

**CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL COMMITTEE  
CONSIDERATION STAGE**

**Promoter to Convener following evidence session on 7 May 2014**

At the evidence session on 7 May 2014, and in discussions with the Committee clerk following the meeting, the Council's witnesses undertook to provide certain further information in writing in respect of questions posed by the Group 1 witnesses and Committee members. There were also some issues raised in the course of that evidence session that the Council believes would benefit from further clarification.

The Council's comments on each issue are provided below. Copies of or links to the documents referred to have also been provided with this letter.

**1 Funding of the Park reinstatement costs**

At the evidence session of 7 May 2014, Diana Cairns asked Mr MacIntyre if he knew which fund paid for the work to reinstate the Park following the exploratory archaeological works (see column 348 of the Official Report). Ms Cairns asserted that payment (which she said amounted to £13,000) had been made from the Council's common good account.

Mr MacIntyre replied (column 349) that the money had come from the project budget as he had instructed. However, he undertook to check the position and confirm that that had indeed happened. The Council has checked the position and can confirm that the remediation works (amounting to £13,468, and invoiced on 28 June 2013) were indeed fully funded from the Portobello High School project budget.

Ms Cairns nevertheless indicated that she had written evidence in relation to this issue that she would provide to the Committee, although we are not aware of that information having been provided so far. That may be a reference to the Council's response to an information request submitted by her seeking a breakdown of £13,243 expended on Portobello Park, which had been referenced in a report to the Council's Finance and Budget Committee on 29 August 2013. A copy of the Council's response to that request is enclosed. It is clear from that response that the costs about which Ms Cairns had asked concerned only the general maintenance of the Park and not the remediation works. If the assertion made by Ms Cairns was indeed based on the response to that information request, we cannot see how she

could have drawn the conclusion that these costs related to the remediation works. However, if Ms Cairns was referring to some other information then we look forward to receiving that, so that we might resolve any remaining misunderstanding.

## **2 Comment in planning report on reduced access to open space in the local area**

Ms Cairns also referred on 7 May (column 350 of the Official Report) to the following statement on page 11 of the report to the Council's Development Management Sub-Committee dated 4 December 2013: "*The proposal would result in an increase in the number of households in the locality which do not have access to the expected quantity and quality of publicly accessible open space, and the retention of approximately 0.6 ha on site for enhanced amenity space does not compensate for this.*" Ms Cairns suggested that this was inconsistent with previous statements made by Mr MacIntyre.

At the evidence session on 26 March 2014 (column 166) Mr MacIntyre referred to the map produced by the Council showing the areas of accessible open space in the vicinity of Portobello Park and explained that "*Portobello park is not coloured on the map. It does not count towards compliance with either standard, as it is classed as being only of fair quality*". Mr MacIntyre then stated (column 167) "*Because Portobello park does not count towards compliance with the standards that are set out in the council's open space strategy at the moment, siting the school on Portobello Park would not alter the position of any dwelling in relation to the present standards*".

Mr MacIntyre undertook at column 350 to clarify the position and advise the Committee. Having consulted with the Council Planning Department, we can confirm that Mr MacIntyre's evidence on 26 March 2014 was correct. The text in the 4 December 2013 report quoted by Ms Cairns must be considered in context, which is shown in the following extract from pages 10-11 of the report (available [here](#)) – the quoted text is shown underlined, with other key extracts highlighted in bold:

*"The [Council's] Open Space Strategy defines significant over-provision as existing when the loss of open space would neither create a deficiency in terms of the local and large greenspace standards, nor remove an **opportunity to address an existing deficiency or need identified in the strategy**. The local greenspace standard does not factor in size and type of open space, while the large greenspace standard recognises that people should have access to larger and higher quality*

*open spaces in meeting neighbourhood needs, especially good quality parks. The Open Space Strategy provides analysis of current open space provision based on these standards.*

*The area, in particular the neighbourhood to the west of the park, **does not currently meet either of these standards due to the park being below the required quality** (the Open Space Audit records the quality as being 'fair'). To resolve this deficiency, the improvement of the park is identified in the Open Space Strategy Action Plan for the Portobello and Craigmillar Neighbourhood Partnership Area. The loss of the greater part of the park would remove **an opportunity to address these deficiencies**. The proposal would result in an increase in the number of households in the locality which do not have access to the expected quantity and quality of publicly accessible open space, and the retention of approximately 0.6 ha on site for enhanced amenity space does not compensate for this.*

The text quoted by Ms Cairns concerned the loss of an opportunity to address existing deficiencies, rather than to a change in the existing position of any dwelling relative to the Council's open space standards. There is therefore no inconsistency between that text and Mr MacIntyre's evidence on 26 March 2014, which concerned the current position and confirmed that because Portobello Park does not currently meet either of the standards for open space, siting the school on Portobello Park would not change the current position of any dwelling relative to the Council's open space standards.

