

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

OBJECTION 49 – ROBERT SUTHERLAND

I wish to object to the Private Bill which is being promoted by City of Edinburgh Council. I am an immediate neighbour to, and a user of, the Park. My objections are made on a number of grounds, which are set out as follows:

Purpose and consequences of the Bill
Consultation process
Precedent
Loss of green space
Amenity impact and suitability
Bad faith on the part of the Council

Purpose and consequences of the Bill

The purpose of the Bill is in order to overturn the law of common good in Scotland as it applies to the Park. It has been suggested that the law of common good is in a mess, and that the outcome of the Court of Session judicial review case was a surprise. Neither of these statements are valid. Common good land can be either alienable or inalienable. Alienable common good land is land held by a local authority for its own purposes, such as council headquarters. Inalienable common good land is land held by a local authority in trust for the local community. Such land ought to be considered as the property of the community, and the duty of the local authority is to administer it not for themselves and not for the short term but in order to preserve it for current and future residents of the local authority area. Because of the nature of such land, it has been the position at common law in Scotland since at least the fifteenth century that a local authority cannot alienate inalienable common good land to allow it to fulfil another of its statutory functions. The historic common law position on common good land was reflected in the terms of Sections 73-75 of the Local Government (Scotland) Act 1973. In 2010 [REDACTED] gave advice to Highland Council that they would not be able to appropriate Bignold Park in Wick in order to build a school on. His opinion was based on the existing statutory provisions and case law which he considered to be clear.

The Park is inalienable common good land. Edinburgh Council sought to run a novel argument in relation to common good law but were ultimately unsuccessful, and the Inner House of the Court of Session confirmed that the position under the 1973 Act was the same as at common law. This Bill is intended to overturn that law and the result of the Court case. The Bill therefore seeks to make lawful what a Court has already declared to be otherwise unlawful. This Bill seems an extraordinary length for the Council to go to seek to overturn the historic protection which the Park (as defined by the Bill) would otherwise be entitled to. The users of the Park, and the wider community on whose behalf the Council hold the land in trust for, have an expectation that the Scottish Parliament will continue to ensure that the Park enjoys such protection.

The effect of Section 1 of the Bill if enacted is that once the Council appropriate that part of the Park for the School, it would have been alienated by virtue of the statutory

provision and would no longer be common good land. As a consequence of that effect, the Park would no longer have the status of inalienable common good land the Council would be able at some future point in time put it to any other purpose they wish. This would include the power of the Council to dispose of the Park if they considered that it necessary or appropriate. This is a consequence of the Bill as it is drafted, which I would submit means it should be rejected.

Consultation process

In my view the Council's consultation process prior to bringing forward the Bill was seriously flawed and did not meet the Scottish Parliament's requirements. As a Park Avenue resident, I did not receive any leaflets about the consultation from the Council until 5 weeks into the 8 week consultation process. I understand that this was true of the whole of Park Avenue and also of the houses on Milton Road. The leaflet itself was one sided, and only discussed what the Council considers to be the benefits of its proposals. The leaflet was misleading as to the precedent effect which the Bill sets. The Council allowed supporters of their proposals to campaign in schools in the area, an opportunity denied to those opposing the Council's proposals. The Consultation was conducted as if it was a school consultation exercise rather than a community consultation exercise. There were people in the community who were not aware of the existence of the consultation.

No information was provided about alternatives and the current proposal was represented as the best option without information being provided to allow an informed assessment to be made of the alternatives.

There has been no means of being able to verify the validity of the voting. Votes were allowed in the names of children without being able to verify that that the children did the voting, or whether the children even existed. At the same time the Council rejected a substantial number of objections from people who lived outside the school catchment area even though the Park is a common good asset for them as well. The figure of 76% of those who voted, and whose votes the Council accepted, does not represent the actual percentage of support within the whole community who support this Bill.

Precedent

There have been other examples of other local authorities using, and attempting to use, parks which are inalienable common good land. As noted above, there was such a case involving Highland Council in 2010, and there have been others. Once it becomes appreciated that it is possible to circumvent the law through the passage of a Private Bill this will set a precedent for other situations. The relatively small expense of such legislation, funded by council tax payers in any event, merely becomes an additional minor development cost. Local authorities in Scotland have a very poor track record in relation to raiding common good assets when it suits them, and of frequently ignoring the legal protection they have. The example set by passing this Bill will make it easier for local authorities to suggest that there is no point in opposing their wishes since they will always be able to circumvent any protected status the land might have otherwise.

Loss of Green Space

The passage of the Bill would result in a substantial loss of recreational assets in the immediate area. These assets serve not just the properties immediately facing the Park, but the nearby Magdalene housing estate, the adjacent Durham housing estate and other properties in the area. The Council has identified other alternative sites for the school.

