

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

WRITTEN SUBMISSION FROM ANDREW C FERGUSON

Submitted in response to a request from the City of Edinburgh Council (Portobello Park) Bill Committee for written evidence, and to support oral evidence to the Committee on 11 September 2013

1.0 Executive Summary

- 1.1 The written evidence below sets out my response to the Committee's request for further information to assist them in their consideration of the Bill before them. Section 2 outlines who I am and how I came to be involved in common good law.
- 1.2 In section 3, the background to, and origins of, common good law are set out in more detail. Common good consists of a fund of money and assets deriving from the central fund formerly administered by burgh councils and which is now administered by the unitary local authorities in Scotland. The two main sources of common good land and buildings derive from either the original burgh charter or from grants and donations by land owners and philanthropists.
- 1.3 In section 4, situations where land can be regarded as common good land are discussed in more detail. It is stressed that the current case law, properly interpreted, means that a lot of land formerly held by burghs can be regarded as part of the common good. However, much of the property now held by unitary local authorities in former burghs may come from other sources - former district councils, regional councils, parish councils, or the acquisitions which have taken place since the advent of unitary councils themselves.
- 1.4 In section 5 the different categories of common good land are examined. Land which forms part of the common good may now be used for a number of things. It may be a landscaped area or a road verge. It may be grazing land. Buildings might be used for burgh chambers, other Council offices, houses, works depots or any number of other uses. Many of these will be alienable - in other words, although they are common good property, they can be sold or otherwise disposed of (including being put to another use by local authorities) without reference to court. The main types of common good land which are inalienable are:
 - land, which has, from time immemorial, been used for recreational purposes by the inhabitants of the burgh;
 - land or buildings which the magistrates had dedicated specifically to a municipal, i.e. public use, such as burgh chambers, or recreational space, where this use is still relevant; and

- land which has been granted to the magistrates for a specific municipal purpose on behalf of the inhabitants of the burgh. This was the case in the *Portobello Park* case.
- 1.5 The current legislation which sets out what local authorities can do with common good land is the Local Government (Scotland) Act 1973. The legislation allows local authorities to dispose of or appropriate for another use, common good land which is considered to be alienable. Inalienable common good land can be disposed of to a third party after the Council gets authority to do so from the court of session or the sheriff court. However, following the *Portobello* case, there is no provision to allow councils to appropriate inalienable common good land to another public use.
- 1.6 In section 7, the impact of the *Portobello Park* case on the work of local authorities in Scotland generally is further discussed. Whilst existing case law sets out how the court will look at a proposed disposal of inalienable common good land to a third party, there is now no way in which councils can appropriate such land to another public use, such as a school. The *Portobello Park* case is the first modern case to consider the issue of appropriation in any detail. Other, relatively recent cases, deal with similar situations in very different ways.
- 1.7 At section 8, the alternative options considered by the City of Edinburgh Council in order to achieve its objectives are examined. I conclude that none of the alternatives would be likely to be as quick or effective as the Bill.
- 1.8 At paragraph 9 I comment further on the circumstances which led up to the Bill and whether the issue confronted by the Council is one which has more general application. Given the current position with the school estate in Scotland generally, and the current Scottish Government's commitment to replacing schools which are no longer fit for purpose, it seems likely that this set of circumstances is likely to be repeated elsewhere in Scotland.
- 1.9 As set out in section 10, I do not consider it appropriate for me to offer comment on the detriment to and/or alternatives for persons affected by the Bill itself.
- 1.10 At section 11 I set out details of any current or previous involvement with the key issues raised by, or the subject matter of, the Bill.

2.0 Introduction

- 2.1 My full name is Andrew Cameron Ferguson. I am a solicitor and member of the Law Society of Scotland, having been admitted as a solicitor in 1987. From 1985 to 1989 I was employed by Pagan Osborne & Grace, Solicitors. In 1989 I joined Kirkcaldy District Council and have now spent the last 24 years of my career with that Council and their statutory successors, Fife Council. I would wish to stress at the outset that the views I give in this evidence are my own personal views from my experience of common good law and are not

intended to in any way necessarily reflect the official views of my employers, Fife Council.

