

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

WRITTEN SUBMISSION FROM RODERICK J McGEOCH

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

A. A synopsis of the background and origins of Common Good Law

A.1 The concept of common good in Scotland can be traced back as far as the 12th century, first finding statutory expression in the form of the Common Good Act 1491. In greatly simplified terms, the system arose through either the Crown or local feudal barons at various times having granted lands and associated revenue-raising rights to the ancient burghs, to enable them to sustain themselves and in an effort to help develop Scotland and its larger settlements both economically and socially. At that early stage, all property in the hands of the burgh was owned and held for the benefit of all of the residents – hence the expression ‘the common good’.

A.2 Regulation and reform of municipal authorities began to take shape in earnest in the early to mid-19th century. With various powers created in a series of legislative reforms and initiatives throughout the ensuing period came rights to levy rates with which to finance them. More and more money thus began to come into the burgh councils’ coffers in the form of taxes payable by the householders of the burghs, simply by virtue of their residence there, rather than through the more traditional revenues from the towns’ landholdings and feudal toll-levying powers. This new income was, as required under the enabling statutes, applied for the specific purposes for which it was collected, rather than being used for the general purposes of the burgh. As such, it was not regarded as part of the common good.

A.3 Over time, as the burgh councils’ statutory obligations and powers increased, a greater and greater proportion of their income was derived from rates. These revenues, combined with grants and other specifically targeted funding provided by central government, had to be used for the provision of statutory local authority services – including the purchase, construction and maintenance of associated buildings or other facilities – and had to be accounted for separately from the common good income and assets.

A.4 The title to (and thus ostensible ownership of) all common good properties rests with the relevant council - but they are legally deemed to be held for the residents of the former burghs in which they lie. The councils therefore hold the assets not as trustees in the full legal sense but as custodians, for the general benefit of the residents of the former burghs. The relationship between the council, the common good and the residents of the relevant towns and cities is thus similar in many respects (but it is not identical) to that which exists between trustees, trust estates and beneficiaries. At common law, this meant that a fiduciary obligation was owed by the councils to the residents – and this was complemented by a right on the part of the residents to assert their rights to the common good assets and to prevent any misuse of them.

A.5 The common law duties of the councils in their dealings with the common good funds/assets, while fiduciary in nature, are less exacting than those of true trustees, in that there are no clearly defined trust purposes or objectives to pursue. The Local Government (Scotland) Act 1973 provided for the transfer of property which was held by town councils as part of the common good to island or district councils on the reorganisation of local government in 1975, and stipulated that, in administering that common good property, the new councils – other than those for the Cities of Aberdeen, Dundee, Edinburgh and Glasgow - were required to “have regard to the interest of the inhabitants of the area to which the common good formerly related”. The district councils for each of the cities were simply bound to have regard to the interests of all of the inhabitants of their respective districts.

A.6 The Local Government etc. (Scotland) Act 1994 in turn passed ownership of common good property to the new unitary authorities on their establishment in 1996 – with exactly the same form of statutory duty as to their administration (set out in s 15(4)) as had appeared in the 1973 Act

A.7 The local authorities’ powers and duties in the guardianship and deployment of the common good funds are thus significantly less restrictive than in relation to the administration of the rates and other public funds. However, while it is, as yet, unclear how this statutory obligation to ‘have regard to the interests of’ the residents sits with the older common law fiduciary obligations, it is apparent from the judgment in the Inner House case which preceded the promotion of the present Bill that the older common law duties still subsist, at least in some contexts.

A.8 Despite the rise in the number of statutory powers bestowed upon the Burgh or Town Councils it had always been competent for common good funds to be utilised to subsidise the provision of a statutory local authority service, provided it was done in the general interests of the town’s inhabitants. So if, for example, the rates monies available for maintenance of a public library were insufficient to cover costs (at one time the library rate was subject to a statutory cap of 1d in the pound), they could be legitimately augmented with monies from the common good fund. Similarly, properties being bought to fulfil a statutory local authority function could be funded from the common good account. Sometimes this would be effected in the form of a short-term loan which would be repaid from the rates account in the following year.

