

JOINT OPINION OF SENIOR
COUNSEL

For

EDINBURGH COUNCIL ('the Council')

Relative to the Council's power to
appropriate land held as part of its
common good for use as a school in the
exercise of its statutory function

D) *PRÉCIS OF FACTUAL BACKGROUND*

We are advised that the Council wishes to engage in a programme of improvement of some of its school buildings. This may entail refurbishing existing schools or constructing new schools. It is proposed to fund this out of the Council's own resources and it is therefore anticipated that the programme of refurbishment and building will extend for a number of years. For that reason, it is anticipated that there will be no private finance or third party partner who might, as in other arrangements, acquire title (whether by disposition or lease) to the land on which the schools are to be built or refurbished (as the case may be). The schools to be rebuilt or refurbished will remain within the ownership and control of the Council.

At present the Council is in the process of identifying and prioritising those schools for which there is the most pressing need for refurbishment or replacement. Included among the possible candidates in the programme is a proposal to build a new school (Portobello High School) on part of the site of the existing park in Portobello.

We are advised that the Council holds that parkland as part of the common good of the Council.

As part of the process of selection the Council require to consider whether there may be any legal impediments to, for example, relocating an existing school onto nearby open ground or parkland. It is in this context that a question has arisen as to whether there may be such an impediment in relation to a proposed new Portobello High School.

II) QUESTION FOR COUNSEL

A question has arisen as to whether there is any legal impediment to a proposed appropriation by the Council of certain land, presently held as part of its common good fund and used as a public park in Portobello ('the Park'), for the site of a new high school (Portobello High School ('PHS')). In particular, we are asked to advise whether an application for authorisation of such a dealing requires to be made to the Court of Session under section 75 of the Local Government (Scotland) Act 1973 ('the 1973 Act').

III) ASSUMPTIONS

For the purpose of this Opinion we proceed on the following assumptions:

- (i) that the Park land in question is inalienable common good land;
- (ii) that the Council is acting in implement of a function in respect of the use for which the common good land is to be appropriated; and

- (iii) that no third party will acquire an interest to the site of the school to be situated on part of the Park (whether by lease, or any sale or lease back arrangement) such as to constitute a 'disposal' within the meaning of section 75(2) of the 1973 Act.

IV) SUMMARY ANSWER

In our view, the Council do not require to seek the prior consent or authorisation of the Court under section 75(2) of the 1973 Act to the proposed appropriation by them of part of the Park at Portobello for the construction of the proposed new PHS.

V) REASONS

From our consideration of Part VI of the 1973 Act, we conclude that no prior authority or consent of the Court is required to the proposed appropriation, even in respect of land held by the Council as part of the common good. The relevant power to be exercised by the Council in respect of the Park for the purpose of constructing a new PHS (if it be selected) is that available to it under section 73 of the 1973 Act. The terms of section 75(2) of the 1973 Act appear to us to have no application to the proposed appropriation of part of the Park for the construction of any new PHS.

(i) The codification of powers in Part VI of the 1973 Act

One of the major features of the 1973 Act was to abolish the old burghs and to constitute new local authorities. The significance of the 1973 Act in abolishing the old

burghs and in transferring all common good property to the newly constituted district and island councils¹ should not be underestimated. For the first time, the holding and administration of common good land was placed on a purely statutory footing².

Furthermore, the local authorities acquiring the common good land transferred to them by virtue of the 1973 Act did so subject to certain obligations. In particular, in administering the common good transferred to them, the island or district councils (as the case may be) were enjoined to 'have regard to the interests of the inhabitants' of their respective areas. In other words, the local authorities to whom the common good was transferred under the 1973 Act had a duty to administer the common good transferred to them in a manner commensurate with those interests.

The local authorities constituted under the 1973 Act were pure creatures of statute and, as such, they could only exercise such powers as were conferred upon them by the 1973 Act (as indeed are the present local authorities, including the Council, having been constituted under the Local Government etc. (Scotland) Act 1994). The powers conferred on them for dealing with property, including land forming part of the common good transferred to them by virtue of section 222 of the 1973 Act, are set out in Part VI of the 1973 Act.

Part VI of the 1973 Act comprises a code of the powers exercisable by local authorities in relation to land transactions. It details the powers exercisable by way of acquisition³, appropriation⁴ and disposal⁵ of land. In our view, the general powers of

¹ By virtue of subsection 222(2) and (3) of the 1973 Act.

² It is for this reason that we do not for the purposes of this Opinion require to consider the pre-1973 case law insofar as it threw up questions about any constraints which were found as a matter of the common law to exist in respect of certain forms of dealing with common good. The pre-1973 case law may remain relevant insofar as specific fact situations inform the separate question of what is or is not a disposal.

