
OPINION OF SENIOR COUNSEL

for

Portobello Park Action Group

Re: The provisions of the City of Edinburgh (Portobello Park) Bill

2013

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Ref: FM/HC/PORT1/4

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Introduction

1. I refer to the letter of instruction dated 18th June 2013 on behalf of the Portobello Park Action Group (“the Group”) concerning the provisions of the City of Edinburgh (Portobello Park) Bill (“the Bill”). The Bill is being promoted by the City of Edinburgh Council (“the Council”) to permit the construction of a new Portobello High School on land at Portobello Park (“the Park”) which is inalienable common good land. It was held in the Inner House of the Court of Session in the petition for judicial review at the instance of the Group that a local authority such as the Council have no power to appropriate inalienable common good land by reference to sections 73, 74 and 75 which are contained in Part VI of the Local Government (Scotland) Act 1973 (“the 1973 Act”); see *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69; 2012 SLT 944 (the case is referred to hereafter as “*Portobello Park Action Group*”).
2. The effect of the Bill was discussed at a consultation held on 3rd May. In light of that discussion, I am instructed first to give my opinion in relation to the land at the Park ceasing to be part of the common good and then to advise on an additional matter.

The effect on the Park

3. Section 1 of the Bill is entitled “Status of Portobello Park” and it states:
 - “(1) Subject to subsection (2), for the purposes of Part VI of the 1973 Act Portobello Park is deemed to be land forming part of the common good of the Council with respect to which no question arises as to the right of the Council to alienate.

- (2) For the purposes of subsection (1), no question shall arise as to the Council's right to alienate Portobello Park 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..."

4. Section 2 contains consequential provisions including subsection (1) which permits the powers under Part VI of the 1973 Act to be exercised notwithstanding the terms of the Disposition of 1898 which brought about the status of the Park as inalienable common good land. Section 3 contains the interpretation provisions and defines "Portobello Park" as an identified area of land by reference to specified boundaries. The area identified is only the southern part of the Park upon which it is intended by the Council to build the new High School and what is referred to as "Portobello Park" does not include the area occupied by the golf course: see the Explanatory Notes which accompanied the Bill, paragraph 17. This means that where the Council make reference to the Park in the Bill and in documents related to the Bill, they are referring only to the part of the Park which is intended to be occupied by the School.
5. Although the way in which section 1 has been expressed can be said to be rather more convoluted than might have been expected, I have come to the opinion that it will achieve the purpose of the Council and that its effects on the Park can be ascertained. Subsection (1), when it becomes operative, renders the land to which it applies "land forming part of the common good... with respect to which no question arises as to the right of the Council to alienate." The effect of that would be to render that land directly subject to section 75(1) of the 1973 Act which would permit the Council to exercise the power of appropriation provided by section 73(1). That power of appropriation is unconstrained in the case of common good land to which no question arises as to its alienability and the Council would be free to appropriate it.

6. The power provided by section 1(1) of the Bill will exist only where the conditions set out in subsection (2) are satisfied. That will be the case where the Council intends to appropriate the land at the Park for their functions as an education authority under the Education (Scotland) Act 1980. These are the functions which the Council will be performing in promoting and constructing the new High School and they will be appropriating the land in fulfilment of those functions. Although that means that the circumstances in which section 1 will operate will be limited, they are nevertheless clear, and they respect the principle that the interference in public rights which the Bill is proposing is the least necessary for the purpose being served. The same may be said about the extent of the land which is subject to the Bill because that is only the area necessary for the construction of the School, and the remainder of the Park will be unaffected. Further, section 1 will operate only if the specified appropriation takes place. If the Council were to decide in due course not to construct the School on land at the Park, the status of all of the land at the Park would remain as it is.