A.9 There is no express general corresponding statutory power to utilise rates monies to subsidise or acquire property for the common good fund. However, there can be little doubt that the provision of rates funding to assist in maintaining a common good asset used for a purpose consistent with one of the council’s statutory functions might still be regarded as a legitimate and effective means by which to perform that function.

A.10 In the days of the Burgh or Town Councils, while there would still have been a distinction between, on the one hand, the interests of the inhabitants of the town and, on the other, the interests of the ratepayers in the town, that distinction would often have been difficult to define, in the sense that (with the possible exception of those who paid rates for business premises) they would all, in theory, have been in a position to draw similar benefits from the provision of a particular facility for the town, regardless of whether it was funded from the rates or from the common good.

However, with the advent of the district and island councils and, particularly now, under the present system of large unitary authorities, a far clearer distinction can be drawn between, on the one hand, the inhabitants of a particular former burgh and, on the other, the council tax and rates payers for the council's administrative area as a whole. While this was not and is not such an issue for the city councils, the potential for tension and conflicts between those interests in other local government areas is therefore now much more evident. This is something the local authorities require to keep in mind in all of their dealings involving common good assets.

B. Situations in which land or buildings can be regarded as common good.

B.1 In determining whether or not a particular property in the hands of a local authority might be common good, essentially there are three basic tests to be applied (as laid down by Lord Wark in *Magistrates of Banff v Ruthin Castle Ltd* 1944 SC 36). The first of these is

Was the property owned by a royal burgh or a burgh of barony?

B.1.1 For practical purposes this test should now be taken to apply to a town council for such a burgh at the time of local government reorganisation in 1975. If the property concerned was owned by the town council at that time, and if it then remained the property of the relevant district council until transferring to the unitary authority in 1996, the property will be common good if (a) neither of the other two grounds of exclusion referred to below applies, and (b) the property has not been formally appropriated for another council function after due process.

B.1.2 The legal 'default position' therefore is that unless one of the exceptions applies, the land in question is deemed to be common good.

B.1.3 If it was not owned by the town council at the time of transfer of responsibilities to the new local authorities on 15 May 1975, the property will not be common good unless it had later been conveyed to either a district council or a unitary authority under the express direction that it should be held for the common good of (or, more typically "for the use and behoof of the community of") a particular former burgh. The instances in which that will have occurred are, however, likely to be few and far between.

B.2 The second test is

Is the property held under a "special trust"?

B.2.1 In general terms this ground of exclusion might be expected to apply only to a full blown express trust which meets all of the criteria for the Trusts (Scotland) Acts to apply. Properties held under such trusts clearly could not have been intended to form part of the common good.

B.2.2 The foregoing represents the full extent of the second test as laid down by Lord Wark. However, there is also some authority for the proposition that, by application of largely the same principle, a property acquired under a disposition or feu disposition containing restrictive provisions in a form insufficient to create a trust

proper, but which are nevertheless inconsistent with the notion that a conveyance to the common good had been intended, may also be excluded. For example, a condition restricting the use of the property, or the revenues accrued from it, to purposes other than the general benefit of the townspeople or generally accepted “common good” purposes like parks or recreation grounds, may suffice to exclude a property from the common good (see the comments of Lord Justice Clerk Cooper, also in *Magistrates of Banff v Ruthin Castle Ltd*, and Lord Drummond Young in *Wilson v Inverclyde Council 2004 SLT 265 at p 277*).

B.2.3 If the property falls into either of these categories of special arrangement then it may not form part of the common good. However, care still needs to be taken in assessing the position.

B.3 The final test is

Was the property acquired under statutory powers?

B.3.1 If it was, then, again, the starting premise is that the property would not be common good.

B.3.2 This demonstrates a clear recognition that properties acquired pursuant to the various legislative provisions of the 19th and 20th centuries formed a separate category of local authority asset which would not fall within the ambit of common good law. It is important to point out, however, that there has not yet been any significant judicial exploration of the full meaning of this test. It seems reasonable to assume that it is intended to cover property acquired for any specific purpose for which the acquiring authority had power to levy rates and where the costs of acquisition and/or the development of the property for provision of the service concerned, and in its subsequent maintenance, were met and/or would be expected to be met from rates monies, as opposed to the common good fund. However, there remains a deal of uncertainty as to how this test should be applied – particularly in cases where there are apparently conflicting pieces of evidence to be assessed.

