

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

PROMOTER'S RESPONSE TO CERTAIN ISSUES RAISED BY OBJECTORS

We refer to the letter from the Committee Clerk to the Council dated 17 January 2014, which explained the approach the City of Edinburgh Council (Portobello Park) Bill Committee (“the Committee”) intends to take to the Bill at Consideration Stage.

We note that during Phase One of Consideration Stage the Committee will consider all remaining objections. There are a number of issues set out in the objections that the Council feels it can address at this early stage. Some of these issues were also the subject of recommendations made by the Committee in the Preliminary Stage Report. The specific issues, and the Council’s responses and/or proposed solutions to them, are set out in this letter.

We are conscious of the Parliament’s expectation that the Promoter of a Private Bill will engage with objectors at Consideration Stage, with a view to identifying whether any objections can be resolved and withdrawn. The Committee will hopefully appreciate that the ‘whole Bill’ nature of the objections means that the Council may be limited in what it can do to resolve all of them completely, but we are hopeful that this letter will provide comfort to at least some of the objectors in relation to certain key issues, and so will allow at least some of the objections to be withdrawn either in whole or in part.

Accordingly, the Council is keen for this letter to be circulated to the objectors in sufficient time to give objectors the time to consider the Council’s position and confirm their own, either before or as part of submitting any supplementary written evidence to the Committee by the deadline of 7 February. We will be sending a copy of this letter to each of the objectors whose email address has been provided to the Council. That is only a minority of objectors, however, and so we should be very grateful if the Committee clerks would forward this letter to all the objectors and otherwise make it available via the Committee’s webpage.

1 Availability of alternative sites – Baileyfield

A number of objectors have suggested that the site known as Baileyfield, on Portobello High Street, offers an alternative to the Council’s preferred option of building the new school on Portobello Park (“the Park”).

The Committee will be aware that Baileyfield is one of the sites being considered by the Council as a potential fall-back if the Bill were not to be enacted. The Council gave evidence to the Committee at Preliminary Stage to the effect that Baileyfield was not a definitive option, as the Council did not own the site and was awaiting the outcome of a bidding process to try to acquire it.

The Council has now been informed that it is not the preferred bidder for the site at Baileyfield. While the acquisition of the site by the preferred bidder is yet to be finalised, there is now a much reduced probability of Baileyfield being a viable alternative option for the Council in the event that the Bill were not to be enacted.

A full summary of the current position on Baileyfield is provided in a report to the elected members of the Council on The New Portobello High School, prepared for a meeting of the elected members on 6 February 2014 and published on the Council's website today, accessible via the following link:

http://www.edinburgh.gov.uk/download/meetings/id/42201/item_no_8_2-the_new_portobello_high_school

2 Future use of Portobello Park

Concerns were expressed at Preliminary Stage that the Bill as currently drafted would not achieve the Council's desired outcome of allowing the Park, once appropriated for the purposes of the Council's education authority functions, to remain inalienable for all other purposes. In particular, Roy Martin QC expressed the view, in an Opinion provided to the Portobello Park Action Group, that once the Park had been appropriated under the Bill it would permanently lose its inalienable common good status, and so could be further appropriated for any other purpose in the future. While the Council does not agree with that assessment (and produced an Opinion from Gerry Moynihan QC supporting its position), it was acknowledged in evidence that the matter could be put beyond doubt by way of a suitable amendment.

At paragraph 52 of the Preliminary Stage Report, the Committee recommended "*that the Bill be amended at Consideration Stage ... to provide safeguards for any future use of the land and to protect its inalienable common good status in circumstances where it was no longer to be used for an educational purpose*". The Council is of course happy to comply with that recommendation, and will in due course submit appropriate wording to a Member of the Committee for consideration as an amendment to the Bill at Phase 2 of Consideration Stage.

In the meantime, the Council wishes to notify objectors of the proposed terms of that amendment, which it hopes will resolve the concerns that have been expressed over this issue.

The Council believes the following wording, which would appear in section 1 of the Bill as a new subsection (3), will resolve any uncertainty over the future use of the Park:

"(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."

This drafting is quite technical, so a brief explanation may assist. 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 that

current status is, as the intention 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 a status already provided for in Part VI of the 1973 Act 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 (i.e. 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 proposed approach also means that any changes in common good law generally (whether legislative changes or changes at common law) would apply to the Park, without any specific provision having to be made for it.

For the avoidance of any doubt, the Council would not be prevented from reverting the Park back to being used for recreational purposes, as section 2(2) of the Bill expressly preserves the Council's powers to use it for those purposes.

