

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

WRITTEN SUBMISSION FROM PROFESSOR ROBERT RENNIE

Submitted in response to a request from the City of Edinburgh Council (Portobello Park) Bill Committee for written evidence ahead of its meeting on 11 September 2013

1.0 Introduction

The City of Edinburgh Council (“the Council”) took a decision to appropriate a large part of Portobello Public Park for the erection of a new school. It was accepted by the Council that the park itself was part of the inalienable common good land. As is usually the case with local authority decisions of this type there was local opposition to the loss of public park land even where the new use was also for the benefit of the community, in this case for educational purposes. Portobello Park Action Group Association (“the Association”) raised an action against the Council in which they asked the court to declare that the proposed erection of the school would be unlawful and to set aside the Council’s decision. The case came before Lady Dorrian in the first instance and the Association lost. Her Ladyship held that the action had been raised too late and should have been brought earlier. In any event she also took the view that the Council were acting lawfully in terms of Section 75 of the *Local Government (Scotland) Act 1973*. That section deals with the power of “disposal” of common good land but does not specifically mention the “appropriation” of common good land whereby a local authority who own common good land use it for a different local authority purpose but do not dispose of it. Section 73 of the 1973 Act provides that a local authority may appropriate for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other function. The Association appealed to the Inner House of the Court of Session who reversed the decision on both counts to the surprise of most commentators.

2.0 The Nature of Common Good Land

Common good as a concept is difficult to define and has now been subject to an excellent textbook by Andrew Ferguson ¹. Historically it meant the common property of burghs particularly Royal Burghs as distinguished from the property of individual burgesses. An Act of the Scottish Parliament ² required common good property to be kept for the common good of the town and spent on necessary things for the burgh. There were several Acts of the old Scottish Parliament over the years to ensure that property of a burgh was used for common purposes. Common good property included not just heritable property as in land and buildings but other revenue sources such as mills, houses and farms. So far as heritable property was concerned the town hall and the town jail would be held in the common good of the burgh because these were buildings necessary for the Burgh to fulfil its functions in terms of its Royal Charter. These functions would be to “watch and ward” ³. At one time certain property which formed part of the common good was said to be inalienable. These were such buildings as I have already mentioned necessary for

¹ *Ferguson, Common Good Law*

² *Act 1491 C19*

³ *see for example Dixon v Lawther (1823) 2S 176*

the Burgh to exercise its functions as a Burgh. Other property held in the common good fund might however be alienable. Some court decisions⁴ tend to suggest that even inalienable property can be alienated if it is no longer needed for the particular purpose. If an alternative property is used for that purpose then it could become inalienable in its turn.

2.1 In the normal case where subjects were conveyed to a burgh for the common good words are used in the deed which indicate that the conveyances are for "behooof of the inhabitants of the said Burgh". In other grants the words of grant can be in favour of the burgh "as representing the community of the said burgh and their successors in office for behoof of the whole body and community of the said burgh". However there are cases where a specific dedication to a particular use which might be said in some way to be a public use has been held to imply a grant to the common good. Thus where the condition was that the property was:-

"To be used as a public hall, council chambers, offices and public refreshment and recreation rooms and offices in connection therewith and in connection with the swimming pond provided always that the said buildings shall always be appropriated to and for uses and purposes for which the same shall originally be erected or for uses and purposes similar to and not inconsistent therewith."

there was a conveyance to common good⁵. As Ferguson notes⁶ each case and each title turns on the specific wording and the expressed intentions of the disponent if these can be shown either from within the bounds of the deed or outwith.

2.2 In the leading case of *Murray v Magistrates of Forfar*⁷ Lord McLaren laid down the three ways in which burgh property might become common good. These were:-

- (a) The land might be appropriated to public uses in the charter or original grant.
- (b) The land after it was vested in a public body such as a Town Council might be irrevocably appropriated to public uses by the act of the Town Council itself.
- (c) The land might be so appropriated or rather the inference might be drawn that it was originally appropriated to public uses from evidence that the land had been so used and enjoyed from time immemorial.

3.0 Alienable and Inalienable Common Good

⁴ *Magistrates of Kirkcaldy v Marks & Spencer Limited* 1937 SLT 574; *Cockenzie & Port Seton Community Council v East Lothian District Council* 1996 SCLR 219

⁵ *Cockenzie and Port Seton Community Council v East Lothian District Council* 1997 SLT 81

⁶ *Ferguson, Common Good Law* p66

⁷ (1893) 20R 908

Before coming to a view on whether something is alienable or inalienable the first hurdle is to decide whether the property in question does indeed form part of the common good. In the Portobello Park case it was accepted by the Council that not only was the land in question part of common good but also that it was inalienable. The law appears to be that if the three categories set out in the leading case of *Murray v Magistrates of Forfar* are satisfied then the land, if it is common good land, is inalienable. The more basic question of whether or not land forms part of the common good of the local authority depends often on the words used in the deed conveying the property to the former burgh.