B.3.3 In considering whether a property might have been acquired under statutory powers, particularly where there is no reference to that fact in the title deeds, it is necessary to investigate the background to the transaction and examine the minutes and financial records of the authority in question (so far as still available), along with such other information as can be produced, in order to establish the parties’ intentions.

B.3.4 It has been held by the Outer House of the Court of Session in one case that a council’s accounts, of themselves, may not be sufficient evidence as to the position - in that they may not actually reflect the true legal status of the property concerned. From this, it may be inferred that it would take a particularly clear set of records to displace any express provision in the title deed indicating that a conveyance to the common good might, in fact, have been intended. This was the position taken in *Cockenzie and Port Seton Community Council v East Lothian District Council*, 1997 SLT 81, where the (apparently rather limited) extent of the entries in the former town council’s accounts to support the contention that the Pond Hall in Port Seton had been held on the rates account was deemed insufficient to overcome title provisions

which indicated that the intention had been that the property was to be used for general common good purposes.

B.3.5 Difficulties can, therefore, arise when the statutory powers in question cover functions which are closely associated with the traditional common good uses. It cannot, however, be assumed that, simply because the use to which a property is put coincides with a typical common good use (such as that of a park or recreation ground) that the property is necessarily common good. It might just as easily be excluded under the 'statutory powers exception' and a full examination of the history of the property's acquisition and usage is therefore generally required before a proper conclusion can be drawn.

C. Alienability

C.1 One facet which sets certain common good properties apart from the rest of the assets in the local authorities' portfolios is that some common good properties are deemed inalienable. What this meant, at common law, was that the properties concerned could not be allowed to be sold, leased or otherwise alienated or encroached upon in a manner which would prevent the townspeople from being able to continue to use them.

C.2 The characteristic of inalienability is effectively a legal recognition of an underlying right of the inhabitants of the former burghs to have and use certain properties for their established purposes. Such rights may be either expressly created in the original conveyances by which the burghs or town councils took title, or constituted either by irrevocable dedication to public uses by the town council or (in the case of properties held under more ancient titles, at least) by public use, as of right, "from time immemorial" (per Lord McLaren in *Murray v Magistrates of Forfar* (1893) 20 R 908 (at 918-919); (1893) 1 SLT 105).

C.3 Inalienable common good properties are therefore generally restricted to:

- (a) Places of customary public resort such as parks and recreation grounds, public streets, market places and the like (which are normally held under the more ancient titles); and
- (b) Administrative buildings/places necessary for the administration and social viability of the burgh, such as town halls, public halls, clock towers etc.

However, not all council-owned properties used for these purposes will be inalienable common good. Many of them may be excluded from the common good altogether by virtue of the 'statutory powers' exception referred to at paragraph B.3 above.

C.4 Furthermore, any inalienable property may become alienable – for example if the need for the property to be used for its previous or original purpose has otherwise disappeared, or the property has simply fallen into disuse, or if a suitable replacement facility has been provided.

C.5 In *Magistrates of Kirkcaldy v Marks & Spencer Ltd* 1937 SLT 574, for example, the town council had vacated the then existing town hall in Kirkcaldy and transferred its civic functions to other properties in the town – and was thus held to be free to sell the former municipal buildings which had previously been considered to be inalienable.

C.6 Alienable common good properties would otherwise generally consist of lands and buildings which had not (at least in more recent times) been available for use by the residents of the burgh at large. Typical examples would be land or buildings which had been used to generate revenues for the common good fund, such as shops, farms or grazing lands which had customarily been leased out to individual tenants and from which the burgh residents as a whole had thus been excluded.

D. Statutory powers of appropriation/disposal of common good land

D1. Part VI of the Local Government (Scotland) Act 1973 deals with Miscellaneous powers of local authorities, and includes sections 70 -77, which cover the powers of local authorities in relation to land transactions. The general powers relating to appropriation are contained in section 73 with the specific provisions relating to common good land appearing in section 75. These statutory provisions supersede the original common law restrictions on alienation. For convenience, these two sections are set out below.