- 2.2 I am the author of Common Good Law, published by Avizandum in 2006. This is currently the only law book which is specifically dedicated to the law of common good, although other textbooks such as Stair's Encyclopaedia feature sections on the subject. Common good law is what could be called a niche area and, in order to assist publication, funding came from two different sources: The Society of Local Authority Lawyers and Administrators in Scotland (SOLAR) and the Clark Foundation, a trust, which assists with legal research and publications.
- 2.3 I would wish to stress that, although SOLAR assisted the funding of the book, it did not at any time have any input into its content. I feel it also important to stress that my employers, Fife Council, although supportive of my writing the book in giving me time to pursue my research, at no time had any influence over its content. I feel it important to make this point as, in the past, a campaigner on various issues including common good has alleged that I was influenced by my employers in writing it. This is not the case, and the content of the book was written without reference to my employers.
- 2.4 I will deal with my past contact with this specific case and other persons who may have been involved in it in section 11. However, the Committee will no doubt appreciate that, whilst I attempt to give an objective view of common good law, its policy background and rationale, I have now for the greater part of my career been employed in local government and will inevitably have a local government perspective. I have always tried, wherever possible, to see the point of view of all parties concerned when giving advice to my employers.
- 2.5 My current job with Fife Council is as Manager (Committee Services). However, it is fair to say that I am still involved in common good issues in Fife, and will occasionally be consulted by others, particularly colleagues in other local authorities. I am a past President of SOLAR and have consulted fellow members on section 7, on the extent of possible effects of the *Portobello* case.

3.0 **Background to, and origins of, common good law**

- 3.1 The concept of common good stretches back into the Middle Ages and is tied irrevocably to the creation, by early medieval Scottish kings such as David the First, of burghs. Burghs were, in essence, an attempt to stimulate trade in a particular area by granting a settlement certain powers so that economic activity was channelled and focused on that area. A typical burgh charter would define the boundaries of the settlement; set out what powers the provost and magistrates (or "baillies") had; and also what obligations they might have. Typical powers would be to hold markets, and levy customs and duties on imports.
- 3.2 The creation of a burgh inevitably led to the need for some sort of administrative infrastructure, with a meeting place for the elected magistrates

of the burgh - frequently representatives of various trades or guilds; a customs house or other means of determining how goods were to be measured and assessed for duties; and a judicial infrastructure of some sort to allow the burgh to dispense its own justice. As customs and duties flowed into the burgh, they would become part of a central general fund, known as the common good. Given the communal nature of the enterprise, it was inevitable that, both by early legislation and custom, any such income, as well as any land held as part of the original grant of the Burgh Charter, were held on behalf of all the inhabitants of the burgh.

- 3.3 The important point to note here is that the common good fund was not, originally, some kind of ancillary fund which the locals only used for special projects. It was the equivalent of a modern local authority's general fund, and was used as such. It is also worth pointing out that much of the original land in the burgh charter was sold off to individual inhabitants and, without that happening, there could have been no development of modern towns such as Dunfermline or Kirkcaldy, the High Streets of which will originally have been part of the burgh charters.
- 3.4 That said, however, some of the original burgh charter land was clearly used by the early burgh councils for specific purposes. Some would be set aside for municipal buildings such as burgh chambers, jails, and so on. Other land would be dedicated to recreational uses - the most common being links which were left as open space for the playing of golf.
- 3.5 By the early 19th century, the Industrial Revolution had caused a number of tensions to the way in which burghs were administered. In the first place, the system of electing a Member of Parliament for each burgh had led to abuses, the elimination of which became part of the agenda for the Reform Act of 1832. Just as crucially, however, the advent of the Industrial Revolution had caused the rate of urbanisation throughout Scotland to increase, with consequent pressure on land in and around existing settlements, and particularly perhaps in burghs, where there had always been a focus on economic activity. Land which had previously been regarded as areas for recreation came under pressure for development, either for housing, or for industrial purposes. This led to an increasing number of cases in the 19th century about common good, where a lot of the present day principles regarding alienability can be seen in practice.
- 3.6 At the same time, the Industrial Revolution created a class of rich benefactors who were keen to provide land and facilities for recreation to inhabitants of burghs. Grants of land and buildings through the 19th and early 20th centuries formed the second wave of what is now held as common good land, with philanthropists such as Andrew Carnegie donating property to burgh magistrates, often under the specific provision that it be used for the benefit of the inhabitants of the burgh.