4.0 The Statutory Provisions

The statutory provisions are contained in the *Local Government (Scotland) Act 1973* and provide as follows:-

“73. - 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 purposes of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function. ...

74. - 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. ...

75(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.”

Section 73(1) seems clear enough namely that where a local authority owns land used for one purpose it can appropriate that land for another local authority purpose. This enabling provision arose in the context of common good land in *South Lanarkshire Council Petitioners*⁸ and *North Lanarkshire Council Petitioners*⁹. In both cases petitions had been presented by the local authority for a authority to alienate common good land under Section 75(2). The petitions were dismissed by the court¹⁰

⁸ *Court of Session Inner House 11th August 2004 unreported*

⁹ 2006 SLT 398

¹⁰ *In the case of South Lanarkshire Council by the Inner House*

on the grounds that they were unnecessary because no disposal was involved. It does not appear to have been suggested that a Council could not “appropriate” common good land for another purpose under Section 73(1). In the South Lanarkshire Council case I myself gave an opinion in relation to whether the land was held in a public trust by the local authority or as common good. The land in question had been conveyed by the Duke of Hamilton to the former burgh as a public park. South Lanarkshire Council, the successor local authority, sought permission from the court to use part of that park for the development of the new secondary school using the public/private partnership method of delivery. South Lanarkshire Council had taken the view that if the property was common good then the authority of the court was necessary because the PPP mechanism would involve a lease of the site to the private sector for thirty years with a lease back to the local authority. The local authority and their advisers took the view that this mechanism amounted to a disposal. As Ferguson points out¹¹ it had been decided in other cases¹² that leases could amount to a disposal. We were all slightly surprised when the court raised the issue of whether the PPP mechanism amounted to a disposal. The court’s view was¹³ that the land would still be in community use and that there was no commercial use by the local authority. It would be fair to say that there was not a great deal of real argument in the South Lanarkshire case and the petition was unopposed. Similar reasoning however was applied in the reported case involving North Lanarkshire Council. That case also involved the appropriation of areas of ground forming part of public parks for the construction of two schools on a shared site with shared facilities. Again the public private partnership arrangement was to apply. There were no leases involved by this time and merely rights of occupancy apart from during the period of construction. Lord Drummond Young followed the South Lanarkshire case holding that for a transaction to amount of a disposal there had to be an act whereby the local authority was deprived of the benefit of the land in question. Accordingly the petition under Section 75(2) was dismissed as unnecessary.

5.0 Portobello Park Action Group Association v The City of Edinburgh Council¹⁴

In the previous cases it does not appear to have been argued that if there was no disposal and the land was inalienable common good then there was no statutory mechanism whereby the court could consent to an appropriation. What seems to have been assumed, on a rather practical common sense view, was that the whole point of Section 75(2) was to provide the local authorities with a way out in a disposal but that they would not need any consent in any other situation such as that of appropriation for another function. What the judges decided on appeal was, firstly, that the defence that there had been an unreasonable delay in bringing the action had no application because the process had been drawn out. More importantly however it was held that there was nothing in the 1973 Act to remove, alter or diminish pre-existing common law rights and obligations as they applied to inalienable common good land. The court held that the local authority did not have

¹¹ *Ferguson, Good Law* 96

¹² *East Lothian District Council v National Coal Board* 1982 SLT 460; *Murray v Forfar Magistrates* (1893) 20R 908

¹³ *there are unfortunately no written judgements*

¹⁴ 2012 SLT 944; Reversed 2012 SLT 1137

the right to *appropriate* (my italics) inalienable common good land on an unfettered basis.

At paragraph 32 of the judgement¹⁵ the following is stated:-

“Section 73(1) bears to confer on local authorities a general power to appropriate ‘for the purpose of any functions whether statutory or otherwise land vested in them for the purpose of any other such function’. As in the case of disposal this general power does not stand alone. Section 75 contains special provisions where common good land is involved, thereby confirming the limiting ambit of the general power, and in the context of appropriation the precise terms of that section are in our view of particular importance.”

I do not agree with the proposition that Section 75 is meant to limit appropriation in terms of Section 73(1). The justification appears to derive from the terms of Section 75(1) which deals with circumstances where the common good land is alienable. That sub-section refers to appropriation and disposal. Section 75(2) however only mentions disposal. However it did seem to me that the court's interpretation was a strained one. All that Section 75(1) was meant to achieve in my view was to provide that the general power of appropriation in 73(1) and disposal under Section 74(1) would apply to alienable common good. Section 75(2) which deals only with disposal of inalienable common good does not mention appropriation because presumably it was not thought there would be any problem with appropriation for another local authority function. As Professors Gretton and Reid note in their commentary in the case¹⁶ the court “sidestepped” the *South Lanarkshire Council* and *North Lanarkshire Council* decisions by pointing out that these applications were refused as unnecessary because there was no disposal. It cannot be denied however that there was appropriation of common good land for a different function of the local authority, in both cases, like the Portobello case, appropriation of park land for school.