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.

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.

*Part II of the Town and Country Planning (Scotland) Act 1959, as referred to in Section 73(1) provides, at s24 (2A) that:-

before exercising any power of appropriation in relation to land which consists, or forms part of, any common or of an open space (not being land which is held for use as allotments) an authority to whom this Part of this Act applies:-

(a) shall, for at least two consecutive weeks in a newspaper circulating in their area, publish a notice of the proposed appropriation and

(b) shall consider any objections to that appropriation which may be made to them.

D.2 Section 75(1) is interpreted as limiting the ambit of s73(1) (and s74, which deals with disposals of property) such that, so far as common good property is concerned, only alienable common good property may be appropriated or disposed of under those sections.

D.3 Section 75(2) deals with transactions involving inalienable common good land, and specifically provides that disposals of such properties may proceed only when the consent of the court has been obtained. There is, however, no corresponding provision to permit of an appropriation of inalienable common good land with the consent of the court. Consequently, the common law rules relating to inalienability will continue to apply, so far as alienations other than outright disposals are concerned, meaning that there is no mechanism whereby local authorities can transfer inalienable common good properties to other council departments.

D.4 It is not entirely clear as to why Parliament had decided that that should be the case, although one might speculate as to a number of possible reasons. Certainly, it is not difficult to imagine the potential for conflicts of interests which could otherwise arise. There is perhaps something innately inappropriate in the notion that a local authority which is acting as custodian might, at the same time, take steps (perhaps for its own convenience) which would deny the residents of one of its towns the use of the very facility which it is supposed to be administering on their behalf. The basic legal principle is, after all, that these inalienable common good lands and buildings are properties which ought normally to be retained so that the people entitled to use and enjoy them will be able to continue to use and enjoy them.

D.5 It is perhaps difficult, nevertheless, to avoid the conclusion that, as drafted, the legislation gives rise to the apparently anomalous situation whereby inalienable common good land might be permitted in certain circumstances to be sold or leased

to a third party (with the approval of the court), but that it cannot in any circumstances be allowed to be re-deployed in the hands of the very body which has been responsible for its administration to date. If the same judicial process had to be followed for an appropriation for use for another council function as has to be followed for a disposal to a third party, it might be argued that the residents would not be placed in any worse a position one way or the other if appropriation of inalienable common good land could be effected only if sanctioned by the court.

D.6 However, it is perhaps equally easy to imagine that if there was an express ability on the part of the councils to appropriate inalienable common good land (albeit subject to the court's approval), then that in itself would increase the likelihood of more pressure being exerted for changes in the uses of (and thus increase the potential for the loss of) many of Scotland's remaining public open spaces.

D.7 No doubt in recognition of the common law fiduciary duties by which the councils were previously bound, the courts have adopted the approach that approval under s75(2) will only be granted when it has been demonstrated to their satisfaction that the disposal is both appropriate and clearly beneficial to the inhabitants of the relevant town. This will normally involve the court in examining the full detail of the proposed transaction, including the specific intentions for the property concerned, and taking account of the views of the residents of the town in question. Any perceived benefit to the townsfolk will be carefully weighed against the effect that the loss of the existing facility might have – and the court, if it does grant consent, may impose conditions to ensure that any steps necessary to safeguard the residents' interests are duly taken.

D.8 This approach was exemplified in the case of *West Dunbartonshire Council v Harvie 1998 SC 789*, in which there had been a proposal to sell part of Dumbarton Common, which was inalienable common good land, for the erection of a new sheriff court building. The intention was to replace an older court building in the town which was no longer fit for the purpose. All parties were agreed that the new court should be built in Dumbarton but there was no clear agreement as to which site, of those available, was the most appropriate one - and no reasoned case for the Dumbarton Common site being preferred was put before the court. In the circumstances the judge found that he could not be satisfied that there would be a clear benefit for the townspeople in erecting the new court on the Common site. He was also persuaded by the objectors' arguments that the land was part of the only public green space in Dumbarton town centre and, as such, a vital amenity for the residents - and he took the view that a very compelling case would need to have been made to justify an encroachment on the land for the provision of a public building which would not be used for the recreational purposes which had been established over a substantial period, particularly when other sites were available.