4.0 **Situations where land can be regarded as common good land**

- 4.1 The result of centuries of grants of land, and its dedication for various purposes, mean that the question of whether land located within a former burgh is common good land or not can be a complex mix of historical fact and legal interpretation.
- 4.2 The 1944 case of *Ruthin Castle* gave a basic formulation that any land held by a burgh which had not been acquired for specific statutory purposes (in other words, acquired under a statute such as the housing legislation for the purposes of building housing) or was not held in some form of “special trust” inevitably fell into the common good of the burgh. That is quite a wide categorisation and includes by default quite a lot of land in former burghs now held by local authorities.
- 4.3 It is worth mentioning, however, that not all land held by local authorities in former burghs will have come to it from the burgh councils. County councils, the former district councils, regional councils and other smaller historical entities such as parish councils will conceivably have contributed to a current unitary council’s overall landholding in a burgh. The only land which can be common good land is land which was previously held at some point by a burgh council.

5.0 **Relevant factors in determining whether common good land can be considered to be alienable or Inalienable**

- 5.1 As I have outlined above, common good land has been acquired by former burghs at various periods of history and for different reasons. Some of it will have been used for as long as anyone can remember for recreational purposes. Some of it will have been used, potentially for centuries, as an administrative building such as a town hall, burgh chambers, or some other well-known municipal purpose. Some of it will have been granted to the former burgh by individuals, for specific purposes which involved the community, such as public parks, swimming baths and so on.
- 5.2 On the other hand, using the formula set out in *Ruthin Castle*, a large proportion of former burgh land now held by unitary authorities will be common good without having been used for a specific purpose or having been dedicated to a specific use. Land may have been part of the original burgh charter but is now nothing more than a vacant landscaped area in the centre of town, a road verge, or a field which has been leased to a local farmer for grazing for some time. A common good building may be a former burgh chambers, but it might be any number of things, including a house, a former works depot used by the council as such for many years, or even an industrial unit. That does not mean the property is not held on the council’s common good account. However, it may mean that it is alienable - capable of being taken out of its existing use and sold, leased or used for another purpose.
- 5.3 The landmark case on which common good land is alienable and which is inalienable is generally considered to be *Murray - v - Forfar Magistrates*. This 1893 case concerned the Market Muir in Forfar, which the magistrates

proposed to lease. In that case, the court decided that there were basically three categories of inalienable common good land, which at that time simply could not be sold or otherwise disposed of by a burgh. These were:

- Land which had, from time immemorial, been used for recreational purposes by the inhabitants of the burgh;
- Land or buildings which the magistrates had dedicated specifically to a municipal, i.e. public, use, such as burgh chambers, or indeed recreational space; and
- Land which had been granted to the magistrates for a specific municipal purpose on behalf of the inhabitants of the burgh. This was the case in *Portobello Park*, where the disposition contained specific burdens that the whole of the area disposed was to be used for public recreational purposes.

5.4 Clearly the above definitions will include some major, well-known assets, whether buildings or recreational land, in many of Scotland's towns and cities. They will be easily identifiable, and their history and provenance well-known to local people. However, I would stress at this point two things.

5.5 Firstly, Fife Council's comprehensive review of its common good landholdings in the past few years has made it clear that a substantial proportion of common good property does not fall into any of the three categories set out above. The land and buildings involved, include all the types of uses I referred to in paragraph 5.2.

5.6 The second point I would make is that, recognising that an absolute rule that inalienable common good land could not be used for anything else could inhibit development which was in the community's best interests, the Town Councils (Scotland) Act 1900 specifically provided for disposal of common good property after a period of advertisement. This rather crude provision was replaced, partly as a result of the *Ruthin Castle* case referred to above, by provisions in the Local Government (Scotland) Act 1947.

5.7 Before moving on to the extant provisions of the 1973 Act, it is worth noting that the 1947 Act contained similar provisions to it about circumstances in which common good land could be sold off, although there was an additional provision about buildings which had been used as a town hall or similar, again reflecting the case of *Marks & Spencer - v - Kirkcaldy Town Council* in the 1930s. In the 1947 Act, there was a similar restriction on appropriation to that set out in the 1973 Act.