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 for an educational purpose, which is the Council's intention. We therefore hope that at least some objectors will now feel able to withdraw their objection on this point, and if so we should be grateful if they would confirm that to us and to the Committee, either in their supplementary written evidence or separately.

However, if there are any objectors who continue to have concerns in relation to this issue, we would be happy to consider any proposals for revising the draft amendment that they believe would better achieve the intended outcome and so address their concerns.

3 Status of the replacement open space

The Council has undertaken to create a new area of open space at the existing combined site of Portobello High School and St John's RC Primary School, in the event that the Bill is enacted and a replacement High School is constructed on Portobello Park. This area of open space would be created following the demolition of the existing Portobello High School and an increase in the site allocated for St John's RC Primary School to 1.3 hectares. The Council has undertaken to dedicate that area of open space as park land / open space, with the most appropriate use of the space to be considered by the local Neighbourhood Partnership.

The provision of this replacement open space was the subject of a formal decision by the Council, at a meeting of the Full Council on 25 October 2012, and was one of the compensatory measures set out in the Council's formal application for renewal of

planning permission in 2013. The Council also confirmed to the Committee at Preliminary Stage that an area of replacement open space would be created at the existing school site if the Bill is enacted (and would be happy to provide a further express undertaking to the Committee at Consideration Stage). Notwithstanding these various commitments, a number of objectors have expressed concerns that the Council is not legally bound to provide this replacement open space, notwithstanding its commitment to do so, as it is not provided for in the Bill. In its Preliminary Stage Report (at paragraph 135), the Committee urged the Council to “consider whether there are any other additional measures which could be taken to allay concerns about the security of the replacement open space’s future”.

Amending the Bill

The Council has considered whether the Bill could be amended so as to oblige the Council to (a) establish an area of open space at the existing site, and (b) use that space in perpetuity as parkland or otherwise for recreational purposes. The Council does not believe such an amendment would be possible, for two reasons.

Firstly, it would be extremely difficult to draft a suitable amendment, as it would have to refer to an area of land that is not currently a discrete property or even a readily definable area. The area would be the remainder of the existing combined Portobello High School / St John’s RC Primary School site following the demolition of the High School and the rebuilding / expansion of the Primary School. However, there is as yet no certainty over the footprint the Primary School would inhabit, and so no certainty over the footprint of the land that would remain. Identifying that footprint would not be a simple matter. Significant work would first have to be done to identify the best solution for the Primary School, which would be wasted if the Bill is not enacted and the Council then had to pursue the fall-back option of a phased on-site rebuild of the High School.

In any event, the Council has taken legal advice on a potential amendment and has concluded that any amendment relating to the existing School site would be inadmissible under rule 9A.12(5)(b) of the Scottish Parliament’s Standing Orders, as being outwith the Bill’s scope.

The long title of the Bill is: “An Act of the Scottish Parliament to change the status of Portobello Park so as to permit the City of Edinburgh Council to appropriate it for the purposes of the Council’s functions as an education authority; and for connected purposes.” The Council’s Memorandum states that the objective of the Bill is to address the legal obstacle which is currently preventing the new Portobello High School being built on Portobello Park, and goes on to state that the Bill’s purpose is to remove this obstacle by reclassifying the Park as alienable common good land for the purposes of Part VI of the 1973 Act.

An amendment relating to the existing school site would not relate to the status of the Park. While the provision of replacement open space on the existing school site is part of the Council’s wider project, being part of the ‘compensatory measures’ for the loss of the Park, a provision relating to the existing site would be by no means necessary for the Bill to achieve its stated purposes.

By way of illustration, the undoubtedly key element of the overall project is the construction of the school. However, as the Committee's Preliminary Stage Report notes, the Bill does not itself authorise the construction of the school. Given the scope of the Bill as relating solely to the status of Portobello Park, an amendment to authorise the school's construction would itself be outwith scope. Accordingly, amending the Bill to include an issue that is itself subsidiary to the school's construction, and relates to an entirely separate piece of land, would be even further outside scope. The Council is therefore firmly of the view that an amendment relating to the replacement open space would not be admissible, and so would not intend to propose any such amendment to the Committee.

Other unilateral measures

The Council also considered the availability of any other measures it could unilaterally adopt to require it to create the area of open space and preserve it for the benefit of the community, including: (i) whether the area could be designated by the Council as inalienable Common Good; (ii) whether the Council could control future use of the area by imposing title burdens; and (iii) whether the Council could control future use of the area by contractual methods. Having taken advice on these approaches, the Council has concluded that none of these alternative options were viable.

The law of Common Good is complex and to a large extent unclear, but the Council is not aware of any authority that would enable a local authority to unilaterally designate an area of land even just as Common Good, much less to give it inalienable status.