D.9 Disposals, for the purposes of the legislation governing such matters, would normally be effected by way of lease or sale. It is arguable that those might have been the only means of disposal intended to be covered by ss 74 and 75 of the 1973 Act. However, it had been held in earlier cases that the council's demolishing or removing a building or facility, even while still retaining ownership of the land on which it is built, may also constitute a disposal – in the respect that these would still involve the council in acting in a way which would prevent the inhabitants of the

burgh from being able to continue to exercise their rights of use and enjoyment of the property concerned.

D.10 In the case of *Crawford v Magistrates of Paisley (1870) 8 M 693*, for example, the magistrates were successfully prevented from demolishing a steeple (which was inalienable common good property) to enable road widening works to be carried out. The same result was achieved in *Waddell v Stewartry District Council 1977 SLT (Notes) 35*, where the council were interdicted from demolishing the town hall and associated buildings in Gatehouse of Fleet, (but that case hinged more on the terms of the title than on the effect of the wording used in the 1973 Act, which was not addressed in detail in the arguments before the court). The same general approach was also followed in an earlier case – *Grahame v Magistrates of Kirkcaldy (1879) 6 R 1066* – in which the magistrates proposed to transfer a disused part of the common muir to themselves in their capacity as police commissioners for the burgh and to erect police stables on the land, but were interdicted from so doing, again, ostensibly, because this would have resulted in the residents being denied their rights to use the property concerned. It is unclear, as matters stand, whether these forms of alienation would be deemed to constitute disposals for which court approval might be obtained under s75(2) of the 1973 Act or whether they would still be governed by the fiduciary duties under the common law. If the latter was the case then, again, there would be no mechanism available for the councils to effect alienations of these types.

E. The Inner House Decision (and its effects) in the case of Portobello Park

E.1 As part of this evidence, I have been asked specifically to comment on *‘the decision of the Inner House of the Court of Session that the land in question is inalienable common good land which cannot be appropriated by the Council’*.

E.2 Unfortunately I have something of a difficulty with the way in which this has been put to me. I am quite satisfied that the Inner House has put beyond doubt the principle that, under the existing legislation, inalienable common good land cannot be appropriated by local authorities, notwithstanding the way in which the ‘advancement of wellbeing’ powers contained in the Local Government in Scotland Act 2003 had been framed. However, it would not be correct to say that it has also determined that the land at Portobello Park is inalienable common good land. While it is clear that the judgment issued proceeds on the clear assumption that it is, at no stage in the judicial process had the court been asked to rule either on that issue or on the question of whether the land is common good at all. Rather, it had simply been presented as the accepted view of both the Council and the Portobello Park Action Group that the land concerned is both common good and inalienable – rendering redundant any proper judicial consideration of these matters.

E.3 It is perhaps worth reiterating, at this point, that in order for a property to be considered potentially inalienable, (a) it must first form part of the common good, and (b) the inhabitants of the former burgh must have an established right to use it. These, therefore, are the areas requiring closest scrutiny before a decision can be made as to the process (if any) requiring to be followed if any change to the current usage or administration of that property is proposed.

E.4 There can be little doubt that, if the land referred to in the Bill is common good, then it would carry all of the hallmarks of inalienability. If, however, it is not common good, then the issue of its possible inalienability (and thus any doubt over the Council's right to re-allocate it to another department) does not arise.

E.5 It appears that the Council had decided that to accept that the land concerned is inalienable common good was the prudent course to follow. It is appreciated that, having taken that course, it would be awkward now for it to seek to argue before the courts that the land is not common good after all. It is perhaps unfortunate, however, that that approach had been taken, certainly in the context of the current process - and also from the broader perspective. An opportunity for some much needed judicial guidance on the operation of the law in relation to the 'statutory powers exception' has certainly been missed but, more pertinently, the Council would have resolved the issue of the status of the land in question and the need (if any) for the present Bill would have been clearly established. As matters stand, this issue has not been put beyond doubt.