6.0 **Powers for appropriation and disposal under the Local Government (Scotland) Act 1973 ("the 1973 Act")**

6.1 The 1973 Act, in line with its predecessor, had specific provisions about acquisition, appropriation and disposal of land in general. It also made

specific provision about common good land. I have attached the relevant provisions as Appendix 1. However, they could be summarised as follows:

- The provisions of the Act which allow for *disposal* and *appropriation* of land apply to common good land in respect of which no question arises as to the ability of the authority to alienate;
- As regards common good land where a question does arise as to the authority's ability to alienate it, the council can only dispose of such land where they have obtained authority to do so in the Court of Session or the sheriff court;
- The Court of Session or the sheriff could, if they think fit, authorise the council to dispose of such land subject to conditions, and those conditions could include a condition requiring that the local authority provide substitute land, to be used for the same purpose for which the original common good land was used.

6.2 It might be useful at this stage to suggest some working definitions of the words used in the statute.

6.3 *Disposal* means selling or leasing the land to a third party. Short term leases are included; and case law has also found that some other actions, and particularly demolition, also constitute a disposal for the purposes of the Act.

6.4 *Appropriation* means the local authority using the land for something other than its current purpose. To use a non common good example, the council as education authority might wish to appropriate some land which was formerly a school but is now surplus to requirements for housing purposes. This would involve a transfer to the housing revenue account, and would be an appropriation of the education land. In the same way, the proposal to use some of Portobello Park for building a school was generally recognised to be a proposed appropriation from its current common good use, to an education purpose.

6.5 *Alienation* is a slightly more difficult concept to pin down. However, case law has generally suggested that, in a common good context, it means that the local authority propose to cede control of a piece of land, on a permanent or semi-permanent basis, in such a way that its public use will be lost or at least temporarily disrupted.

6.6 *Land ... with respect to which ... a question arises as to the right of the authority to alienate* is taken to mean generally that type of common good land discussed above which is inalienable.

6.7 Whether common good land is alienable or inalienable exercises local authorities and their legal advisers on a frequent basis. The circumstances in which a former burgh came into possession of a particular piece of land, and the use to which it has been put, either by way of custom or direct dedication by the former burgh, may be difficult to establish. Moreover the length of time

during which a piece of common good land has been put to some sort of public use may be similarly difficult to establish.

- 6.8 Local authorities and their legal advisers do not have the monopoly on such knowledge. The title deeds may be silent on such issues. There may or may not be minutes from the former burgh available to give guidance on what the land was acquired for, and when, and whether common good money or rates money. However, much local knowledge from people who have been resident in the former burgh for many years, may be available.
- 6.9 The important point here, in my opinion, is that whether the question of common good land is alienable or inalienable is crucial to the way it is treated should a disposal or appropriation be under consideration. However, that quality or otherwise of alienability is very difficult at times to determine, and may well be open to two opposing interpretations which are not completely unreasonable. To reach a decision on this a view has to be taken on matters of fact and law. That is presumably why, at least until now, the question has been directed to a court to determine. However, I will comment later on whether this necessarily represents the best way of resolving the issue.
- 6.10 Turning to the issue of what powers councils have for appropriating and disposing of common good land, the relevant provisions are contained in sections 73, 74 and 75 of the 1973 Act. Put simply, and following the Inner House decision of the Court of Session on the *Portobello Park* case, the following conclusions can now be drawn about the statutory provisions:
- Alienable common good land can be disposed of by councils to third parties without going to court;
 - Alienable common good land can be appropriated by councils for other functions without going to court;
 - Inalienable common good land can be disposed of by councils to third parties only if the court agrees to it;
 - Inalienable common good land cannot be appropriated by councils for other functions. If they attempt to do so, an action of judicial review of their decision to do so will be successful;
 - If councils choose to decide that a particular piece of common good land is alienable and does not require court authority before being *either* appropriated or disposed of, then the only means available to objectors to stop them doing so would be by way of judicial review.

