

**Opinion of Counsel  
for  
City of Edinburgh Council**

**City of Edinburgh Council (Portobello Park) Bill**

1. I am asked to respond to the Opinion of Mr Martin Q.C. dated 23 June 2013.

**Precedent**

2. It may be helpful to begin by pointing out that the City of Edinburgh Council (Portobello Park) Bill addresses a quite specific problem deriving from a gap in the current legislation: the Local Government (Scotland) Act 1973, section 75(2). As interpreted by the Inner House of the Court of Session in *Portobello Park Action Group v Edinburgh Council* 2013 SLT 1137 that provision enables a Council to seek authority from the court for the disposal of common good land that may be inalienable but not for its appropriation. The term 'disposal' covers sale or lease of land. So a Council wishing to sell or lease inalienable common good land to a third party for any purpose can make an application to the court for authority to proceed with the transaction. The term 'appropriation' refers to the internal transfer of land from one Council function to another without altering either ownership or possession of the land. It may be thought that, of the two, 'appropriation' causes less invasion of public rights because the land remains under the ownership of the Council and in its possession but the ruling of the Court in the *Portobello* case is that no application can be made to the court under section 75(2) for authority to make that more limited transfer.
3. There is reason to believe that this gap in the legislation was not intended. Section 75 of the 1973 Act was not new. It can be traced back to section 171 of the Local Government (S) Act 1947. Like the current section 75, the original section 171 concentrated on 'disposal' but the textbook *Hutton on The Local Government (Scotland) Act 1947* (published in 1949), contained this statement at page 271:

"If the Secretary of State, under sub-sec. (2), and the court under sub-sec. (3), can authorize the council to 'sell or feu' the lands to which those sub-sections

respectively refer, they can presumably also authorize the town council to appropriate or let or excamb such lands.” (emphasis added)

4. To reinforce the conclusion that the gap was unintended one need only reflect on what might have happened had the possible use of Portobello Park for educational purposes arisen in the two decades from 1975 to 1996 when (a) the ownership of the land as a recreational asset vested in the District Council and (b) education was a function of Lothian Regional Council. The possible use of the land for educational purposes would have involved a transfer of ownership or possession by sale or lease from the District Council to the Regional Council, which would have been a ‘disposal’ for the purposes of section 75(2) of the 1973 Act. Accordingly, at that time an application to the court could have been made to authorise the transaction. That can no longer be done because we now have unitary local authorities and the change of use from recreation to education is now merely an ‘appropriation’ and not a ‘disposal’. It may be thought odd that a means existed to sanction the very same scheme at a time when local government functions were divided between two Authorities but no means exists now that the functions vest in a single Authority.
5. Be that as it may, there is a gap in the 1973 Act and this proposal falls into it. The Council has accordingly taken the matter to the Scottish Parliament for authority to be granted under the Bill.

#### **Parallels with section 75(2)**

6. Two parallels can be drawn between the Parliamentary process applicable to the Bill and the court procedure under section 75(2).
7. Firstly, applications to the court under section 75(2) of the 1973 Act are not a mere formality. The court (Sheriff Court or Court of Session) can and does hear objections and requires to be satisfied that there is a sufficient justification for setting aside or qualifying the public’s right in the common good land in order to permit whatever ‘disposal’ is being proposed. Because section 75(2) does not apply to an ‘appropriation’ the Council cannot make an application to the court but in presenting this Bill to the Scottish Parliament the Council is subjecting its proposal to the same degree of scrutiny, in this instance by elected Members of

the Scottish Parliament, as it would have received from a judge had the matter gone to court. The Council's task is essentially the same: to persuade the elected Members of the Scottish Parliament that it has sufficient justification for its proposal. Objectors have the same right to be heard and not only is the Scottish Parliament addressing objections in fact that is the very context in which Mr Martin's Opinion now requires consideration.