In any event, it should be noted that the report to the Development Management Sub-Committee concluded at page 12 that "there are clear benefits to the local community from the replacement school which outweigh the loss of open space".

### **3 Whether the Council can take steps to guarantee free access to the pitches**

Alison McInnes MSP asked the witnesses for the promoter whether the Council could give a guarantee in perpetuity about its commitment to making the pitches at the new school freely accessible for residents in the local area in perpetuity (column 374). Mr MacIntyre undertook to consider whether there was anything further the Council might do in relation to the decision it has already taken to guarantee that access in perpetuity.

The provision of free access to the pitches by residents of the Portobello area in perpetuity was confirmed by the Council's elected members 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 has also confirmed to the Private Bill Committee on a number of occasions that this commitment will be implemented, and this letter can be treated as further confirmation of that. As Mr MacIntyre noted in his evidence on 7 May (columns 355 and 374), there is no reason to believe that future elected members of the Council would renege on that commitment, or in particular to believe that the Council's Children and Families Department would recommend such a course of action.

However, having considered the matter, there is no unilateral action the Council could take to bind itself to that arrangement in perpetuity. The same principle applies to a local authority in relation to such matters as applies to the UK and Scottish Parliaments, in that it is not possible for one council administration to bind its successors. The Council has nevertheless considered whether there are any other mechanisms by which a legal obligation might be placed on the Council to maintain free access to the pitches by local residents in perpetuity.

We considered the possibility of extending the agreement with Fields in Trust to include the pitches, with incorporation into that agreement of a charging structure for the booking of the pitches (including rules on free access). However, we believe there would be practical difficulties in giving effect to any such agreement. For example, we anticipate it would be difficult for Fields in Trust to oversee and enforce a charging structure for booking the pitches, as that would not be within their usual purview and also because the applicable charge would only apply to certain people and not others (i.e. those resident in the local area) and the charge would also likely vary over time. Accordingly, the Council does not consider that this option would be practicable or would adequately address the issue Ms McInnes raised.

We have also considered whether there are any unilateral measures we might adopt that would oblige the Council to make the pitches bookable for free by local residents in perpetuity. The options considered are similar to those considered in relation to the replacement open space to be created on the existing combined site of Portobello High School and St John's RC Primary School, including the use of a title condition over the land and lease or lease-back arrangements (e.g. leasing the land to a third party, who would sub-lease it back to the Council subject to a clause in the

lease that the pitches would be freely bookable by the local community). The Council's analysis of those options in respect of the replacement open space was set out in its letter of the Convener of 31 January 2014, and the same considerations would apply in relation to the pitches. For the same reasons as were set out in that letter, plus the fact that any disposal of land at the Park to a third party would require the consent of the Court, the Council has concluded that none of these alternative options would be viable in guaranteeing the proposed free access to the pitches in perpetuity.

We also do not believe it would be possible to amend the Bill to include a provision about the free access to the pitches. Such an amendment would be inadmissible for broadly the same reasons that an amendment to the Bill relating to the replacement open space would be inadmissible, as set out in the Council's letter to the Convener of 31 January 2014. In the same way that an amendment relating to the existing school site would not relate to the status of the Park and would therefore be outwith the scope of the Bill, so an amendment relating to the free access to the pitches in perpetuity would be outwith scope as being unrelated to the purpose of the Bill. The Council therefore does not intend to propose such an amendment to the Committee. However, if any Committee members take a different view on admissibility and would like to propose an amendment in relation to pitch access, then we would of course be happy to consider the terms of a draft amendment.

Ms Connelly also referred to pitch access in relation to a report of 10 December 2013 to the Council's Education, Children and Families Committee (column 353). A copy of that report can be found [here](#). Ms Connelly quoted from that report, but the text she quoted was taken both out of context and out of sequence.

The report noted that “[p]rogress is being made in the development of a revised scheme of letting charges for use of school premises. **It is proposed that a revised scheme of charges would be applied systematically across the city and take account of council priorities to tackle inequality, poverty and disadvantage**” (paragraph 2.24, with the text Ms Connelly quoted shown in bold; the text she quoted about online bookings appeared earlier, at paragraph 2.15). This quote was preceded by an outline of the inconsistent charging approach that exists in some of the city's schools at present. The proposals set out in the report are therefore intended to improve, not restrict, community access to school facilities across the city.