5.1 The court also rejected a broader argument based on Section 20 of the *Local Government (Scotland) Act 2003* which appears to confer on a local authority powers to do anything which it considers is likely to promote or improve the well being of its area, persons in the area or either of these. Section 22 provides that the power is limited and does not enable a local authority to do anything which it is, by virtue of a limiting provision unable to do. Common good law would be a limiting provision and the court in the Portobello case rejected the argument based on well being.

5.2 The decision surprised most people and of course as Professors Gretton and Reid point out that if correct it means that local authorities have greater powers to sell and dispose of common good land by obtaining the consent of the court than they have to appropriate land and simply change it's use to another function for the public good.

6.0 Alternative Approaches to the Bill

¹⁵ *Delivered by Lady Paton for the whole court*

¹⁶ *Conveyancing 2012 pp 172-176*

These alternatives are:-

- (a) Appealing the decision of the Inner House to the Supreme Court.
- (b) Renewing the status of the Park with a view to establishing whether it is in fact inalienable common good or indeed part of the common good at all and if necessary seeking declarator from the court.
- (c) Disposing of the Park with consent of the court under Section 75(2).
- (d) Applying to the court seeking authority to appropriate under Section 75(2) despite the fact that appropriation is not mentioned in that provision.
- (e) Petitioning the court under the *nobile officium*.
- (f) Changing the existing legislation by a Private Bill, a Government Bill or a statutory order.

6.1 Taking these in turn:-

- (a) Appeal to the Supreme Court

Legal advice has been given to the Council to the effect that an appeal would be unlikely to succeed given that the Inner House gave cogent reasons admittedly based on a narrow statutory interpretation. The well-being argument in my view would certainly not succeed. In my view the main problem with an appeal is that if it was unsuccessful time would be lost and the Council would be back again seeking legislation.

- (b) Challenging the Park's Status as Inalienable Common Good

It is fair to say that neither the judge in the Outer House nor the judges in the Inner House actually considered the question of the status of the Park in the sense of whether it was common good land and whether it was inalienable. In fairness none of the judges were asked to do this; the Council accepted the position that the land formed part of the inalienable common good. I accept that there is lack of clarity in the law relating to common good and in the question of alienability. The Council, having consulted their own archive and having taken legal advice is of the view that there would be poor prospects of success in obtaining such a declarator and I tend to agree. Again if the declarator failed the Council would be back to square one having expended further considerable sums on legal fees.

- (c) Disposal

The type of disposal envisaged here is a disposal to a "vehicle" specially set up simply to provide the mechanics of disposal. This could be challenged as a sham device. I would assume that the local group

who brought the original action would wish to bring a further action challenging such a “sham device”. Again if that challenge was successful the Council would be back at square one having again expended further sums in legal expense and attracted adverse publicity.

(d) Appropriation under Section 75(2)

For an application under this provision to succeed the court would require to adopt an interpretation of Section 75(2) which does involve doing violence to the actual language. I could not recommend that as an alternative.

(e) ***Nobile Officium***

The scope of the ***nobile officium*** is not clear although generally it is to provide a legal remedy where none is otherwise available. It is not clear to me that the court would be willing to intervene in this way given the fact that there already is a decision on the interpretation of the statute. One could argue of course that if the Inner House are correct then there is no way of appropriating inalienable common good land for other functions. I suspect however that the Court of Session would take the view that any amendment or change would require to come by way of legislation.

(f) Other Legislative Routes

A Scottish Government Bill would require a policy decision and wide consultation and such legislation would be of general application throughout Scotland and not just in relation to Portobello Park. I am myself of the view that given the decision of the Inner House the current legislation will require to be examined and changed. A situation where a local authority can ask the court for consent to dispose of land but is stuck with common good land which is needed for another purpose seems to me to be bizarre.

7.0 My Involvement with Common Good Law

Over the years I have provided a number of Opinions to local authorities in connection with common good law. I have also given opinions to potential developers and purchasers of land from local authorities where there is a question over whether the land is part of common good and indeed inalienable common good. In many cases these opinions turn on the words used in particular deeds of transfer to former burghs. In some cases the land is acquired for specific statutory functions in which case my view is that it is not being acquired as part of common good. I would not be in a position to divulge the contents of these opinions without the consent of the local authorities and developers concerned.

30 July 2013