8. Secondly, section 75(2) permits the court to impose such conditions, if any, as it sees fit. If, for example, a Council wanted to lease land temporarily for a specific purpose it would be possible for the court to impose a condition that when that purpose has been served the land be restored to its original common good use. The parallel with Parliamentary procedure is that if, as is the case here, the Council wants authority for a limited purpose (i.e. to build a new school), the Scottish Parliament could grant legislative authority subject to a condition restricting that authority to that specific purpose. In court proceedings the condition would appear in the terms of the court order (i.e. the interlocutor). In Parliamentary procedure the condition has to be appear in the Act.

### **Mr Martin's Opinion**

9. It is essentially that second point that goes to the heart of Mr Martin's Opinion.
10. The Council intends a quite specific use of the land as the home of a new Portobello High School and in paragraph 15 of the Promoter's Memorandum it is explicitly stated that the Council intends that there be no other qualification to the common good status of the land. The Council seeks authority only to 'appropriate' the relevant part of the land (the part that is within the definition of 'Portobello Park' in section 3(1) of the Bill) for an educational purpose and intends that otherwise all of the land shall remain subject to the existing restrictions on its 'alienation' (a generic term that covers both 'disposal' and 'appropriation') as common good land
11. In paragraph 6 of his Opinion Mr Martin accepts that section 1 of the Bill respects the principle that the interference in public rights which the Bill is proposing is the least necessary for the purpose being served. Thus far he and the Council are at one and there is no possible criticism of the Bill.

12. The issue that Mr Martin raises is whether the Bill achieves the intended result of restricting the use of the relevant part of the land to the specific educational purpose that it seeks to promote. He questions whether, by releasing the relevant part of the land for that specific purpose, the Bill may have the unintended consequence that the relevant part of the land is available to the Council for use for any purpose whatsoever under section 73(1) of the 1973 Act or, for that matter, for sale for any purpose whatsoever under section 74(1).
13. Section 73(1) of the 1973 Act permits land vested in a Council for the purposes of one function (for example, recreation) to be appropriated to another function (e.g. education). Section 74(1), on the other hand, empowers Councils to dispose of (or sell) any land held by it.
14. The Inner House held in *Portobello Park Action Group v Edinburgh Council* that the general powers of appropriation in section 73(1) and sale or disposal in section 74(1) do not apply to inalienable common good land, so the risk that Mr Martin contemplates would arise only if the Bill entirely frees the relevant part of the land from its existing status as inalienable common good land.
15. As I have already said, if it had been possible to raise this matter in court under section 75(2) of the 1973 Act, the court could have removed that risk by a condition or conditions restricting the authorised use to the specific proposal in hand and providing that the land otherwise be used for its original common good purpose only. The Scottish Parliament can itself do what the court could have done and impose a condition to the same effect in the Act. That is the objective of section 1(2) of the Bill.
16. The issue is whether section 1(2) of the Bill achieves that objective. That is a question of interpretation.
17. There are well established principles of interpretation. I begin with a recent statement by *Lord Reed* in the Supreme Court case of *M v Scottish Ministers* 2013 SLT 57 at paragraph 42:

“It has long been a basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act which conferred it: see for example *Padfield v Minister of Agriculture, Fisheries and Food*.”

That statement was made in the context of a case concerned with Mental Health legislation but is of general scope. Where legislation confers a power on a public authority (in our case a power on the Council to use the relevant part of the land for educational purposes), the power must be construed in accordance with the object of the Act. In this case the object of the Bill is solely to allow the land to be used for a school. That being so, section 1 of the Bill would be construed consistently with that object and as providing that the Council can only use the land for the specific purpose authorised by the Bill and for no other purpose. In other words the land does not slip in to sections 73(1) and 74(1) and thereby confer on the Council an unrestricted power of ‘alienation’ (by ‘disposal’ or ‘appropriation’). The means by which section 1(2) blocks the route to sections 73(1) and 74(1) is by providing that the inalienable status of the land is altered “only to the extent that the alienation in question consists of the appropriation of Portobello Park for the purposes of the Council’s functions as an education authority, including for the avoidance of doubt the Council’s powers under section 17 of the 1980 Act”. The words that I have underlined are clearly words of express qualification and mean that the inalienable status of the land is lifted “only to the extent of” permitting an educational use. That specific use apart, the inalienable status of the land remains and sections 73(1) and 74(1) do not apply.

