

**NOTE BY SENIOR COUNSEL**

**for**

**Portobello Park Action Group**

*Re:* Evidence given to the Committee on the City of Edinburgh Council  
(Portobello Park) Bill on 23rd April 2014

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2014

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

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1. I have been instructed on behalf of the Portobello Park Action Group (“the Group”) following the evidence session held on 23rd April 2014 by the Committee of the Scottish Parliament on the City of Edinburgh Council (Portobello Park) Bill (“the Bill”). I have also been provided with a letter dated 30th April 2014 from Brodies, who are acting on behalf of the City of Edinburgh Council (“the Council”) who are the promoters of the Bill, and which was addressed to the Chair of the Group (“the Brodies letter”).
  
2. The particular concern of the Group relates to the future status of the land at Portobello Park which is the subject of the Bill. I addressed this in the Opinion which I gave dated 23rd June 2013 (“the Opinion”) and in a Note dated 10th April 2014 (“the Note”). Although I do not repeat the contents of these documents, for convenience I quote what is said at paragraph 11 of the Opinion:

“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.”
  
3. As discussed in the Note, the Council decided following consideration of the Opinion to propose an amendment to the Bill which would provide an additional subsection (3) to section 1. For the reasons which I explained in the Note, I did not consider that such an amendment would address the concerns of the Group.

4. During the course of the session on 23rd April, I was permitted to ask questions of the witnesses for the Council and these were answered by Mr Iain Strachan who is a solicitor and officer of the Council. In responding, Mr Strachan accepted on behalf of the Council the following particular propositions:

- The land at Portobello Park will remain part of the common good notwithstanding that the land will be vested in the Council for their education functions; and
- The school building which will be constructed on the common good land will itself be part of the common good.

It appears to me that these answers demonstrate a fundamental misunderstanding on the part of the Council and those advising them as to what is the nature of land which is held for the common good and the responsibilities and duties of the local authority which holds such land.

5. In the first place, an appropriation of land which takes place under section 73(1) of the Local Government (Scotland) Act 1973 results in land which has been held by a local authority for the purposes of one function becoming held by the same local authority for the purposes of another function. It ceases to be held for the purposes of the former function. It does not appear to me that it can be held simultaneously both for the previous function and for the subsequent function. That is a consequence of what is the “appropriation” of land.

6. That is the position in relation to land which is held ordinarily by a local authority but the situation is even more significant where land which has been appropriated was previously common good land. Where land is held by a local authority as part of the common good, it is not part of the normal estate of the local authority. Common good land is to be held by the local authority for the benefit of the local community and not for the benefit of the local authority. Unless authorised by the court, the local authority have duty to retain the land for the benefit of the community and to maintain the land in a reasonable condition for the use to which the community are entitled to put it. I do not repeat the legal authorities which provide clear support for these propositions but they were reviewed in *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69; 2012 SLT 944. For the Council to suggest that the land at Portobello Park would remain as common good land notwithstanding that it would be occupied by the school is to ignore the fact that if it remains as common good land then the Council have a duty to maintain that land for the benefit of the local community, in this case for recreational purposes. The

Council simply could not fulfil their obligation to maintain the land for the benefit of the community for recreational purposes if the land was occupied by the school.

7. The problem is that the Council and those advising them appear to believe that the common good status of land is simply a label which can be attached to it. That is not the case. Where land is part of the common good, the local authority in question have separate duties in respect of that land and unless the local authority can fulfil those duties then it is impossible to see how the land can remain as common good land.
8. Secondly, the suggestion that the school buildings would become part of the common good land gives rise to the same criticism. If the school buildings became part of the common good land at Portobello Park, then the buildings would require to be maintained for the benefit of the local community for public recreation. That is a practical impossibility while the school is occupied and functioning as a secondary school. Once again, those representing the Council do not appear to understand that common good land, including any buildings constructed upon it which are part of the common good, require to be maintained by the local authority for the benefit of the community and not for their own benefit, and that is the case even where they are performing a public function such as an education function.
9. In the course of his evidence, Mr Strachan emphasised that there were buildings which were part of the common good. That is not in dispute. Municipal buildings are a well-known category of common good property but the distinction is that municipal buildings have historically been held and maintained for the benefit of the community, that is to say for the administration of the affairs of the municipal authority. In the case of a secondary school and its buildings, such buildings are not being maintained for the common good purpose for which the land forms part as an asset of the community, but rather in order to fulfil the Council's statutory functions in relation to education. That is not the common good function for which the land at Portobello Park was conferred upon the local community.
10. This means that if section 1 of the Bill is intended to maintain the land at Portobello Park as part of the common good notwithstanding its appropriation for education purposes, then it remains my view that that cannot be so whether the proposed amended subsection (3) is added or not.
11. In Mr Strachan's evidence and in the Brodies letter it was said that the Group should

assist the Committee by proposing their own amendment. Whilst that is entirely reasonable in principle, the difficulty is that as far as I am concerned the concept upon which the Council are proceeding is unjustified as a matter of law, and there is no amendment of which I can conceive which would change that position. If the Council were to accept that once the land at Portobello Park had been appropriated, it would cease for all time to be part of the common good, then that would avoid the problem but that is not the position which the Council are adopting.

12. In the Brodies letter, it is stated that when I appeared before the Committee on 9th October 2013, I myself suggested that the issue could be resolved by an amendment. This is not the case. In the appropriate passage of the evidence, the Convener referred me to the fact that in their evidence on 11th September 2013, the Council had said that the land would remain “inalienable common good land following any appropriation”. I replied as follows:

“I have read that evidence. I confess that I find it slightly difficult to understand, although I do not think that this is a situation in which a suitable amendment could not resolve the issue. I start by accepting that, but the position is slightly unclear.

At various points in the court proceedings, it was unclear what the council thought would be the status of the land on which it would build the school, if we assume that it could overcome the hurdles to doing that. The answer to which the convener referred might be read as suggesting that, despite a school having been built on the land, it would remain common good land. The alternative is that the remainder of the park—by and large, the golf course—is not affected by the bill and will therefore remain as inalienable common good land.

I am sorry if I cannot help the committee much further. There is uncertainty as to what the council thinks the status of the land to which the bill applies will be, if it appropriates the land and builds a school. My legal view—my opinion was to this effect—is that the land will cease to be common good land. As I have said, conditions could be imposed and amendments could be lodged that would limit what could be done with it. I do not dispute that. However, a slight concern has been raised in my mind that the council is not absolutely sure what the status of the land will be when the bill is passed, if it is passed. I am sorry if my answer is less than helpful.”

Quoting from that passage, my opinion at that time was, and it remains, that “if it appropriates the land and builds a school [m]y legal view... is that the land will cease to be common good land.” I then referred to possible amendment by saying that “conditions could be imposed and amendments could be lodged that would limit what could be done with it”. As will be apparent, my reference to amendment was in a situation where it was being accepted that the land would cease to be part of the

common good and it may be possible to conceive of steps which might be taken in the Bill to prevent or limit the onward transmission of the land in the event that it ceased to be used as a school. But so long as the Council maintain that the land and the school building will remain as part of the common good (whether alienable or inalienable), it is my position that the Council are proceeding upon a legal impossibility and there is no amendment which can cure that.

**Roy L Martin QC,**  
26th May 2014.