7.0 **The Inner House decision in *Portobello Park*, and its impact on the work of local authorities in Scotland**

- 7.1 I do not propose to comment in great detail on the Inner House decision as regards powers of appropriation, other than to state that I am not surprised by it, and that, were I to be the City of Edinburgh's legal adviser, my advice would be that it was a sound decision, and there would be uncertain prospects of success if it were appealed further. The decision, in my opinion, correctly interprets the provisions of the legislation as containing no power, express or implied, for councils to appropriate land which is inalienable common good land.
- 7.2 I have however been asked to set out any comments I have on the impact of the decision on the work of local authorities in Scotland, and I hope that the following comments are helpful.
- 7.3 There is a string of relatively recent case law which sets out the type of test a court will apply to determine whether inalienable common good land should be *disposed of* to a third party. For example, in the *Motherwell District Council* case, the court held that the sale of part of a park in Wishaw - some to Strathclyde Regional Council for a replacement primary school, with a playing surface at the primary school being available for public use outwith school hours, and some being leased to developers of a retail food store for car parking, was an acceptable prioritisation of limited council funding. The proceeds from the sale and lease would be used for a comprehensive improvement scheme on the remainder of the park.
- 7.4 A similar approach was taken in the *Kirkcaldy District Council* case, where the public caravan park was sold to British Alcan, then the largest employer in Burntisland. Lord Caplan recognised that the district council had taken a judgement on whether the disposal constituted something that would benefit the economic welfare of the former burgh of Burntisland.
- 7.5 By contrast, the *West Dunbartonshire Council* case refused a petition by that council to dispose of part of a park for a Sheriff Court to the then Secretary of State for Scotland. The court decided that no clear benefit in locating the new courthouse on that particular site, with the consequent loss of green space in the town, had been established.
- 7.6 These cases, in my opinion, represent a solid body of case law indicating that, when it comes to *disposal* of inalienable common good land, the interests of the inhabitants are looked at by the court as a whole and the proposed disposal judged on its merits.
- 7.7 It is to be contrasted, however, with the situation which local authorities now find themselves in where what is proposed is not a disposal to a third party, but an appropriation for another local authority function. In those circumstances, if the common good land is considered to be inalienable (and, as I have explained above, that is very much a difficult question at times of fact and law) then it cannot be used legally for another local authority function. There is no question of the merits of the proposal being debated and decided upon by anyone. It simply cannot legally happen.

- 7.8 If I may offer comment on this point, it seems to me that it puts local authorities in an invidious position. Councils are under increasing pressure to make best use of their resources. The public sector as a whole is suffering from the effects of the economic recession which began in 2007, and is unlikely to emerge from those effects for some years to come. Local authorities are increasingly challenged to make best use of the public pound.
- 7.9 However, inalienable common good land - which may or may not be capable of, or suitable for, development by the local authority itself in certain situations - cannot be used for any other local authority function, even though in certain circumstances it could be sold off to a third party such as a supermarket operator.
- 7.10 It is also perhaps appropriate to mention at this stage that this is not the first school to be built on a park which constitutes common good. The *South Lanarkshire Council* and *North Lanarkshire Council* cases concerned very similar circumstances to the *Portobello Park* case, in that they concerned local authorities wishing to build schools on common good land.
- 7.11 However, principally because these cases were unopposed, they were handled very differently by the court. In both cases, the council asked the court for authority to dispose of the relevant land, as the schools were being constructed under PPP/PFI arrangements. The court held that these arrangements did not amount to a *disposal* in terms of the legislation. The issue of *appropriation* was not raised by the councils as petitioners; the court was not asked to consider the issue of appropriation; and, as there were no objectors to the proposal represented in court, no-one else raised the issue of appropriation. However, the obvious conclusion to draw is that, if the schools were not being disposed of in terms of the funding arrangement, then they were being appropriated by the authorities themselves for an educational purpose.
- 7.12 In summary, therefore, the current state of the law could be said to be somewhat illogical. In the *Motherwell District Council* case, a school was built on inalienable common good land because it was being disposed of to the regional council. In the *Lanarkshire* cases, the councils were told that PPP/PFI arrangements were not disposals but the whole issue of appropriation was not addressed. In the *Portobello Park* case, the lack of powers in the 1973 Act to allow an appropriation for a school on inalienable common good land brought the proposal to a halt so far as the court was concerned, without any discussion of the merits of the proposal or otherwise.
- 7.13 Having offered these comments, I fully appreciate reform of common good law is not what the Committee has been asked to examine. However, the impact of the decision is likely to be that local authorities will either avoid any proposed appropriation of common good land, whatever the merits or otherwise of a specific proposal; or they will seek to argue that such common good land is not inalienable and can, therefore, be lawfully appropriated. How successful they might be with such an argument may depend on how well organised and resourced the communities involved are. It may be that not all

communities will be as well organised and resourced as the objectors in Portobello.

