

**OPINION OF SENIOR  
COUNSEL.**

for

**THE CITY OF EDINBURGH  
COUNCIL**

re

**PORTOBELLO PARK**

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I refer to the consultation held on 19<sup>th</sup> August 2008.

A problem arises because of the terms of sections 73, 74 and 75 of the Local Government (Scotland) Act 1973 ("the 1973 Act"). These are among a number of sections concerned with land transactions. Sections 73 and 74 clearly distinguish between appropriation and disposal of land. In short, section 73 provides that a local authority may appropriate for the purpose of any function, whether statutory or otherwise, land vested in them for the purpose of any other such function. Section 74 empowers a local authority to dispose of land held by them in any manner they wish, but subject to various conditions. Section 75 is concerned specifically with common good. It provides,

- "(1) The provisions of this Part of this Act with respect to the appropriation or disposal of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which land no question arises as to the right of the authority to alienate.
  
- (2) Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such

conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.

- (3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used for the same purpose for which the former land was used ”

It is clear therefore that section 73 (appropriation) and section 74 (disposal) apply to common good land which is alienable. Section 75(2) then provides a mechanism for obtaining the authority of the Court to dispose of common good land which is inalienable or in respect to which a question arises as to its alienability. What is conspicuously lacking, in my opinion, is either a power to appropriate, within the meaning of section 73, inalienable common good land, or a mechanism for obtaining the approval of the Court to such an appropriation. This appears to me to be a *casus improvisus* in the legislation. It is a defect which probably did not come to light at least before 1<sup>st</sup> April 1996 because education and roads were regional council functions whereas common good transferred to district councils by virtue of orders made under section 222(2) of the 1973 Act. Prior to 1<sup>st</sup> April 1996, transfers of common good land from district councils to regional councils for functions such as education and roads were clearly disposals within the meaning of section 74. If the common good concerned was inalienable then an application to the Court under section 75(2) was required. Since then, such disposals have become appropriations.

In an unreported Inner House decision in South Lanarkshire Council, Petitioners, 11 August 2004, the Court refused as unnecessary a petition under section 75(2) of the 1973 Act in respect of an appropriation of common good land for education. The circumstances are briefly narrated in paragraph 7 of Lord Drummond Young's Opinion in North Lanarkshire Council, Petitioners, 7 October 2005 [2006] CSOH 48. Lord Drummond Young in his case was bound by the Inner House decision in South Lanarkshire Council (paragraph 8 of his Opinion). As I understand the position, the South Lanarkshire Council petition was refused on the basis of a concession made by their counsel, and the question of whether the consent of the Court was required for an appropriation of inalienable common good land was not considered by the Court.

In these circumstances a potential problem arises for the Council in respect of the proposal to use part of Portobello Park, which is generally recognised to be inalienable



common good land, for the site of a new school. As matters stand at present, it is likely that there will be no "disposal" of the site within the meaning of section 74 of the 1973 Act but rather an appropriation within the meaning of section 73. The present proposal is that the school should be built and operated by the Council as education authority on land the title to which would remain in the name of the Council

Although the South Lanarkshire Council decision is superficially helpful in that it appears to be sound authority for the proposition that an appropriation of inalienable common good land for education purposes does not require the authority of the Court, the appropriation point appears not to have been considered and accordingly its value as an authority is seriously diminished. In this state of affairs there would appear to be at least three possibilities. First, to treat the South Lanarkshire Council case as authority and simply appropriate the common good land without further ado. In light of the known opposition to the project, this would appear to be a risky option, the more so since it cannot be maintained that the Inner House considered the *casus improvisus* point. Secondly, the Council could present a petition under section 75(2), narrate the facts and seek the approval of the Court to the proposed appropriation. It might be possible to persuade the Court that such a petition should be refused as unnecessary, but that would only be achieved after intimation and service of the petition and the probability of answers being lodged by objectors to the project. The advantage would be in being able to describe to the Court in detail the proposals and there would be the reasonable expectation that the competency point could be resolved before any inquiry into the facts. In light of the existing decision in the South Lanarkshire Council case it should be possible to persuade the Court to treat such a petition as an Inner House one at first instance. This course of action would, I understand, involve delay until such time as the Council had decided upon the prioritisation of the five schools in wave three

Thirdly, the Council could seek to present a petition to the *nobile officium* of the Court of Session on the basis of a *casus improvisus* in section 75 of the 1973 Act. Such a petition would not be without potential difficulty because the *nobile officium* is an extraordinary, equitable jurisdiction of the Court recourse to which would only be justified by necessity in the interests of justice. On the face of it, this is a high level to meet, but the *casus improvisus* appears to be reasonably plain, the authority of the South Lanarkshire Council decision appears to be potentially misleading and the actual administration of the Council's education programme is potentially being disrupted because of this state of uncertainty. Such a petition would not involve the practicalities of an application under

section 75(2) of the 1973 Act because it would be concerned rather with the principle of whether the consent of the Court was required rather than the practicalities of whether, if it was required, it should be granted. If the Court could be persuaded to entertain such an application, the prospects for a comparatively speedy resolution would appear to be better, but there may not be much to choose between such a petition and an application under section 75(2) so far as time saving is concerned.

I have considered the possibility of recourse to the power of the Scottish Ministers *inter alia* to amend legislation by means of a statutory instrument under section 57 of the Local Government in Scotland Act 2003, but it does not appear to me that the use of this power would be appropriate in the present circumstances having regard to the detailed provisions of that section.

If the Council decides to proceed with a *nobile officium* petition, it will be necessary to describe in as much detail as possible the reasons why the interests of justice require it to be entertained. In other words, why the Council requires the question to be answered now and in the abstract rather than waiting for the time when the appropriation is required. Such an application would require detail of the appropriation, namely why there is no disposal, but no particular detail of the precise land take involved or of the design of the new school would be required. For a petition under section 75, more detail of the land take and of the proposed school would be required, but not to the extent of detailed designs. The important considerations would be the nature and extent of the use presently made of the Park and the compensatory facilities which would be available to inhabitants of the area in the form of access to facilities within the school premises and to improved facilities on the remaining common good land if the appropriation was permitted. Some broad details of the financing arrangements would also be required.

Once the Council has decided how to proceed, it would probably be helpful to discuss the draft petition at consultation.

**THE OPINION OF**

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**22 August 2008**