7. In the event of appropriation as a consequence of section 1 of the Bill, the effect on the Park would be as follows. The land appropriated and upon which the School would be built would cease to be common good land, it would not be subject to any restriction in terms of the Disposition of 1898, and it would become owned by the Council by reference to their education functions. As long as they appropriated it for the purpose of their education functions, the Council would be free thereafter to deal with the land in the future as they saw fit, and could redevelop it, appropriate it to a function other than education, or dispose of it.

8. This may be said to provide one ground upon which the Bill can be criticised. The Council could appropriate the land at the Park which is the subject of the Bill for the purpose of their education functions, and thus remove the land from its inalienable common good status, and they would then be free to do something completely different with the land and without restriction. This might happen simply as a result of an unforeseen change of circumstances and without any

deliberate intention on the part of the Council in advance to use the powers of the Bill in a way not anticipated. It would, of course, be contrary to the objectives of the Bill which are set out in the Promoter's Memorandum which accompanied it but the Bill itself does not guarantee that the School will be built or that the land will remain within the Council's education functions once it has been freed of the prohibition against appropriation. Once the land had been appropriated for the purpose of their education functions, it could be appropriated again or disposed of by the Council for any purpose which they might decide at any time in the future by virtue of sections 73(1) and 74(1) of the 1973 Act.

9. As far as the remainder of the land at the Park is concerned, being the land which is not included in the geographical extent of the expression "Portobello Park" as defined in section 3, namely the golf course, that land will be unaffected by the Bill in any way. It will remain as inalienable common good land (as long as the Council do not decide in the future to dispute that status) and it will continue to be bound by the restrictions contained in the Disposition of 1898.
10. In relation to the future status of the land at the Park, the following is stated in the Promoter's Memorandum at paragraph 15:

"Accordingly, and having consulted extensively on the issue, the Council has decided to seek to have the status of the Park changed from 'inalienable' to 'alienable' by an Act of the Scottish Parliament, though only insofar as permitting its appropriation for the purposes of the Council's education authority functions. This will enable the Council to appropriate the Park as the site of the new Portobello High School under sections 73(1) and 75(1) of the 1973 Act, while ensuring that it remains inalienable for all other purposes. The Park will also retain its common good status. As a result, it Council will remain subject to restrictions on the uses to which it can put the area, and will remain unable to dispose of the land without first obtaining Court consent under section 75(2) of the 1973 Act."
11. Bearing in mind that in referring to "the Park" in the context of the Bill the Council are referring only to the part of the Park upon which the School is

intended to be built, this paragraph is difficult to understand. What is said in the first sentence and in the first part of the second sentence is correct because the passing of the Bill will permit the appropriation of the land at the Park by the Council for their education functions. But in my opinion it is not correct to say that this will occur “while ensuring that it [ie the land appropriated] remains inalienable for all other purposes”. Once the land has been appropriated for the purpose of their 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.

12. The fact that the administration of the land as common good land and the building of the new School would be incompatible was confirmed in the Opinion of the Court in *Portobello Park Action Group* where it was said:

“... the construction of the new High School would physically obliterate a substantial proportion of the southern section of the park, and... the community's use of the park for open space amenity and recreational purposes would suffer grave and permanent encroachment. The Council's plans do not appear to us to concern the management or administration of Portobello Park for public recreation and amenity. On the contrary, they involve appropriation of the land to a different function altogether, namely the construction and operation of a school.”

In passing, that statement by the Court may be said to be inconsistent with the assertion contained in paragraph 65 of the Promoter's Memorandum that the construction of the School “would... meet the needs of people who already use the Park”.

13. Further, there is no basis upon which it could be said that the land would remain “inalienable for all other purposes” as the Council have stated. That would be directly contradictory to the position of the Council in section 1(1) of the Bill

which is to render the land alienable so that it may be appropriated. There is no basis within the 1973 Act upon which a single area of land, such as the land which is to be the subject of the Bill, could be simultaneously alienable and inalienable.