Ms Connelly suggested that the absence of an explicit reference to exceptional arrangements at Portobello High School was indicative of a lack of commitment to those arrangements on the Council's part. This was entirely incorrect; the exceptional arrangements that would be put in place at Portobello High School are already the subject of an express Council decision (as Mr MacIntyre noted in his evidence) and are in any event dependent firstly on the Bill being enacted so that the project can proceed and secondly on the new Portobello High School actually being constructed and brought into operation, which would likely not be until August 2016. Moreover, the general revised scheme of charges would apply at Portobello High School when those residing outside the local area sought to book the facilities, as they would not be covered by the exceptional arrangements (these are the "circumstances" to which Mr MacIntyre referred at column 354 and, since that has always been the proposed arrangement, do not constitute a "very grey area" as Ms Connelly suggested). Nothing should therefore be inferred from the absence of a reference to the access arrangements at a new Portobello High School in that December 2013 report.

For the avoidance of doubt, however, the Council's Children and Families Department has nevertheless taken steps to ensure that the arrangements that would be put in place for Portobello High School, if it is built on Portobello Park, are expressly noted in the most recent report on community access to schools. That report is available [here](#) and will be considered by the Education, Children and Families Committee on 20 May 2014. We trust that will address Ms Connelly's apparent concern about the terms of the previous report.

#### **4 Further points of clarification / correction**

In addition to the issues on which the Promoter undertook to provide further information, there are a number of points arising from the last evidence session which the Promoter would like to clarify.

##### **(a) Disclosure of Counsel's Opinion of August 2008**

Ms Connelly suggested in her concluding statement on Category 5 (at column 339) that Counsel's opinion of August 2008 had been "hidden" by the Promoter, that it "was not withdrawn" and that its release in April 2014 in response to an FOI request may have been "an accident", which Ms Connelly had deduced by reference to other information released at the same time to which redaction had been improperly applied. None of those statements are correct.

As Mr MacIntyre explained in evidence (column 341), the opinion was not “hidden” but rather was superseded by a later opinion, also authored by Malcolm Thomson QC (in the later case, alongside Sarah Wolffe QC).

The suggestion that the earlier opinion was “not withdrawn” reveals a misunderstanding of the nature of Counsel’s role. Where Counsel has provided legal advice, and then on revisiting the issue provides different legal advice, the later opinion will take precedence. There is no requirement on Counsel to formally “withdraw” the earlier advice. The fact that the later opinion reaches a contrary view will be sufficient to render the earlier opinion redundant.

The opinion was not disclosed by accident. It was released because it fell within the scope of the relevant FOI request and was specifically referenced in the covering letter. Had the Council intended to withhold the information, it would have been obliged under FOI legislation to confirm that in the covering response and to specify the statutory exemption on which it was relying to withhold the information.

#### (b) Proposed decant to Holy Rood RC High School

Ms Connelly referred (at column 340) to Mr MacIntyre’s previous evidence to the Committee on 23 April 2014 and his response to a question from Bill Flockhart, witness for Group 3, relating to the possibility of using Holy Rood RC High School to decant pupils from Portobello High School to allow it to be rebuilt on the existing site. Ms Connelly suggested that Mr MacIntyre’s response was an “*inaccuracy about the assessment of alternative options*”. Mr MacIntyre’s evidence on 23 April on that issue (column 286) was that the decision not to use Holy Rood RC High School as decant accommodation was taken prior to him joining the Council in mid-2008. Ms Connelly suggested on 7 May that that was incorrect, as “*the old Holy Rood high school was not vacated until summer 2009, and it was demolished the following year*”.

A decant to Holy Rood RC High School would only have been a relevant option if a rebuild on the existing school site had been identified as the preferred option by the Council. The outcome of the statutory consultation, which considered three options for the location of a new Portobello High School, was reported to Council on 21 December 2006; a copy of the report can be found [here](#). One of the options considered was a rebuild on the existing school site, extended to include the site of St John’s RC Primary School. However, that was rejected in favour of the option to build on Portobello Park. The question of a potential decant to Holy Rood RC High

School was nevertheless addressed in the December 2006 report. On page 12 of the Appendix to that report (the minutes of a consultative meeting held on 3 October 2006), the question was noted “ Q33 *The Parent of a child at Portobello High School expressed the view that he was inclined to support Option A but had reservations. He asked whether consideration had been given to using Holyrood High School as a decant option?*” The response was then noted “*The Director of Children and Families confirmed that Holyrood High School had been considered as a decant option relative to replacement of Portobello High School. The Director also explained however that the timing of the two projects made that difficult if not entirely impossible and that that option had eventually been discarded as impractical*”.

Furthermore, the demolition of the old Holy Rood RC High School buildings was instructed via the same PPP contract as the construction of the new school building, which was signed in April 2007. The timetable for demolition of the old school was therefore set at that time, before Mr MacIntyre joined the Council (in July 2008) and before funding for the new Portobello High School was identified in 2009 under the Wave 3 Programme.

Mr MacIntyre's evidence on 23 April was therefore correct.