Title burdens can generally only be created where one party grants rights over its land in favour of another party, most commonly where there is a change in the title to the piece of land in question, and in any event requires identification of both a 'burdened property' (i.e. the property which is subject to the burden) and a 'benefited property' (i.e. the property entitled to enforce the burden). Since the aim of imposing a title burden would be to restrict the Council's ability to dispose of the replacement open space, or change its use, a process requiring changes in the title to the land would not be desirable, and it would also require the identification of a suitable and willing third party who would be entitled to enforce those rights. In addition, title conditions are vulnerable to challenge at the Lands Tribunal, under the Title Conditions (Scotland) Act 2003, and it could not be guaranteed they would remain enforceable in perpetuity.

The Council could potentially grant a lease giving possession of the land to a third party, subject to a reservation of access rights to the general public and obliging the tenant to use the site for park / recreational uses only. Alternatively, a sub-lease containing such requirements could immediately be granted back to the Council. The third party would then be in a position to take enforcement action against the Council in the event of breach of the terms of the sub-lease. This would be a relatively complex structure and an unusual step for a local authority to take, involving potential tax implications (i.e. Stamp Duty Land Tax / Land and Buildings Transaction Tax) that would need to be considered. There would also need to be a suitable and willing counterparty to any lease or sub-lease. The grant of a lease

would also constitute a disposal of an interest in the land, which is again what the Council understands the objectors wish to restrict. In any event, this possibility may not add much to the existing commitment to give the Property Fields in Trust status, as that would confer a similar type of contractual protection on the land by preventing the Council from alienating it or changing its use without the permission of the other party to the agreement.

In addition, none of these options could be put into effect until the exact scope of the replacement open space has been identified, as the relevant area of land would have to be clearly specified in any title burden or lease, and even in any attempt to designate it as inalienable common good land. Accordingly, and as noted above in relation to an amendment, they could not be put into effect until there is certainty over (a) whether the replacement open space will be required at all (i.e. whether the Bill is enacted); and (b) what part of the site will remain available after the reconstruction / extension of the Primary School.

Accordingly, the Council could not commit to any of these courses of action in advance of the Bill being enacted, and so they could not alleviate the concern expressed by certain objectors that the Council is at present not legally prevented from changing its position on the use of the open space at some point in future (again, notwithstanding the commitments previously given by the Council as referred to above).

4 Fields in Trust status

While the Council has concluded that neither an amendment to the Bill nor any other suitable measures restricting the future use of the replacement open space could be put in place at this stage, its commitment to create and preserve the space as park land or other recreational land will be secured via Fields in Trust status. Objectors can find more information about Fields in Trust status at: http://www.fieldsintrust.org/Upload/protecting_guide.pdf.

The Council believes that this option provides the best solution to objectors' concerns, since it will entail the Council entering into a legal commitment that the land will be used as open space in perpetuity. This commitment will be supervised, and could if necessary be enforced, by Fields in Trust, an independent third party which is committed to securing and improving community open space. The Council has discussed this prospect with Fields in Trust, who have advised that they are content with it in principle, and to exchanging letters to confirm agreement in principle at this stage.

The Council's elected members, at the next full Council meeting on 6 February 2014, will be asked to formally approve the giving of a written undertaking to Fields in Trust to the effect that, once the area of replacement open space has been constructed, it will (subject to the agreement of Fields in Trust) be dedicated as a Field in Trust. As with the unilateral options discussed above, no formal dedication could be made until the area of open space has been constructed following the demolition of the existing High School and the rebuild / extension of St John's RC Primary School. For further detail please see the link to the Council report referenced at section 1 above.

5 Remaining open space at Portobello Park

The Committee also indicated that it would welcome the Council's consideration of what protection could be given to the area of open space that would remain at the Park following the construction of the school.

The Council considered whether it would be possible to amend the Bill so as to remove this area from the definition of "Portobello Park", so that the Council's right to appropriate the land would apply only to that part required for the proposed footprint of the school. The Council has concluded that this would not be practicable, however, on the basis that it would require very precise specification of co-ordinates, and also because it is highly likely the area will be required for ancillary purposes during the construction phase of a new school, should the Bill be enacted.

The Council nevertheless intends that the area will be reinstated as, and will remain, open space after a new school is built. The Council's elected members will also be asked at the above-mentioned meeting on 6 February 2014 to approve the dedication of this space as Fields in Trust (again, once the school had been constructed and the open space reinstated) in the same manner as referred to above – please see again the link to the Council report referenced at section 1 above. This possibility has again been discussed with Fields in Trust, who have again advised that they are content with it in principle, and to exchanging letters to confirm agreement in principle at this stage.