³ Whether by agreement (under section 70) or compulsorily (under section 71).

⁴ Under section 73.

appropriation and disposal may be exercised by a local authority even in relation to common good land, except to the extent that section 75(2) of the 1973 Act qualifies the exercise of such powers in respect of certain forms of dealings (being disposals) of a specific type of common good (being inalienable common good).

What is the scope of the restriction contained in section 75(2) of the 1973 Act? In order to ascertain this it is necessary first to note the terms of section 75(1), which provides as follows:-

(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.

Section 75(1) serves two purposes. It introduces the distinction between 'alienable' common good⁶ and 'inalienable' common good⁷. In doing so, it also clarifies that the restriction set out in section 75(2) does not apply to appropriations or disposals of alienable common good. Absent the distinction made in section 75(1), subsection 75(2) might be construed as requiring consents to disposals of inalienable *and* alienable land. The terms of section 75(1) put beyond doubt that the requirement for court authorisation in section 75(2) did not extend to dealings with alienable common good. The terms of section 75(2) make it clear that to the extent that the consent of the court was required, it was only in respect of disposals of inalienable common good.

⁵ Under section 74.

⁶ Being land 'with respect to which a question a question arises as to the right of the authority to alienate', under section 75(2).

⁷ Being 'land in respect to which no question arises as to the right of the authority to alienate', under section 75(1).

It is important to recall that there is no statutory presumption of a prohibition of disposals of inalienable common good. The scope of section 75(2) is restricted to 'disposals' of inalienable common good and, in respect of such a dealing, makes provision for an application to be made to the Court of Session or the Sheriff Court for authority to engage in such a dealing (i.e. a disposal) in respect of common good having this quality of inalienability. There is in our view coherence to the distinction between disposals and other, lesser forms of dealings because, it is only disposals which have the effect of 'depriving the local community of the land in question'⁸. In any event, the policy underlying section 75(2) of the 1973 Act is simply to ensure that any such dealings are under the control of the court⁹. We consider the terms of section 75(2) and the recent case law in more detail, in the next section of this Opinion.

(ii) *The terms of section 75(2) of the 1973 Act*

We are advised that it is proposed that there will be no third party funder acquiring an interest in the Park land on which the new PHS (if selected) will be built. It is for this reason that we proceed on the third assumption (noted above), that there is no 'disposal' for the purposes of section 75(2). The Court of Session has had occasion recently to consider what is encompassed within the meaning of 'disposal'¹⁰ in this context. In the case of *North Lanarkshire Council, Petitioner*, Lord Drummond Young made the following comments:

⁸ This is a paraphrase of the latter part of the first sentence in paragraph 8 of Lord Drummond Young's Opinion, quoted in Part V(ii) of this Opinion, below.

⁹ The court has a wide discretion in how it deals with such applications. In authorising such a dealing (i.e. a disposal of inalienable common good), the court may impose conditions (under section 75(2)), including the provision of substitute land (under section 75(3)).

¹⁰ See the Inner House case of *South Lanarkshire, Petitioners* of 11 August 2004. No opinion was issued in that case, but see the discussion by Lord Drummond Young in the Outer House case of *North Lanarkshire Council, Petitioner* 2006 SLT 398.

[7] In South Lanarkshire Council, Petrs, a petition was presented under s. 75(2) in relation to land forming part of the common good of the petitioning council. The land in question was in use as a public park and playing fields, and the petitioners wanted to make use of it for the construction of a new school and sports facility. The school and sports facility were to be constructed under PPP arrangements. Those differed from the PPP arrangements proposed in the present cases in that they involved a 30 year lease of the school by the petitioning council to the private sector contractor with a lease back to the council for the same period. During the period of the lease and lease back the contractor was obliged to maintain the school buildings. The facts thus bear some similarity to the present cases. The court ordered a report into the facts and circumstances of the petition. When this was obtained, the Inner House refused the prayer of the petition as unnecessary. The interlocutor narrates that this was done "in respect that it was accepted by counsel for the petitioners that the arrangement proposed did not involve a 'disposal' of land for the purposes of section 75(2) of the Local Government (Scotland) Act 1973". It seems clear that the court was itself satisfied that the arrangements did not involve a "disposal" for the purposes of s. 75(2), because that was the only basis on which it could have refused the petition as unnecessary. That is an indication that, in at least one other case, the court has taken the view that PPP arrangements of the sort under consideration in the present case did not amount to a "disposal" for the purposes of s. 75(2). Indeed, the present cases are a fortiori of South Lanarkshire Council, Petrs in that no lease is involved; instead, the PPP contractor is merely given rights of occupancy, and those are non-exclusive rights except during the period of construction, when obviously special considerations apply.