It may also be worth noting that the new Holy Rood RC High School building was constructed on the existing school site via a phased rebuild. The process was captured on Google Maps, which in the birds-eye view shows the site partway through the construction process (see [here](#)) and in the 45° view shows the finished site (see [here](#)). The demolition of the old school buildings was required to complete the development of the new school. Using the old school buildings for a decant of Portobello High School would have required those buildings to remain in place for much longer than was in fact the case, and so would have caused both unacceptable delay to the completion of the new Holy Rood RC High School and also significant issues regarding the ongoing operation of the new school (e.g. a lack of both parking and provision for bus stance / turning). In any event, the site would have been far too small for both schools to operate there at the same time without significant disruption.

#### (c) Dates of the Park usage survey

Ms Cairns asked Mr MacIntyre when the Park usage audit was carried out and whether it had been carried out at a time when people would have been at work or



school (column 346). Mr MacIntyre said that the audit was carried out in the middle of 2009, but that he did not have the other information to hand.

The report (prepared by Ironside Farrar, a copy of which has previously been provided to the Committee but which can for ease of reference be found [here](#), from page 11) was based on a total of 10 assessments, each lasting one hour and taking place on a range of different days. The details of these visits are shown on page 12 of the report. Six of the visits took place outside normal working hours and seven outwith normal school hours (not six as Ms Cairns claimed). Five visits were at the weekend, one on a Friday evening at 6pm and one on a Friday morning on the first day of the school holidays (Friday 3 July 2009, the last day of term for school year 2008/09 being Thursday 2 July 2009). It is worth noting that the visit on that first day of the school summer holidays, when the weather was 'Bright, sunny and warm', recorded only 13 visitors to the Park of whom 12 were dog walkers.

The assessment times covered a mixture of weather conditions and times of day. Where the report recorded the weather as wet, this signified that there was rain at some point during the hour visit and not necessarily that the whole hour was wet. The visits were undertaken on typical normal use days over the weekend and during the week, at what would be expected to be peak times of use. It was necessary to record use in a range of weather conditions, to ensure that the results were not skewed by a period of particularly good or particularly bad weather. Ironside Farrar are professional environmental consultants who are experienced in carrying out audits of this type, and who are well-placed to decide how to obtain a sample representative of typical use.

#### (d) Fields in Trust protection

At column 361 of the Official Report, Iain Strachan was asked by Stephen Hawkins whether he agreed "*that you will find very few people who would not say that Fields in Trust status is an extra layer of protection, but it is not as good as the protection provided by, for example, common good status or an act of Parliament*". Mr Strachan indicated that he did agree with that statement.

However, having reviewed the Official Report Mr Strachan now realises that he misunderstood Mr Hawkins' question. Mr Strachan's answer to Mr Hawkins was intended as an explanation as to why he, and the Council, take the view that Fields in Trust is the best protection available in the circumstances, and in some respects offers better protection than common good status (in particular in relation to the

disposal of land), albeit that the mechanisms for protection operate in different ways. Mr Strachan and the Council apologise for the misunderstanding.

(e) Promoter's threat to sue PPAG

In his closing statement, Mr Hawkins claimed (at column 377) that the Council had "threatened to sue" the objectors. The Council believes it is important to correct this inaccurate statement for the record. When Lady Dorrian ruled in the Council's favour in March 2012 the Council advised that it intended to recover the expenses it incurred in defending the court action raised by PPAG, in accordance with the general approach to litigation in Scotland that the expenses of an action should follow success. When Lady Dorrian's decision was overturned in the Inner House, PPAG sought and were awarded the expenses of the action on the basis of the same principle.

**5 Additional documents requested by the Committee**

The clerk to the Committee has contacted the Council subsequent to the evidence session to request that copies of the following documents be provided to the Committee:

- The Secured by Design report referred to by Ian Alexander in evidence; and
- Report to Council on Community Access to Schools, dated 10 December 2013.

The report to which Mr Alexander referred (at columns 356 and 357) was prepared by Lothian and Borders Police. Mr Alexander said in evidence that the report was in the public domain, but has since realised that the report is in fact restricted and so has not been made public. Mr Alexander and the Council regret that error, but have now confirmed with Police Scotland that a copy of the report can be provided to the Committee (and published online if the Committee is minded to do so). A copy is therefore attached.

A copy of the report on Community Access to Schools is available at the link provided in section 3 of this letter, together with an explanation as to why the inferences drawn by Ms Connelly in respect of that report are inaccurate, and confirmation that the Council has for the avoidance of doubt included a reference to the proposed Portobello High School arrangements in the latest report on this issue to the Education, Children and Families Committee.

We hope that this additional information will be of some assistance to the Committee, but please do let us know if we can provide any further information. We are currently collating a response to the 47 additional written questions submitted by the Group 1 objectors, and will provide that response to the Committee as soon as possible.

15 May 2014