

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

**Correspondence from Promoter to Portobello Park Action Group following Oral
Evidence Session on 23 April 2014**

We are instructed by the City of Edinburgh Council (“the Council”) to write to you in your capacity as Chair of Portobello Park Action Group (PPAG), which is the named lead objector for the first Group of objectors to the Bill, in relation to certain submissions made by the Group 1 witnesses to the Bill Committee on 23 April 2014.

Legal effect of the Bill on the future status and use of the Park

The submissions made by the Group 1 witnesses in respect of this matter were based on the opinion Roy Martin QC produced for PPAG, which was provided to the Council on 22 April 2014 and which concerned in particular the efficacy of the draft amendment to the Bill that the Council proposed in the letter of 31 January 2014 from the Council’s Director of Children and Families, Gillian Tee, to the Committee Convener. This letter was forwarded to all the objectors to the Bill.

You will be aware that, at the oral evidence session of 23 April 2014, Billy MacIntyre expressed the Council’s concern about both the late provision of Mr Martin’s opinion and the appropriateness of raising the issue before the Committee at that stage of the process. You will also be aware that the Convener indicated that the Committee was not at this stage concerned with the content of any amendments to the Bill, which would instead be considered at phase 2 of Consideration Stage. The Convener also confirmed that there will be no opportunity at that phase to give evidence on amendments.

The Council’s concerns over the late provision of Mr Martin’s advice, and the relevance of the amendment issue to this phase of the proceedings, arise particularly in light of Ms Tee’s letter of 31 January 2014 inviting objectors to contact the Council directly if they wished to raise any concerns about the terms of the amendment proposed therein. In particular, that letter expressly advised that the Council would be happy to consider any proposals for revising the amendment so as to better achieve the intended outcome and address objectors’ concerns.

Such discussions between promoter and objector would be entirely consistent with both the purpose and practice of the Consideration Stage of the Private Bill process. The Scottish Parliament's Guidance on Private Bills states at paragraph 5.26 that "promoters and objectors are encouraged to enter into early dialogue to seek resolution of objections whenever and wherever possible", and at 5.42 that "objectors are encouraged to include within their [written] evidence details of amendments they would like to see made to the Bill".

It was therefore disappointing that the Group 1 objectors did not provide anything in respect of this issue until the day before the Group was to appear before the Committee, and particularly disappointing that Mr Martin's opinion (presumably reflecting the instructions he was given) did not include any proposal for how the Council's proposed amendment might be revised (or indeed replaced) so as to address the concerns he identified. This is despite Mr Martin stating to the Committee on 9 October 2013, in respect of the land's future status, that "I do not think that this is a situation in which a suitable amendment could not resolve the issue" (Col. 75 Official Report, 9 October 2013). Charles Livingstone, a solicitor representing the Council, had given evidence to the Committee in similar terms at an earlier session (Col. 27 Official Report, 11 September 2013), and Gerry Moynihan QC made a similar comment in the opinion he provided on the issue to the Council (which was then provided to and published by the Committee).

The Council's proposed amendment is expressly designed to put beyond doubt the intention underlying the Bill, namely that the Bill should not result in the Council being able to appropriate the land further, nor confer any power on the Council other than the very specific and limited authority to use the Park for educational purposes. It was intended to address concerns raised by a number of objectors in your Group (among others) about the status of the Park if the Bill were to be enacted and the Park was then appropriated, and in particular to comply with the Committee's recommendation at paragraph 52 of its Preliminary Stage Report 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".

We do not agree with Mr Martin's assessment of the proposed amendment, and are confident that the amendment would address this issue. However, we do not believe it would be a productive use of time or resources to enter into a legal debate with Mr Martin about whether that is the case, and nor do we believe that simply providing competing legal

opinions would be likely to assist the Committee in its consideration of the Council's proposed amendment. Rather, if Mr Martin and by extension the Group 1 objectors continue to have concerns in relation to this issue then, rather than simply criticising the Council's proposed amendment, the constructive way to proceed would be for you to propose an alternative amendment with which you would be content.

The Council remains content to consider and engage with any revisions to our proposed amendment, or indeed any alternative amendment, that your Group may wish to suggest. We are therefore contacting you directly, as lead objector for Group 1, to invite you to make specific proposals for revising the draft amendment so that it would in your view better achieve the stated intention of the Council in respect of the future use of the land, and thereby address your concerns on this issue. We look forward to receiving your proposals.

Legal advice provided by Malcolm Thomson QC in 2008

At the Committee meeting of 23 April 2014 Alison Connolly tabled, as further evidence, a legal opinion from Malcolm Thomson QC dated 22 August 2008 which was recently released by the City of Edinburgh Council in response to a Freedom of Information request. Ms Connolly suggested that this was relevant to "the Council's previous and ongoing risk approach".

The Convener advised that Mr Thomson's opinion was not relevant to the matters being considered by the Committee. While the Council agrees entirely with that position, we nevertheless believe it is necessary to clarify the status of that opinion with you in light of the apparent misunderstanding about its relevance to the Council's December 2008 decision to proceed with the project, and the sequence of events leading to that decision.

While Malcolm Thomson QC did indeed produce an opinion on 22 August 2008 which noted what was his view at that time (i.e. that appropriating the Park for education purposes would not have been without legal risk), he was also one of the two QCs who provided the subsequent opinion on 19 November 2008. After further consideration of the issue and, in particular, consultation with Sarah Wolffe QC (now Lady Wolffe, and the co-author of the later opinion), Mr Thomson changed his view from that expressed in his August opinion to that expressed in the November joint opinion. That earlier opinion was therefore superseded, and so was not relevant to the decisions subsequently taken by the Council.

PPAG already has a copy of that later joint opinion and so will be aware of its authors and its conclusion (at page 9) that "so long as the proposed appropriation of part of the Park

land is for the purposes of 'any function' [...], the Council may lawfully do so in exercise of the power conferred upon it in section 73 of the 1973 Act". While this view ultimately turned out to be incorrect, it was on the basis of this robust opinion provided by Mr Thomson and Mrs Wolffe that the Council's elected members took the decision on 18 December 2008 to proceed with the project (the relevant report to Council can be found at:

http://www.edinburgh.gov.uk/download/meetings/id/6550/wave_3_schools

This letter has been copied to the other objectors in Group 1 for whom the Council has an email address. They do not hold a personal email address for Mr Hawkins, so we should be grateful if you would ensure that this letter is forwarded to him. We have also copied the letter to the Private Bills Unit of the Scottish Parliament, with a request that it be made available on the Committee's webpage so that the Council's positions on the issues raised above are placed on the record.

Brodies LLP on behalf of the Promoter
30 April 2014