[8] Although no opinions were issued, the decision in South Lanarkshire Council, Petrs indicates that, for a transaction to amount to a "disposal" of land for the purposes of s. 75(2), there must be an act whereby the local community are deprived of the benefit of the land in question. It seems to be implicit in the decision that the use of land held for the purposes of the public park to construct a school and playing fields does not involve any "disposal" for the purposes of the subsection. In view of that decision, which is obviously binding on me, I consider that there is no "disposal" in the present cases. It follows that s. 75(2) has no application. In these circumstances I refused the prayers of the petitions as unnecessary. (Emphasis added.)

The words we have highlighted in paragraph 8 of Lord Drummond Young's Opinion appear to us entirely to govern what is envisaged in the case of the proposed appropriation of parkland for the construction of a new PHS. Indeed, the facts of the Petitioner in the *North Lanarkshire* case are *a fortiori* those in the instant case, as in

NLC, Petitioner there was a third party contractor who was to acquire contractual rights of occupation of the land to be built upon and dedicated to use as a school.

The critical point is that the act of appropriation by the council in *North Lanarkshire Council, Petitioner* was held to be outwith the scope of section 75(2). There was no suggestion by Lord Drummond Young in that case, or by the Inner House in the *South Lanarkshire* case, that what was proposed was either beyond the powers of the council concerned or otherwise required some other form of authorisation. Accordingly, simply because prior court authorisation is required under section 75(2) of the 1973 Act in respect of acts amounting to 'disposals' of inalienable common good land, that does not in our view import a like restriction for other lesser forms of dealing, such as appropriation, in respect of inalienable common good land.

(ii) *Appropriation of land*

No question arises in respect of the power to acquire land and we therefore do not consider the terms of sections 70 to 72 of the 1973 Act, which are the first powers set out under the rubric of '*land transactions*' in Part VI of the 1973 Act. The general power of appropriation of land is set out in next, in section 73. So far as material, section 73 provides as follows:-

'(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 functions, whether statutory or otherwise, land vested in them for the purpose of any other such function.'

Part II of the Town and Country Planning (Scotland) Act 1959 ('the 1959 Act'), contains a similar but different codification of powers (to that in Part VI of the 1973 Act) of acquisition, appropriation and disposals. In broad terms, section 24 of the

1959 Act introduced a relaxation in respect of the exercise of powers of appropriation. In particular, except in respect of certain limited classes of land¹¹ with which we are not concerned, it effected a relief from any requirement for Ministerial consent as might have been contained in any enactment conferring a power of appropriation and for which, until the passing of section 24 of the 1959 Act, Ministerial consent would have been required. It is pertinent here to note, too, a number of definitions contained in the 1959 Act. '*Disposal*', means '*disposal by way of sale, excambion or lease, or by other manner, except by way of appropriation, gift or the creation of a heritable security...*'¹². '*Function*' was defined in Section 54(1) of the 1959 Act as meaning '*a power or a duty*'. In our view, the administration of the common good subject to the duty we noted above (i.e. of having regard to the interests of the inhabitants) falls within the phrase '*land vested in them for the purpose of any other such function*' in section 73(1) of the 1973 Act. Accordingly, so long as the proposed appropriation of part of the Park land is for the purpose of '*any function*' (which is the second of the assumptions we set out in Part III, above, and which we understand will be that of education), the Council may lawfully do so in exercise of the power conferred upon it in Section 73 of the 1973 Act.

We have reached that conclusion as a matter of interpretation of the relevant statutory provisions. However, the recent cases referred to above also support this

¹¹ As originally enacted, section 24(2) of the 1959 Act contained a savings for 'common or open space' and for 'land held for use as allotments'. The consent of the Secretary of State was required to the appropriation of such lands. From 1981 a further relaxation has been introduced in that, while the consent of the secretary of state is still required for an appropriation of land held as allotments, all that is now required in advance of the appropriation of common or open space is publication of notice of the proposed appropriation coupled with an obligation to consider any objection that may be made to the proposed appropriation: see paragraph 2 of Schedule 3 and paragraph 9 of Schedule 2 to the Local Government (Miscellaneous Provisions) (Scotland) Act 1981.

¹² Section 54(1), emphasis by underlining added.

conclusion. What was proposed by the petitioning Council in the *North Lanarkshire* case constituted an appropriation not a disposal. Similarly, in our view, what is proposed here (if PHS is selected) would constitute an 'appropriation', not a disposal. The relevant power of appropriation, in the sense of changing the use of part of the Park and dedicating it to the construction of a school, is that available to the Council under section 73 of the 1973 Act.