7.14 The only other option for local authorities will be for them to pursue legislation in the Parliament in the same way as the City of Edinburgh Council.

7.15 I have had the benefit of seeing a copy of the Opinion of Roy Martin, QC, on the terms of the Bill as currently drafted. I note that Counsel considers the Bill as drafted currently will achieve its intended result, but that there remains a question as to whether the City of Edinburgh Council, having appropriated the land for education, could then use the land for another purpose in the future. I do not disagree with anything that Counsel says, although I do wonder whether, depending on the length of time involved, the Council could ever appropriate the land in question for another use without such a decision being challengeable on the grounds of being unreasonable, following the string of case law about unreasonability beginning with the *Wednesbury* case. This is a point which the Committee may wish to consider and, perhaps, consider whether the land could ever be used for anything else or whether, should its education function fail, it should then be transferred back into the common good automatically and thereafter be made inalienable again. I would have thought that this is a matter which could be dealt with by means of an additional provision in the Bill.

7.16 Since being asked to give evidence to the Committee I have consulted other local authorities on any similar cases which they may have and/or any consequences of the Inner House decision, whether intended or otherwise. I have, at the time of writing, received two responses. One, from North Ayrshire Council, suggests that the Keeper of the Registers of Scotland has, since the case, adopted an approach to common good property which may result in the Council requiring to go to court to obtain a decree to the effect that the relevant properties are alienable. It is the view of the Council's legal advisers that the properties in question are clearly alienable and can be disposed of without court authority. However, without the Keeper granting full indemnity of title, the transactions cannot be properly completed, and the Council's legal advisers are in no doubt at all that the Keeper's approach is as a result of the *Portobello* case.

7.17 The second case concerns Aberdeenshire Council and the provision of an alternative leisure facility in Banff, where the alternative leisure facility is to be sited beside a secondary school. I understand that overcoming the legal hurdles to allow this to happen (the original land being sold to a supermarket operator) has taken some twelve years and, in the interim, the proposed leisure provision has changed, with the likelihood that further court action is required to gain approval for the changed provision.

8.0 **Feasibility of the alternative approaches outlined at paragraph 17-42 of the Promoter's Memorandum accompanying the Bill**

- 8.1 The alternative options considered by the City of Edinburgh Council in order to achieve its objectives of developing part of Portobello Park for a school were as follows:
- (a) appealing the Inner House's decision to the Supreme Court;
 - (b) reviewing the status of the Park to establish whether it might be categorised as alienable common good or not as part of the common good, and if necessary seeking a declarator to that effect from a court;
 - (c) disposing of the Park under section 75(2) of the 1973 Act, with the approval of the sheriff court or the Court of Session;
 - (d) applying to the sheriff court or the Court of Session seeking authority to appropriate the park under section 75(2) of the 1973 Act;
 - (e) petitioning the Court of Session under the *nobile officium*;
 - (f) changing the existing legislation, in respect of which three sub-options were identified:
 - a Private Bill promoted by the Council;
 - a Government Bill revising the 1973 Act; or
 - a statutory order made by the Scottish Ministers under existing legislation.
- 8.2 I have been asked to comment on the feasibility of these alternative approaches, and the City of Edinburgh Council's conclusion that none of the alternatives would be likely to be as quick or effective as the Bill.
- 8.3 Firstly I would say that I do not know of any further alternative approaches. The Council and their legal advisers have set out what appear to be the only viable alternatives.
- 8.4 Secondly, for the sake of brevity, I do not intend to rehearse the arguments made in the Policy Memorandum to any great extent, except to say that I fully agree with the reasoning expressed in it. Certainly any form of further court action would be likely to have at the very least uncertain prospects of success, be expensive for everyone involved, and introduce a very significant time delay. Given what I have said above regarding the soundness of the Inner House decision, it follows that I cannot see any merit in the City of Edinburgh Council attempting to obtain court authority in some other way so as to "get around" the earlier judgement.
- 8.5 My only comment on the alternative approaches would concern the other legislative routes and, in particular, the proposal that appropriate legislative measures could be included in the Scottish Ministers' draft Community Empowerment and Renewal Bill. I have been involved in consultation meetings regarding the Bill, and I concur with the comments in the Promoter's Memorandum that there is considerable uncertainty as to whether this piece

