

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

PPAG FURTHER SUPPLEMENTARY WRITTEN EVIDENCE FOLLOWING 9 OCTOBER MEETING

Following the meeting of the Portobello Park private bill committee on 9 October we wish to draw the following points to your attention regarding the principles of the bill and its implications.

This issue was raised before the committee on 9 October and accordingly we thought it would be helpful to follow it up in writing, as it reiterates the points raised in evidence.

I refer to part of the report to the City of Edinburgh Council meeting on 14 March 2013, at which the decision to promote the bill was taken. The report states on page 54, appendix 3, paragraph 2.1.6 that: *"The decision of the Inner House of the Court of Session leaves this Council, and other local authorities in Scotland, with a legal anomaly"*.

It is clear that the council believes the issue of appropriation of inalienable common good land is one that is of general concern and affects local authorities throughout Scotland. Therefore we suggest that the Private Bill is contrary to Part 5, paragraph 5.8 of the Scottish Parliament Private Bill guidance which states "A Bill should not proceed as a Private Bill if a statutory remedy is not necessary to achieve the result sought; nor should it proceed if the result sought would more appropriately be achieved by means of changes to the general, public law (i.e. by a Public rather than a Private Bill) that would give the same powers or benefits to others in a similar position, without the need to single out the promoter".

We also attach a copy of a letter of 9 October 2012 from Sue Bruce, Chief Executive of the City of Edinburgh Council, to John Swinney which we quoted from in our evidence to the committee on 9 October. In the second paragraph on page 3 Ms Bruce writes: "For these reasons we would wish to explore whether there is Ministerial support for legislative change that will enable our project, **and others of similar value**, to be taken forward." She goes on to say in the last paragraph on the same page that: *"Whilst this request is being made on behalf of the City of Edinburgh Council, **we are sure that this matter will be of interest to other local authorities**"*. (Our highlighting in bold).

This clearly indicates that despite the City of Edinburgh Council's public assertion that the pursuit of the Private Bill is a purely local matter, for other purposes they agree this has a significance which goes beyond Portobello and indeed beyond Edinburgh. It is the case that a number of other local authorities have, in the past, considered the possibility of using public parks, which are also common good land, for the same sort of purpose and continue to do so. In a number of cases the only thing that has prevented them from doing so has been the inalienable common good status of that land. Should the City of Edinburgh Council be successful in their attempt to circumvent that protection, other areas of public green space across Scotland will inevitably be at risk.

We trust you will take into consideration that what is being asked for in this bill is a closing of what appears to be a legal anomaly but one which the promoter, and indeed all parties, agree has a national effect and therefore should be addressed by changes in existing legislation. Consideration of this change to legislation by parliament will allow for all the ramifications of the change to be taken into account for the benefit of all and also be considered without the time pressure being brought to bear by the promoter.

Winifred Aitken

Chair, Portobello Park Action Group
24 October 2013

John Swinney MSP
Cabinet Secretary for Finance, Employment
and Sustainable Growth
The Scottish Government
Victoria Quay
Edinburgh
EH6 6QQ

Our Ref: AB/SB
Your Ref:
Date: 9 October 2012

Dear Mr Swinney

New Portobello High School

As you may already be aware, plans by the City of Edinburgh Council to build a new Portobello High School on part of Portobello Park have recently encountered a major setback in the form of a decision of the Court of Session last month.

Our purpose in writing is to seek your assistance in ensuring that the new school is delivered on the preferred site on Portobello Park at the earliest opportunity.

As there are clearly a number of Ministerial interests involved in this particular matter we have taken the liberty of sending this letter to the Cabinet Secretary for Education and Lifelong Learning, the Cabinet Secretary for Justice and the Cabinet Secretary for Finance, Employment and Sustainable Growth.

Background

The existing Portobello High School is, and has been for many years, in urgent need of replacement. This need is well illustrated by the storm damage the school suffered only very recently which resulted in it having to be closed for the day.

During 2006 an extensive and exhaustive assessment was undertaken of any potential sites in, and around, the school catchment area for a new school. Three potential options were short-listed and taken forward as the subject of a full education statutory consultation, at the conclusion of which, in December 2006, the Council approved Portobello Park as the location for the new Portobello High School. We did not feel that

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it was necessary for this letter to detail all of the key events in the history of the project, but in Appendix 1 we have included a timeline should this be of interest.