14. It may be that paragraph 15 of the Promoter's Memorandum is badly expressed and what is being referring to is actually the land at the Park which is not included in the Bill, namely the golf course. If so, what is said about the status of that other land remaining as inalienable common good land is correct, but in that situation the paragraph does not explain clearly what the Council consider to be the position about the land which is subject to the Bill. If it is being implied that somehow the land which is the subject of the Bill would remain as part of the common good and that there would be restrictions upon its alienation even after appropriation, then in my opinion that would not be correct. Once the Council have appropriated the land, all of its common good and inalienable characteristics will cease.

Precedent

15. The additional matter upon which my advice is sought concerns the possibility that the passing of the Bill may be relied upon in the future as a precedent to justify similar legislation for the purpose of avoiding legal restrictions on local authorities or other public bodies. Although this is essentially a political consideration which may be pursued as a matter of submission before the Scottish Parliament and the Committee appointed to consider the Bill, it appears to me that it may be said to raise both a narrow and a broad issue.
16. The narrow issue is that if passed, the Bill will demonstrate a mechanism whereby local authorities can avoid their responsibilities in respect of inalienable common good land. As explained in the previous court decisions discussed by the Extra Division in *Portobello Park Action Group*, a local authority essentially holds the common good for the benefit of the inhabitants of their area and not for their own

purposes. As the Lord Justice Clerk (Thomson) said in the case of *McDougal's Trs v Lord Advocate* 1952 SC 260, at p 266, "the common good itself is the property of the citizens and the fiduciary element comes in because it is the duty of their elected representatives to administer it not for themselves but for their constituents." In *Waddell v Stewartry District Council* 1977 SLT (Notes) 35, at p 36, the Lord Ordinary (Wylie) said:

"... It is clear from the authorities... that property of this nature is extra commercium. It could not be sold without the authority of the court, because that would be to deprive the community of something which, as a community, they were entitled to have... If an authority cannot deprive the community of the use of property which is inalienable by disposing of it in the ordinary commercial sense of the term, or by making a gift of it, it would only be in accordance with the underlying principle that they could not deprive the community of its use by destroying it, except in the highly special circumstance of imminent danger to the public."

17. The effect of the Bill would be free the Council of those responsibilities and to deprive the community of an asset previously held by their local authority for the benefit of the community and not for the benefit of the local authority. In the future, other local authorities might use the passing of the Bill as a precedent to justify the appropriation of inalienable common good land for a whole range of purposes which they might say were in the public interest. As a result, the nature of inalienable common good land could be reduced to a status which was equal in practical terms to all of the other functions of local authorities, and legislation such as the Bill would be a practical way of making them effectively interchangeable and remove the special status which attaches to inalienable common good land. This would amount to the achievement of the practical purpose which was described by the Extra Division in *Portobello Park Action Group* as being inconsistent with the duties of a local authority towards their local community in respect of inalienable common good land: see the Opinion of the Court, paragraph [29]. As the Court said in the context of the argument which had been advanced on behalf of the Council that they were already entitled to transfer such common good land by virtue of the 1973 Act (the argument which

the Court rejected), the outcome would be that “for practical purposes the future of every piece of inalienable common good land in Scotland, notably public parks and other open space recreational and amenity provision, would be in jeopardy.” The same would be the result if local authorities could overcome their obligations in respect of inalienable common good land by the expedient of private legislation.

18. The broad issue in respect of precedent is whether the Scottish Parliament would wish to allow private legislation to be used for the purpose of rendering lawful conduct which is not only unlawful in terms of statute but, as in this case, has been declared to be unlawful after full consideration on its merits by the Inner House of the Court of Session which is the highest civil court sitting in Scotland. It is impossible to anticipate all of the circumstances in which a public body, or even a private interest, might rely upon the example of the Bill to say that they can justify legislation which would permit them to act in a way which would otherwise be unlawful because they have a sufficiently good reason why they should be entitled to do so.

THE OPINION OF

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23rd June 2013