of legislation will, or even should, cover the specific issue of appropriation of inalienable common good land. Although the issue of common good has been raised as part of the consultation paper, it may well be that the Scottish Ministers consider that reform of common good law itself is a matter for separate, if related, legislation.

8.6 However, given that at the date of writing, the Community Empowerment Bill has still to be published for consultation, it would appear to be in the City of Edinburgh Council's best interest to promote its own legislation meantime.

8.7 I will comment further on the issue of further legislation below.

9.0 **Comments on the circumstances which led up to the Bill and whether the issue confronted by the Council is one which has more general application**

9.1 I have already set out above the more recent case law which concerns building schools on inalienable common good land. However, I do think that the issue confronted by the City of Edinburgh Council in Portobello is one which has even more general application.

9.2 The programme of school replacement using the current Scottish Government's Scottish Futures Trust funding mechanism is currently well under way in various parts of the country, with the policy objective of replacing some of the many schools built during the 1960s and 1970s and, on occasion, rationalising school provision. Many of the schools will be built in urban locations to minimise travel requirements for pupils and maximise the value for the community of having a school at its heart.

9.3 Inevitably, in former burghs, this may involve use of common good land. In Fife Council's area, for example, a replacement Burntisland Primary School is currently being built on land which is held on the common good account. The Council is proceeding on the basis that this common good land is alienable and therefore capable of being appropriated.

9.4 I do therefore think that the circumstances which led up to the bill, and the issue confronted by the City of Edinburgh Council, is likely to be a relatively frequent issue in some part of Scotland over the coming decades. It is also fair to say that new school buildings on what was previously open space is often likely to be controversial and divisive. A means of resolving disputes and deciding what is in the community as a whole's best interests, which does not involve expensive and lengthy court action, would be, I respectfully submit, in everyone's best interests.

9.5 It is easier to speculate on what the best legislative solution would be than to actually draft the provisions, but, as I have set out at section 7 at some length, the whole issue of whether common good land is alienable or inalienable and whether it can be therefore disposed of or appropriated for other uses is one which will not go away. The issue is one which affects only some of our

towns and villages (all of Scotland's cities are former burghs). One option would be to abolish the distinctions between common good and other Council owned land. This would mean that development of such land would be subject only to the existing controls, and particularly planning legislation.

9.6 It is very unlikely that such a proposal would find favour with local residents of burghs, who feel a deep sense of attachment to common good property of various kinds. However, if it were linked to legislation which allowed for some form of local inquiry into the merits and demerits of any substantial disposal or appropriation of publicly owned land - whether that was common good or not - perhaps the interests of residents could be seen to be more fully protected. As I have said already, I appreciate this is not a matter for the current Committee to determine.

10.0 **Consideration of detriment to and/or alternatives for persons affected by the Bill**

10.1 I do not have any comment to make regarding detriment to and/or alternatives for persons affected by the Bill. The Committee will no doubt hear from other persons who are much more familiar with Portobello, the alternative sites, and the likely effect building the school on Portobello Park will have on residents and others in the area.

11.0 **Details of any current or previous involvement with the key issues raised by, or subject matter of, the Bill**

11.1 I set out in the introduction my legal career to date and the context in which I wrote a book on common good law. However I have also been asked to include details of any current or previous involvement with the key issues raised by, or subject matter of, the Bill.

11.2 So far as the *Portobello Park* case itself is concerned, I have had no direct involvement in either the Outer or Inner House case, or any of the discussions which have no doubt taken place within the City of Edinburgh Council on its legal position. Nor have I advised any of the campaigners, either for or against the current proposal.