6. Renewal of Planning Permission

A number of the issues raised in the objections were considered by the Council as Planning Authority when planning permission for the new Portobello High School on Portobello Park was originally granted on 24 February 2011, and again more recently when the Council's Development Management Sub-Committee approved the renewal of the planning application for the proposed new Portobello High School. That approval was granted on 4 December 2013. As formal renewal of the current planning consent was necessary rather than merely an extension of the original permission, the full planning process was followed, notwithstanding that there were no material amendments to the design proposals previously approved in February 2011.

The report to the Development Management Sub-Committee (which relates to the application for renewal of planning permission, Reference 10/02830/FUL) and related documents, including drawings for the proposed school and consultation responses, are accessible via the following link:

<https://citydev-portal.edinburgh.gov.uk/idxpa-web/applicationDetails.do?activeTab=documents&keyVal=MRIBITEWLO000>

The report summary states that, although the proposal is contrary to the Development Plan in terms of the land use allocation, a departure can be justified in this instance as the community benefits of a new school outweigh the loss of open space. It notes that the development represents an opportunity to redevelop the High School on a suitable site within the catchment, without creating any adverse impacts in terms of residential amenity or road safety.

The planning permission is subject to a number of criteria which must be satisfied prior to the occupation of the school, some of which relate directly to specific areas of concern raised by objectors:-

1. The Council will arrange for the design, construction, works and necessary traffic orders:
 - a. to introduce or amend school keep clear markings, part time 20mph speed limits, bus lane operation times, waiting and loading restrictions and bus lanes and to re-determine sections of footway, carriageway and cycle track; and
 - b. for a toucan crossing in the vicinity of the main school entrance on Milton Road, to be operational prior to occupation of the school and to be subject to Road Safety Audits at appropriate stages.
2. A Travel Plan will be submitted before the school is occupied, the terms of which are to be agreed with the Council's Head of Transport, and a management agreement shall be in place prior to the occupation of the school.
3. Deliveries and collections, including waste collections, are restricted to 0700 - 1900 hours Monday to Saturday.
4. The operation of the floodlighting system is restricted to between the hours of 0800 and 2200 hours daily.
5. The floodlighting system will be controlled so that there is no direct illumination of neighbouring land, and any light spillage onto neighbouring land does not exceed 25 lux.
6. A fully detailed landscape plan and habitat management plan, including full details of the extent of removal of the Millennium Planting on the site's northern boundary will be submitted to the Planning Authority for approval;
7. A surface water management plan, showing flood risk from all sources at the 1:200 year runoff shall be submitted for approval by the Planning Authority before commencement of works on site. This will show the location of the land drains, and demonstrate that there is no increase in flood risk to adjacent property, such as Portobello Golf Course.
8. The design, installation and operation of any plant, machinery or equipment shall be such that any associated noise complies with NR25 when measured within any nearby living apartment.

We would invite objectors to review the Development Management Sub-Committee report, which we hope will alleviate any concerns about the above issues and so allow for the withdrawal of objections relating to those points (particularly in light of paragraph 57 of the Committee's Preliminary Stage Report, which notes that the Committee "is obviously very conscious that its role is to scrutinise and reach a view

on a Bill that has been referred to it, and not to take over the Council's own role as planning authority").

7. Conclusion

We hope the above explanations of recent developments, and the Council's proposals, will provide some comfort to objectors and so allow for the withdrawal of at least some objections, in whole or in part. We are also hopeful that objectors will take into consideration the Committee's Preliminary Stage Report and its findings on issues such as:

- the alleged precedent effect of the Bill;
- the appropriateness of pursuing a Private Bill notwithstanding the terms of the Inner House's decision on the appropriation of inalienable common good land; and
- the necessity of the Bill, in terms of the absence of other viable legal options.

We acknowledge that all aspects of the valid objections remain live at this stage, but would invite objectors to consider their position on such issues in light of the views expressed by the Committee, and indeed the updates and points dealt with in this letter, and confirm, directly to us or to the Committee clerks, whether they are content to withdraw their objections on such points (in whole or part).

We would also be happy for individual objectors to contact us directly should they require any further information on the issues discussed above, and in particular if they wish to propose any revisions to the terms of the draft amendment set out in section 2 of this letter.

If the Committee, or any of the objectors, would like a hard copy of the Council report of 6 February or the Development Management Sub-Committee report referred to in this letter please phone Catherine Duckworth on 0131 469 3161.

Please contact us if we can provide any further information in respect of any of the above.

Gillian Tee
Director of Children and Families
31 January 2014