18. Coming closer to home I would refer to paragraph 30 of *Lady Paton’s Opinion in Portobello Park Action Group v Edinburgh Council*, when she was considering the interpretation of sections 73-75 of the 1973 Act:

“Properly construed, do the relevant provisions of the 1973 Act have that result? In our opinion that question falls to be answered in the negative. By way of background, as acknowledged by the Lord Ordinary (Lord Maxwell) in *East Lothian District Council v National Coal Board* , the relevant statutory provisions must be construed with due regard to the pre-existing fiduciary obligations of a local authority with respect to common good land, and the corresponding rights of the local community to prevent encroachment. A relevant general presumption in that connection is that a statute does not

interfere with public or private rights without compensation, and where deprivation of common law rights is in issue a strict construction of statutory provisions will ordinarily be appropriate. Along similar lines, parliamentary legislation is presumed not to alter the pre-existing common law unless that is the subject of clear provision. In our judgment there is no obvious reason why general considerations of that sort should not equally apply to the rights of members of the community in common good land which a local authority hold for their benefit. At the very least one would expect to find some express provision to divest local inhabitants of long established and valuable rights.”  
(underlining added)

19. Each of the three formulations of general principle could be applied to the Bill but I find the third most directly applicable to the potential risk that Mr Martin identifies. Accepting that “parliamentary legislation is presumed not to alter the pre-existing common law unless that is the subject of clear provision”, I would observe that section 1(2) is the exact antithesis of a provision that clearly alters the pre-existing common law status of the relevant part of the land as inalienable common good land. On the contrary, section 1(2) says in terms that it confers a power of alienation “only to the extent that the alienation in question consists of the appropriation of Portobello Park for the purposes of the Council’s functions as an education authority, including for the avoidance of doubt the Council’s powers under section 17 of the 1980 Act”. Properly construed section 1 of the Bill provides that the land retains its common law status as inalienable common good land save for the limited exception of ‘appropriation’ to educational purposes.
20. For these reasons my opinion is that section 1 would be construed in a limited manner as authorising only the appropriation of the relevant part of the land for the purposes of locating the new Portobello High School. It would not be construed as opening the way, whether through sections 73(1) and 74(1) or otherwise, to any other use of the land inconsistent with its common law status as inalienable common good land. Section 1 provides that, subject only to the limited exception that the relevant part of the land may be used for the new school, the land will remain subject to the common law restrictions on inalienable common good land.

### **Final observation**

21. Given (a) Mr Martin's opinion, with which I agree, that section 1 of the Bill respects the principle that the interference in public rights which the Bill is proposing is the least necessary for the purpose being served and (b) the unequivocal statement in the Promoter's Memorandum that the Council intends a strictly limited exception to the status of the land as inalienable common good land, it may be concluded that we are here concerned with a technical drafting question and not a fundamental objection in principle to the Bill.
22. The first question is whether the Bill, as presently drafted, achieves the objective of providing only a limited authority to use the relevant part of the land for educational purposes while leaving the land (both the relevant part and the remainder which is beyond the definition of 'Portobello Park' in the Bill) otherwise subject to the law relating to inalienable common good land. My opinion is that it does for the reasons that I have given. It is for the Council, and ultimately the Scottish Parliament, to be satisfied that my opinion is correct.
23. However, if there be any doubt about the matter then that need not be fatal to the Bill. If there be any doubt whether, as presently drafted, the Bill achieves the intended result of a strictly limited authority that does not open the way to a wider power of 'alienation' under section 73(1) or 74(1) of the 1973 Act, the Bill could be amended to put the limitation beyond dispute.

THE OPINION OF

26 August 2013

Gerry Moynihan Q.C.