11.3 Of necessity, the world of Scottish local government property law is a small one, and the world of common good law even smaller. I should make it clear, therefore, that I have informally discussed the case and its implications with Kevin Paterson, solicitor and Iain Strachan, Legal Services Manager, both at City of Edinburgh Council. However, this has very much been on an informal basis and I am content that in no way could I be seen as offering advice or in any way influencing the advice which has been provided to the City of Edinburgh Council. My main reason in discussing the case was to establish timescales for the Inner House decision, as it became clear it would have implications for other councils, including Fife.

- 11.4 I also know some of the partners and associates in Brodies who have been advising the City of Edinburgh Council in the current case, and particularly Jackie McGuire. We have discussed the case in passing, and mainly as regards its consequences for other local authorities.
- 11.5 In the same way, I have discussed the case informally with Andy Wightman, a prominent campaigner on land reform issues including common good. Again Mr. Wightman is very much his own man and I would not presume to think that any of our discussions have influenced his approach to the Portobello case.
- 11.6 For the sake of completeness I have also contributed in case reports on the decisions to Scottish Planning and Environmental Law.

13 August 2013

Appendix 1: Relevant sections of the Local Government (Scotland) Act 1973

73 Appropriation of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to the following provisions of this section, a local authority may appropriate for the purpose of any function, whether statutory or otherwise, land vested in them for the purpose of any other such function.

(2) A local authority may not exercise their power of appropriation under subsection (1) above with respect to any land specified in subsection (3) below except with the consent of the Secretary of State.

(3) The land to which subsection (2) above applies is land which is held for use as allotments.

74 Disposal of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish.

(2) Except in accordance with regulations under subsection (2C) below, a local authority shall not dispose of land under subsection (1) above for a consideration less than the best that can reasonably be obtained.

(2A) Subsection (2) does not extend to a disposal where—

- (a) the best consideration that can reasonably be obtained is less than the threshold amount; or
- (b) the difference between that consideration and the proposed consideration is less than the marginal amount.

(2B) The Scottish Ministers shall, by regulations, fix the threshold amount and the marginal amount for the purposes of subsection (2A) above.

(2C) The Scottish Ministers may, by regulations, provide as to the circumstances in which and procedure by which local authorities may, under this section, dispose of land for a consideration less than the best that can reasonably be obtained.

(2D) Those regulations may include provision—

- (a) requiring a local authority proposing to dispose of land at less than the best consideration that can reasonably be obtained to appraise and compare the costs and other disbenefits and the benefits of the proposal;

- (b) requiring the local authority, before deciding in favour of the proposal, to be satisfied that so deciding would be reasonable; and
- (c) setting out factors to which the local authority must have regard when considering whether its decision would be reasonable.

(2E) References in this section to the best consideration that can reasonably be obtained by a local authority are references to that consideration as assessed by a suitably qualified valuer.

(2F) In appointing and instructing a suitably qualified valuer for the purposes of subsection (2E) above, the local authority shall have regard to any guidance provided by the Scottish Ministers on—

- (a) what are suitable qualifications;
- (b) what factors are to be or not to be taken into account by the valuer in assessing the consideration referred to in that subsection.

(2G) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

(2H) Before making such regulations, the Scottish Ministers shall consult such associations of local authorities and such other persons as they think fit.

75 Disposal, etc., of land forming part of the common good.

(1) The provisions of this Part of this Act with respect to the appropriation or disposal of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which land no question arises as to the right of the authority to alienate.

(2) Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.

(3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used for the same purpose for which the former land was used.

Appendix 2: Case references

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223

Kirkcaldy District Council v Burntisland Community Council 1993 SLT 753.

Magistrates of Banff v Ruthin Castle Ltd 1944 SC 36, 1944 SLT 373.

Magistrates of Kirkcaldy v Marks & Spencer 1937 SLT 574.

Motherwell District Council, Petitioners 1988 15-666 (OH)

Murray v Magistrates of Forfar (1893) 20R 1908

North Lanarkshire Council, Petitioners 2006 SLT 398

South Lanarkshire, Petitioners, (11 August, 2004, unreported)

Portobello Park Action Group Association, [2012] CSOH 38; [2012] CSIH 69

West Dunbartonshire Council v Harvie 1997 SLT 979