E.6 From the background information to be found in the public domain, it is apparent that there are certain elements of principle in the available evidence (as to the circumstances in which the title to the land at Portobello was acquired) which have not previously been directly weighed against each other in the existing common good case law.

E.7 I had referred at paragraph B.3.4 above to the Outer House decision in the case of *Cockenzie and Port Seton Community Council* which is regarded as the authority for the proposition that the treatment of a property in a Town Council's accounts may not necessarily be taken at face value in terms of determining whether or not the property is part of the town's common good. It is clear from the reports of that case, however, that there were a number of factors involved which would be likely to have contributed significantly to the way in which the annual accounts were compiled in that particular instance.

E.8 This is obviously not the forum for a detailed analysis of the issues concerned, or those identified in the present case, but from the papers I have seen, it is apparent that the circumstances surrounding the acquisition of Portobello Park, and the quality of the available evidence as to what was intended, can be distinguished in a number of significant respects from those in the Port Seton case. While the comments contained in the Proposers Memorandum are noted, it is nevertheless quite possible that, on a full consideration of the matter, Portobello Park might have been deemed by the courts not to be common good land. It must be emphasised that I can put this point no more strongly than that of a possibility. It is also quite possible that the contrary conclusion would have been reached. However, I cannot readily share the Proposers' view that the prospects of their obtaining a declarator that the park is not inalienable common good land are necessarily 'very poor'.

E.9 The fact of the matter is that, given the extent of the existing law - and the unresolved questions which arise from it - there are well-reasoned arguments to be made to support either view. The case for the land being properly held on the rates account certainly appears significantly stronger in the instance of Portobello Park than it was in the Port Seton case, but it is probably futile to speculate, in the context

of the law as it stands, as to which elements the court would have decided should prevail had a judicial determination been sought. The point is evidently redundant now. The one certainty is that if the land in question is not, in fact, common good, then no question arises over its alienability – and thus over the Council’s ability to appropriate it for another of its functions. A ruling from the court would, therefore, have clarified whether or not it might be necessary to promote the current Bill.

F. Effect of the Inner House decision

F.1 The decision made by the court is, essentially, that the terms of the 1973 Act do not empower local authorities to appropriate inalienable common good land for use for any of their other functions - and that the ‘advancement of well-being’ powers as contained in s20 of the Local Government in Scotland Act 2003 do not alter that position. The older common law fiduciary duties – and the corresponding rights of the inhabitants of the relevant area – therefore remain in force in transactions not involving outright disposals of inalienable common good properties. This would include the rights of the residents to insist that such inalienable property is not encroached upon (or appropriated for other uses) by the council itself.

F.2 I have been invited to comment on the impact of the Inner House decision on the work of local authorities in Scotland.

F.3 While, in practical terms, my experience in the workings of our various local authorities is obviously limited, I have given this question careful consideration and concluded that, in theory, the decision itself ought not to have any significant impact in their dealings with common good properties – at least from the perspective that it simply re-affirms the position which had always existed (namely that inalienable common good land could not be appropriated to other uses) before the perceived possibility of any ‘loophole’ having been created by the powers to advance wellbeing under the 2003 Act had arisen. In any event, even if the Inner House appeal had been determined in the Council’s favour, thus enabling local authorities to appropriate inalienable common good lands for other functions without requiring the consent of the court, the councils would still have been bound by the statutory element of their obligations in their dealings with the common good (to have regard to the interests of the relevant inhabitants) as referred to in Paragraphs A.5 and A.6 above.

F.4 This would still, therefore, have provided legitimate objectors to an appropriation involving inalienable common good property with an opportunity to seek a judicial review of a decision to effect the appropriation on the grounds that that statutory duty had not been adequately met. On the face of it the statutory duty may not appear to be a particularly onerous one. However, the precise meaning and effect of the councils’ obligations in this respect is another area which the courts have not yet explored in any great detail. It might be rather bold to suggest that broadly the same factors would have needed to be taken into account in reviewing any decision to appropriate an inalienable common good property, were this to have been permitted, as currently need to be considered in relation to an application under s 75(2) for consent to a proposed disposal. However, there would seem to be no obvious reason as to why that should not have been the case. The point, in any case, is obviously academic now.

