

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

WRITTEN SUBMISSION FROM THE CITY OF EDINBURGH COUNCIL – BILL PROMOTER

We write to address two issues arising from, and provide further evidence in relation to, the written submission provided to the Bill Committee by Mr Roderick J McGeoch.

1. Committee's invitation to comment

We note that Mr McGeoch's submission, along with those of Professor Robert Rennie and Mr Andrew Ferguson, are noted as being in response to a request for evidence by the Committee.

At paragraph E1 of Mr McGeoch's submission, he notes that he was asked 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". While we understand that the question put to Mr McGeoch intentionally reflects the substance of a large number of the objections, we are concerned that those objections reflect an apparent wider misunderstanding of what the Inner House was and was not asked to decide. For the sake of completeness, we would wish to stress that the Inner House was **not** asked to decide whether the land was inalienable common good land (as Mr McGeoch himself notes at paragraph E2 of his submission). Rather, the judicial review proceeded on the assumption that that was the case, and the Court was neither asked nor required to comment on whether that assumption was correct.

The Council respectfully submits that it will be important to remove any such misunderstanding in the course of the Committee's consideration of the Bill's general principles, and the Council would welcome the opportunity to do so in oral evidence before the Committee.

Whilst only the courts can formally determine whether or not any land is common good, or alienable or inalienable common good, the Council strongly believes that Portobello Park ("the Park") is inalienable common good land, as the following section notes, and that if a court was asked to consider the question that is the decision it would reach. As such, the absence of an existing court decision to that effect should not be a significant issue in respect of the Bill.

2. Mr McGeoch's submissions on the status of the land

We note that Mr McGeoch, at paragraph E5 of his written submission, casts doubt on the Bill's necessity by questioning the Council's decision not to seek a court judgment to confirm the status of the land as inalienable common good land, and stating that the matter has not been put beyond doubt. He then speculates, at paragraph E8 of his submission, that *"it is 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'."

The Council strongly disagrees with this view. Following the conclusion of the Inner House appeal, the Council sought advice on the status of the land from Gerry Moynihan QC. A copy of Mr Moynihan's opinion of 22 November 2012 accompanies this letter. Mr Moynihan examined the historical background to the Park and confirmed that it forms part of the common good. He also concluded that the Park is inalienable. He was sufficiently confident in that conclusion that he separately advised that he would decline to act should the Council bring a court action arguing for a different conclusion.

Mr Moynihan's opinion is accessible via the following link:

<http://www.edinburgh.gov.uk/downloads/file/9214/>

Also accompanying this letter is an advice note prepared by Brodies LLP on 14 November 2012, which likewise assessed the Park's status and concluded that it falls within the category of inalienable common good land.

Brodies' opinion is accessible via the following link:

<http://www.edinburgh.gov.uk/downloads/file/9215/>

Both Mr Moynihan and Brodies had access to all the relevant information held by the Council concerning the Park, including the historical documents relating to it.

In light of those views, it would not have been appropriate for the Council to pursue a court action, with no realistic prospects of success, seeking a decision that the Park was not inalienable common good land. Such an approach would almost certainly have resulted in the Council ending up back in the position in which it now finds itself, having wasted potentially significant amounts of public funds and added further delay to the delivery of the much-needed new Portobello High School.

Both of these pieces of advice have previously been published by the Council on its website, but we thought that it would assist to bring them specifically to the Committee's attention in light of Mr McGeoch's submission.

It may also be worth highlighting that, from our understanding of their submissions, both Mr Ferguson and Professor Rennie agreed with the Council's views on the prospects of the potential alternatives to a Private Bill.

Yours faithfully

Gillian Tee
Director, Children and Families
5 September 2013