(iii) *Casus improvisus?*

Is there, as one recent commentator¹³ has suggested a *casus improvisus* in Part VI of the 1973 Act, i.e. an unforeseen and hence unprovided for circumstance, in relation to the appropriation of inalienable common good? No. In our view, there is no *lacuna* in the 1973 Act such as to require consideration of an application to the court for consent outwith the scheme or provisions of the 1973 Act.

First, having made express provision for the exercise of the power of appropriation (in section 73) and further express provision for the requirement of court consent to a disposal of inalienable common good (in section 75(2)), there is in our view no basis for contending that the prospect of the appropriation of inalienable common good land was unforeseen to the drafters of the 1973 Act. Secondly, the significance of the new local authorities brought into existence by the 1973 Act, as creatures of statute, must be recalled. The common good hitherto held by the burghs were transferred to the new statutory island and district councils and placed on a statutory footing¹⁴. Any constraints on the manner of dealing with common good as may have emerged in the common law cases were superseded by the express statutory

¹³ A.C. Ferguson, *Common Good Law* (2006), pp. 119-120.

¹⁴ The point remains the same in respect of the statutory transfer effected by section 15(4) of the Local Government etc (Scotland) Act 1994 to the local authorities brought into existence by that Act, including the Council.

powers of dealing with land, including common good land, conferred by Part VI of the 1973 Act. It is for this reason that Part VI of the 1973 Act required to be a comprehensive code governing all manner of dealings. In any event, having regard to the variety of powers conferred, in our view Part VI of the 1973 Act comprises a complete 'code'¹⁵ of the powers exercisable by local authorities in respect of land transactions. All of these features lead to the conclusion that Part VI of the 1973 Act is intended to be a complete code of the available powers and how they are to be exercised in respect of particular types of property. These factors militate against the identification of any *lacuna* in the 1973 Act or the need to imply any additional procedures to be followed for dealings in common good outwith that Act.

We have reached this view upon a consideration of the provisions in Part VI of the 1973 Act. We are, however, fortified in that view by the researches we have undertaken into the statutory predecessors to the 1973 Act enacted in the preceding 100 years relative to powers of appropriation and governing disposals (by various means) of common good land. The principal features which emerge from that historical review include the following:

- (i) the introduction of a procedure for obtaining the court's consent to the exercise of certain permissive powers (i.e. allowing certain forms of dealing) with certain types of common good land;
- (ii) the emergence of specific statutory provisions enabling the exercise of a power of appropriation by local authorities of assets held for one purpose to another purpose;

¹⁵ Including, of course, any other powers which are incorporated by reference in Part VI.

- (iii) the fact that a power of appropriation has been regarded as a distinct power from, and is not to be equated with, a power to dispose;
- (iv) that when a statutory codification of the powers exercisable by local authorities in relation to land was first enacted, consideration was also given in that code to the manner in which those powers (or some of those powers) might be applied to land held as common good;
- (v) that in tracing the evolution of the statutory provisions in enactments in the Twentieth Century anent the general powers of appropriation and disposal exercisable by local government entities, there is a clear and discernable trend to reduce the mechanisms of control (e.g. by dispensing with ministerial consent) or their reach (e.g. by reducing the classes of lands requiring some control mechanism), rather than to make them more onerous or wider reaching; and
- (vi) that in no enactment in the last 100 or so years has the consent of the court ever been required to the exercise of the power of appropriation of common good, whether alienable or inalienable in character, and the former requirement for Ministerial consent has (with one minor exception¹⁶) been abolished.

¹⁶ Proposed appropriations of land held for allotments still requires Ministerial consent: see section 73(3) of the 1973 Act (as amended).

Accordingly, even if we are wrong and there is a *casus improvisus* in Part VI of the 1973 Act, what additional requirement can it be said would be implied? Having regard to the just noted features which emerge from our historical review of the evolution of the statutory predecessors to the 1973 Act, we are nonetheless of the view that any argument that the Council required the consent of a court (e.g. under an application to the *nobile officium* of the Court of Session) to the proposed appropriation would be likely to fail.

We trust this is sufficient for the Council's present purposes. If the Council's Gill Lindsay has any questions, she should not hesitate to contact us.

THE OPINION OF



Malcolm Thomson QC



Sarah P.L. Wolffe QC

19th November 2008

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COUNSEL**

For

EDINBURGH COUNCIL ('the Council')

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2008

ref. Gill Lindsay

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