We would emphasise, that the Council believes the good reasons why Portobello Park was approved as the location for the new school are still as valid as ever, and we have a “shovel-ready” project, with funding secured and all necessary statutory consents in place. We have also selected a preferred contractor who offers high quality at a very competitive price.

The Council believes that building the new school on part of Portobello Park has a substantial body of support amongst the local community, despite the well publicised opposition of some, and is the community’s preferred option. However, the recent Court judgment prevents further progress.

Legal Challenge

In essence, the Court has decided that although local authorities have powers to dispose of inalienable common good land, they do not have the power to appropriate such land for an alternative statutory purpose, whether under the provisions of the Local Government (Scotland) Act 1973, the Local Government in Scotland Act 2003 or otherwise. This position would appear to apply to any proposed alternative purpose, regardless of its merits. The judgment has also recast the power to advance well-being as a limited ancillary power, which of course has wider implications for all Scottish local authorities. This limitation does not accord with what the Council understands to have been the intention of the Scottish Parliament, which is that the power ought to be available as one of first instance

We do not believe that this position was ever the intention of Westminster or of the Scottish Parliament. It has, however, come about as a consequence of a challenge by a local action group that is not, in our view, reflective of the wider community interest.

We understand that other local authorities have, in the absence of legal challenge, already appropriated inalienable common good for educational purposes. It can also be expected that local authorities will be keen to utilise their existing estates for future projects, but that the state of the law following the Court of Session judgement may frustrate their plans – even where it can be argued, as in the case of Portobello Park, that their plans will bring significant benefits to local communities.

In case it assists, in Appendix 2 we have included a slightly more detailed summary of the legal issues considered by the Court.

Next steps

On 25 October the Council will consider a report which will set out a number of options as to how the present legal impediment might be overcome. The report will also consider alternative sites, although it is safe to say that the Portobello Park site continues to be the preferred option and any alternative which might be available would represent a significant compromise by comparison.

Preliminary investigations suggest that the difficulties associated with the other alternatives which were previously identified and discounted have not been overcome and, in some cases, have been further exacerbated.

Legal Options

In conjunction with our legal advisers we have undertaken a thorough assessment of the legal options now available to the Council. There are, however, a number of practical considerations that drive the need for an effective solution within a reasonable period of time, including that the planning permission for the school will expire in February 2014. Additionally, the Council is mindful of the cost to the public purse of pursuing the options that are open to it. For these reasons we would wish to explore whether there is Ministerial support for legislative change that will enable our project, and others of similar value, to be taken forward.

The Council is obviously aware of the current consultation on the proposed Community Empowerment and Renewal Bill which has, within the wide range of matters covered, recognised the necessity to review areas of uncertainty on common good such as that which we have experienced. However even if, following consultation, the Scottish Government does decide to proceed with the Bill the likely timescales are such that it would be a considerable period of time before any legislation which might clarify the existing situation was enacted and this obviously presumes that any legislation would allow our particular issue to be resolved.

As such, there are three options which we believe are available which would, in the majority of instances, involve legislative change to the Local Government (Scotland) Act 1973 and/or the Local Government in Scotland Act 2003, but would all require the support of both Ministers and the Scottish Parliament to varying degrees, these being as follows:

1. A Private Act of the Scottish Parliament under the provisions of section 82 of the Local Government (Scotland) Act 1973;
2. An Executive Bill of the Scottish Parliament; or
3. An order made by Scottish Ministers under the provisions of section 57 of the Local Government in Scotland Act 2003.

These approaches entail significantly different requirements and timing. Obviously the extent to which Ministers and/or Parliament would be persuaded that the circumstances are of sufficient significance that they would merit action under any of the above provisions cannot, and is not, being presumed.

However, we do believe that there are unique and extenuating circumstances on this occasion regarding which we would, respectfully, welcome your thoughts regarding the extent to which you may be minded to assist.

Whilst this request is being made on behalf of the City of Edinburgh Council, we are sure that this matter will be of interest to other local authorities, albeit the opportunity has not yet been taken to raise the matter more widely through COSLA.

We need an urgent solution to the entirely unexpected situation which we now find ourselves in, of having evidently no current lawful means by which we might appropriate inalienable common good land for what we consider to be the real benefit and well-being of the community of Portobello. This restriction, and the limited scope for the exercise of the power to advance well-being by Scottish local authorities, will potentially have a significant impact elsewhere in Scotland.