This Park is one of only two City Parks on the east side of the city. It currently has protected views to Arthur's Seat and views from Milton Road down to the Firth of Forth which would be lost. It has Millenium planting and a variety of trees, bushes and flowers. Before the Council's decision to use the Park as the site for rebuilding the School the Park was used every Saturday and Sunday by children and adult football teams. In the summer months local children would play mini-cricket games. It was used by joggers and people doing athletics training as it was the only large area of level green space in the area. Many elderly people in the area appreciated being able to walk round it and sit on the park benches to look over the Park, the golf course and over the Forth. The ability to use the Park in this way has been prevented in recent years by the actions of the Council. The Park has also suffered in recent years by a deliberate lack of maintenance. Nevertheless it remains the case that there is a shortage of this type of space with its variety of flexible uses, and that the Park is a valuable community asset.

The loss of green space is itself immeasurable. I work in the town centre, and daily walk along George IV Bridge. There is a small area of green space between the National Library of Scotland and the back of the WS Library. The number of people who are not familiar with the area who smile as soon as they see that spot of green space is quite noticeable. The health values associated with protecting such land cannot be readily measured, but I believe that they are real. Just being able to see the Park brings a benefit to the mental and physical health of people.

Amenity impact and suitability

For those like myself who live beside it, and for those living in the area generally, the Park represents a substantial amenity to the community as a whole. The building of a new 1400 pupil Portobello High School will also have significant detrimental impact on the amenity of those living around the Park. In addition to the loss of the Park itself, the new building will obscure views of residents, block light, and will be a predominant building out of keeping with the area. Existing protected views will be lost.

The proposed re-development of the Park will result in serious traffic problems as the School would be built right beside the main arterial road on the eastern side of the city. There is an existing problem with speeding traffic, even in Park Avenue where there are speed bumps (which do little to act as a deterrent given the noise of car and van bottoms hitting speed bumps which is heard every day). At peak hours there is a substantial amount of traffic congestion along Milton Road. The absence of traffic islands on Milton Road and other main roads, and poor visibility from side roads onto main roads, are also further safety concerns. A number of pavements in the area are narrow. Approximately a fifth of pupils at the existing school are dropped off by their parents from cars. Safety concerns on the part of parents is likely to increase that percentage. Even assuming no change in the percentage of

pupils dropped off at, and collected from, school, it would result in substantial additional traffic on an already busy road at peak traffic hours. Limited parking associated with the new school also means increased parking problems in the surrounding street.

Bad faith on the part of the Council

The wish of Edinburgh City Council to rebuild the existing school is understandable. The existing school was built in the 1960's on a greenfield site. It has not been well maintained, and had been shortlisted for rebuild as a PFI project. At the time the Council's preferred site for rebuilding the school was on the existing school site. Once PFI funding was no longer available the Council had to find alternative ways to finance the building of the school. The Council realised that one of the consequences of Land Reform legislation was that a burden in the title deeds preventing the Park being used for another purpose would no longer apply. A local councillor at the time, Councillor [REDACTED], told me in 2006 that he had discussions with Council officials about whether there was anything the Council could sell off to help build a new school, and it was proposed that the Council could sell the 9 hole golf course and the existing school site for housing, and use the remainder of Portobello Park for the site of the school. A suggestion that the existing school site might be used to extend Figgate Park was rejected by the Council as an extension of Figgate Park was considered to have no real benefit to the area as it would not be a distinct area of green space to make up for the loss of the Park.

The Council subsequently withdrew the proposal to use the 9 hole golf course for housing. It also made it a condition of proceeding to use the remainder of the Park for the site of the school that it would find replacement green space. That condition was removed when it was decided by the Council that no alternative replacement green space could be found. It should be noted that implicit in this was confirmation that the existing school site was not a suitable replacement.

The Council initially argued that the Park was not common good land. At a time when this was the case Councillor [REDACTED] stated at a public meeting in Portobello Town Hall in 2008 that if the Park was common good land then the Council would not build the school on it.

Since that time the Council has required the local football teams to move elsewhere, and they have failed to maintain the Park through regularly allowing the grass to grow and not cutting it down, not maintaining the Park benches, and (until a few weeks ago) not levelling off the ground disturbed by archaeological digging. The only reason for such measures is to actively put people off from using the Park.

The Council have broken a number of promises to the local community over time in order to achieve their stated outcome. The proposal in this Bill is a further example of the local authority acting in bad faith in breach of previous commitments.

Conclusion

For all of the above reasons I object to the Private Bill.

23 June 2013