F.5 Instances of councils seeking to appropriate inalienable common good lands for other council functions were, as far as I am aware, relatively rare. In my experience, obstacles to the work of the councils arise much more frequently when the status of a property which they may intend to dispose of in one way or another is called into question. It may be difficult to establish the original status of the property concerned with any degree of certainty, either because not all of the original records documenting the circumstances of the property's acquisition and the history of its usage are available, or due to the case law not having been developed sufficiently to provide appropriate guidance to apply to the particular set of circumstances involved. These, it appears, may remain the problem areas for some time to come.

G. Feasibility of alternative approaches

G.1 I have considered the feasibility of the possible alternative approaches identified at paragraphs 17-42 of the Proposer's Memorandum and, save for the observations made at paragraphs E.5 – E.9 above, and my additional comments below, I find myself largely in agreement with the majority of the conclusions reached by the Council.

G.2 The primary area of dissatisfaction lies in the fact that the Council had not sought a judicial determination of the status of the land in question. As previously indicated, I am unable to support the Council's conclusion that the prospects of obtaining a declarator to the effect that the land in question is not inalienable common good land are very poor.

G.3 From a purely practical perspective, I can see that, in one respect at least, it might be thought that it is not particularly material for present purposes that such a declarator has not been obtained. The argument would be that if a declarator was now to be sought, with the process taken to a conclusion through the courts, and the land in question was found not to be inalienable common good, the Council would then be placed in a position broadly similar to that in which it would be if the Bill was passed. If, on the other hand, the Park was found by the courts to be inalienable common good, the only feasible avenue open to the Council to enable the desired appropriation to be effected would involve the promotion of private legislation anyway.

G.4 To that extent, then, if the Committee is minded that the Bill should be enacted, doing so without requiring the available legal determination to be obtained first might be viewed as simply expediting the desired outcome, whatever the true status of the land in question might be. It may, however, be considered inappropriate to be enacting provisions (in the form of paragraph 1(1) and (2) of the Bill as presented) dealing with the common good status of the Park when that is not a matter upon which the courts have passed judgment.

H. Additional comments

H.1 If the land at Portobello Park is currently inalienable common good, it is clear that the Bill as presented does not offer the same judicial safeguards for the residents of the city as those which would have been available had the Council's

intention been to effect a disposal to a third party as opposed to an appropriation for another of its own functions - producing a similar anomaly to that created by the existing legislation, as referred to in paragraph D.5 above.

H.2 If, however, the Bill was to be enacted in its current form, the land in question would have to be regarded as common good (whether or not it is at the moment) and the Council would thus be bound by the general statutory duty (to have regard to the interests of the residents) imposed under s.15(4) of the Local Government etc (Scotland) Act 1994 in its dealings with it. The possibility would therefore remain that any decision to effect the proposed appropriation in terms of the Bill as enacted might still, at least in theory, be open to challenge on the grounds that there had been a perceived breach of that duty. To that extent, the enactment of the Bill, were it to proceed, might not necessarily result in a final resolution of the issues with which the Council is faced as quickly as might be hoped. As mentioned above, the courts have not yet examined the extent and effect of the local authorities' statutory duties in relation to the common good. However, the fact that the property would not be treated as inalienable would suggest that a less exacting approach to justifying the appropriation would be required than in the case of an application for consent to dispose of inalienable common good land under s75(2) of the 1973 Act.

Current/previous relevant involvement in matters relating to the common good

I am a Scottish qualified solicitor of 29 years' standing. The great majority of my career has been spent in the commercial property departments of some of Edinburgh's larger commercial law firms. I am now a partner in Iain Smith & Partners, WS in Galashiels and Duns. Immediately prior to my moving to my present firm I had been engaged by Scottish Borders Council on a full-time basis, for a period of around 14 months, specifically to carry out researches into and advise on matters relating to the common good of the local burghs - including, in particular, investigating the background to the acquisition of various properties owned by the former town councils and making recommendations as to the status which ought to be assigned to them. In my present practice I have continued to carry out similar researches and advise clients (from both the public and private sectors) on common good issues on a regular basis.

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