said that the land at Portobello Park would be retained as inalienable common good land notwithstanding its appropriation for the purposes of the education functions of the Council and the construction upon it of the School. That is consistent with section 2(1) of the Bill which removes the obligation of the Council to maintain the land for public recreation which was imposed by the Disposition of 1898 by which the Council's predecessors acquired the land. It is this obligation which underlies the status of the land as inalienable common good land and it would otherwise continue without any qualification. On the approach of the Council, that obligation is presumably relaxed only insofar as necessary to allow the appropriation to be carried out in terms of section 1(2) but, if that is so, it is difficult to see how the obligation could continue to be fulfilled once the School had been constructed and the building and its associated open space was being used and controlled by the Council for educational purposes and was no longer subject to a right of recreation which was enforceable by members of the community.
15. There is a final point. Where a building or other structure is constructed upon land, the building becomes part of the land by the operation of the principle of

accretion. Subject to the particular terms of any individual title, the title to land includes title to any building on the land, and the land and building are bought and sold together. If the land at Portobello Park remains as inalienable common good land notwithstanding its appropriation for the education functions of the Council, the School itself would on the face of it be part of the common good of the Council and thus an asset of the common good fund. The Council have not explained how this might be addressed and how a building which was part of the common good could be used by a local authority for the performance of their education functions. This is not addressed in any part of the Bill.

16. For all of these reasons, my views on subsections (1) and (2) of section 1 of the Bill remain as they were expressed in my previous Opinion. At paragraph 14, I stated my conclusion on the apparent position of the Council:

“If it is being implied that somehow the land which is the subject of the Bill would remain as part of the common good and that there would be restrictions upon its alienation even after appropriation, then in my opinion that would not be correct. Once the Council have appropriated the land, all of its common good and inalienable characteristics will cease.”

That remains my position in relation to the effect of subsections (1) and (2) of section 1.

17. Does the proposed subsection (3) make any difference to that? I begin by noting that it begins with the expression “For the avoidance of doubt...”. In my experience, that is an unusual formulation in legislation (although it is not uncommon in contractual documents). By its use in subsection (3), it implies that what has gone before is sufficient. If that is so, it suggests as a matter of legislation that the Council’s position is a sound one based upon a consideration of subsections (1) and (2) alone (and for the reasons just explained, I do not consider that to be so). It also implies that subsection (3) is not necessary and thus has no legislative effect, and I am not certain that it is appropriate to pass parliamentary legislation which contains unnecessary and superfluous provisions. No doubt, the officials of the Scottish Parliament will have considered this and

taken advice from experienced parliamentary draughtsmen.

18. After the opening words, subsection (3) then states “in the event that the Council appropriates Portobello Park for the purposes of its functions as an education authority...”. The effect of these words is that subsection (3) is engaged when the Council appropriates the land. As already noted, this will be done in exercise of the power provided by section 73(1) of the 1973 Act, and not subsection (2) of section 1 of the Bill, because what subsection (2) does along with subsection (1) is to permit an exercise of the power of appropriation when that would not otherwise be lawful. Thus subsection (3) operates only in the situation where subsections (1) and (2) are already engaged and the words just quoted do not add anything to that.

19. In that situation, subsection (3) continues:
 - “... nothing in this Act shall permit any further alienation of Portobello Park by the Council that would not have been permitted but for
 - (a) the terms of this Act; or
 - (b) the appropriation of Portobello Park by the Council in consequence of this Act.”

On the face of it, the initial words in this part of subsection (3) may be said to prohibit any further alienation after the appropriation which has taken place as a consequence of subsections (1) and (2), albeit that the words used do not create a prohibition, rather they merely confirm that section 1 itself does not permit any further alienation. Taken in isolation, those initial words could be said to operate to prevent further appropriation or disposal, and thus be consistent with the view that the land would be inalienable in the future, although even if that were to be correct this does not suggest that the land would remain part of the common good because the initial words only take effect after appropriation has taken place under subsections (1) and (2). Insofar as it appears to me, and if the initial operative words of subsections (3) were to apply without qualification, the land which had been appropriated at Portobello Park would be held for the education functions of the Council although the land would be rendered inalienable because of

subsection (3).

20. But even this this inalienability is subject to the further words of subsection (3) where it is provided in paragraphs (a) and (b) that the potential prohibition against further alienation does not apply in two situations. The first is where alienation would have been permitted “but for... (a) the terms of this Act”. If it is correct, as I have explained above, that once the land has been appropriated for the education functions of the Council, it then becomes land which may be appropriated in the same way as any other land held by the Council, then the effect of subsection (3) will not arise because any further appropriation or disposal would not be being done by the use of the provisions of subsections (1) and (2). In that situation, subsection (3) would have no effect because the Council would not be relying upon the terms of the Bill (or Act as it would have become) but would be entitled to exercise the powers of appropriation and disposal under sections 73(1) and 74(1) of the 1973 Act which they possess in respect of any land which is being held for any of their functions. In this respect, it is to be emphasised that subsection (3) refers to “any further alienation”, that is to say an alienation subsequent to the appropriation which has relied upon section 1, and any further alienation of the land which had come to be held for the education functions of the Council would not be an alienation which “would not have been permitted but for... the terms of this Act.”
21. The second situation where subsection (3) would not operate is where alienation would have been permitted “but for... (b) the appropriation of Portobello Park by the Council in consequence of this Act.” That provision would be operative because the appropriation of the land is only permissible because of the provisions of the Bill. In this respect, subsection (3) might be said to have the effect of a prohibition because the initial appropriation could not have taken place without subsections (1) and (2) of section 1. This means that I do accept that the words of paragraph (b) of subsection (3) would apply to qualify that subsection and could thereby have the effect of rendering effective the opening words which I have

already addressed.

22. But paragraphs (a) and (b) of subsection (3) are alternatives. Even although the application of paragraph (b) may by itself have the effect of not permitting a further alienation, paragraph (a) does not prevent further alienation and paragraph (b) would not affect that even if the two paragraphs were to be stated to be cumulative rather than alternative. In addition, and if paragraph (b) were to be engaged, it proceeds upon the assumption that the land at Portobello Park will remain as inalienable common good land to which section 75(2) of the 1973 Act applies. If that is not correct for the reasons which I have already explained, paragraph (b) adds nothing because the normal powers of appropriation and disposal which exist under the 1973 Act would apply to the land.

Conclusion

23. I therefore conclude that the effect of subsection (3) would be that it would not prevent future alienation of the land at Portobello Park and that it does not maintain the land as inalienable common good land following appropriation by reference to subsection (2). If the Council wished to maintain the land as inalienable common good land notwithstanding its appropriation as a consequence of section 1, then that could have been stated clearly within the Bill. That would raise directly its own issues, such as the status of a school building constructed and operated upon common good land and the ability of the Council to continue to fulfil their obligations to the community in respect of common good land upon which a school has been built, and these may be the reasons why the Council has chosen to follow a much more obscure route.
24. As it is, the legislation proposed by the Council, even including subsection (3) of section 1, gives rise to a number of uncertainties and at the very least there must be a material risk that legislation in that form will not achieve the overall purpose of the Council which is to obtain the ability to appropriate and use the land at Portobello Park to construct and operate the School. The Council have created

these uncertainties by their assertion that the land would remain as inalienable common good land notwithstanding appropriation for the education functions of the Council, and neither section 1 of the Bill as a whole, nor subsection (3) in particular, resolve these uncertainties.

Roy L Martin QC,
Terra Firma Chambers,
Parliament House,
Edinburgh,
10th April 2014.