In this regard, we would welcome your thoughts and what assistance, if any, you consider might be possible in resolving this matter. Should you require any further information, or wish to discuss this matter in more detail, please let us know. A more detailed briefing on the matters raised in this letter can also be arranged.

Yours sincerely



SUE BRUCE
Chief Executive



ANDREW BURNS
Leader of City of Edinburgh Council

cc: Michael Russell, Cabinet Secretary for Education and Lifelong Learning
Kenny MacAskill, Cabinet Secretary for Justice

Appendix 1

Historic Timeline

December 2006 – The Council approved Portobello Park as the location for the new school, following full statutory consultation.

December 2008 – The Council approved the new school as the first priority within its Wave 3 school replacement programme.

February 2009 – Funding for the project confirmed in the Council's Capital Investment Programme.

March 2010 – The Council approved the revised approach to open space compensation.

October 2010 – The Council lodged a planning application for the new school.

February 2011 – The Council was granted full planning permission for the school.

July 2011 – PPAG lodged petition with Court of Session to judicially review the Council's decision to build the school on part of the Park.

September 2011 – Council selected Balfour Beatty as preferred contractor for the school.

January/February 2012 – Judicial Review action heard in Outer House of Court of Session.

March 2012 – Judgement issued by Outer House, rejecting the legal challenge of PPAG.

April 2012 – Council approved the appropriation of part of Portobello Park for the new school (under both the 1973 Act and the 2003 Act) and made a decision to formally appoint Balfour Beatty upon PPAG's legal challenge being resolved.

May 2012 – PPAG's appeal heard in the Inner House of the Court of Session.

September 2012 – Judgement issued by Inner House overturning the Outer House's decision and upholding PPAG's legal challenge.

Appendix 2

Brief Summary of Legal Issue

Portobello Park was acquired by the statutory predecessors of the Council in 1898. The Council never considered it to be part of the common good of the City however this changed in 2006 when PPAG obtained a QC's legal opinion suggesting it was. The Council then conducted its own research into the issue, and concluded that facts and circumstances indicated it was inalienable common good.

Section 75(1) of the Local Government (Scotland) Act 1973 permits local authorities to appropriate or dispose of alienable common good land. Section 75(2) of the 1973 Act permits local authorities to dispose of inalienable common good subjects, subject to obtaining the prior authority of the courts. However, the 1973 Act contains no specific reference to the appropriation by local authorities of inalienable common good land. It is the Council's view that the absence of such a specific power of appropriation is simply a legislative oversight, and that local authorities can still lawfully take such action. This view was confirmed by a joint opinion from two QCs which the Council obtained in November 2008.

Given this legal position, the Council considered that it did not require the approval of the Court to the proposed appropriation, and that it was able to proceed without it.

There is precedent for this assertion e.g. in the case of North Lanarkshire Council which, in 2005, took a petition to the Outer House of the Court of Session for approval of what they considered to be the disposal of inalienable common good land. The intended disposal related to the proposed construction of a school on land under a public private partnership and subject to a lease and lease-back arrangement. The Court determined that this was not actually a disposal as the use of the land for a school did not deprive the local community of the benefit of the land. The petition was dismissed as being unnecessary and the school subsequently built. If this was not a disposal it was appropriation.

In 2011 PPAG sought judicial review of the Council's actions. When PPAG's action was heard by the Outer House of the Court of Session in January 2012 the court agreed with the Council. However, PPAG then appealed to the Inner House, who heard the case in May 2012, its decision being issued in September 2012.

The Inner House ruled that local authorities do not have the power to appropriate inalienable common good land under the 1973 Act, and also ruled that local authorities do not have the power to appropriate such land under the Local Government in Scotland Act 2003. This outcome was both extremely disappointing and unexpected.

The Inner House's rejection of the Council's decision to appropriate such land under the provisions of Section 20(1) of the Local Government in Scotland Act 2003 is, in the Council's opinion, very surprising. In particular, the very narrow definition which the Court has applied seems to be at odds with what it had been understood the intent of this legislation was, and the powers which it confers on local authorities. The well-being power is widely drawn and it is clear from the applicable statutory guidance issued by

the Scottish Ministers that it is intended to be a power of first resort, in other words it is to be relied upon to enable local authorities to fulfil their statutory duties.

It is respectfully considered that the Inner House's decision has overly restricted the ability of local authorities to deal with their common good assets, and how they might use the power to advance well-being under the 2003 Act. These restrictions are likely to be a concern for all local authorities in Scotland, not only the Council and the replacement of Portobello High School.