Opinion of Counsel
for
City of Edinburgh Council

(Portobello Park Action Group)

Gerry Moynihan Q.C.
Advocates Library
Edinburgh EH1 1RF
Telephone: 07739639346
E-mail: MoynihanQC@aol.com

Brodies LLP
LKEN.JMG.CIT13.23

Opinion of Counsel
for
City of Edinburgh Council

(Portobello Park Action Group)

Introduction

1. The case involving the City of Edinburgh Council and Portobello Park Action Group has proceeded on the basis of the Council's classification of the park as part of the inalienable common good land held by the Council. I have reviewed this classification and for the reasons that I explain in this Opinion I have concluded that it is correctly made and unavoidable.

2. The Council has effectively reached two conclusions. The first is that the park is common good land. The second is that it is inalienable. Each of these conclusions requires separate discussion.

3. I am bound to confess that when one considers any aspect of the law on common good one is entering very uncertain territory. One need only recall the observation of *Lord Justice Clerk Cooper* in *Mags of Banff v Ruthin Castle* 1944 SC 36 at page 43:

> *"... the different categories of property which a chartered burgh may competently hold, and the distinguishing characteristics of the special category known as common good, can hardly be said to have been anywhere defined with mathematical precision ...".*

Common Good

4. Given the uncertainties in the law generally, the prudent course ordinarily is to proceed, as *Lord Osborne* did in *Cockenzie & Port Seton CC v East Lothian DC* 1997 SLT 81 at page 89I-J, on the assumption that all property of a former burgh is part of the common good.

5. In considering whether that default position has to be adopted here I have given particular consideration to two observations by *Lord Drummond Young* in *Wilson.* The first is at para 43:

> *"Common good is a category of property held by burghs prior to 1975, and by the various forms of local authority that have existed since that date. In its original form, it comprised all property of a royal burgh or a burgh of barony not acquired under statutory powers or held under special trusts: Magistrates of Banff v Ruthin Castle Ltd, at p 60 per Lord Wark."*

That is closely associated with the second observation that common good land may lose its inalienable character as a result of statute, and section 75(2) of the 1973 Act is a classic example of that.

6. I set section 75(2) aside because the Inner House has held that that sub-section does not apply to appropriation to new uses (as opposed to disposal) of property held by the Council (see §33 of the Inner House decision).

7. Dealing with the statutory origins of the park, I note that it was acquired under the Edinburgh Extension Act 1896, section 74. I understand that that statutory provision was repealed by the Edinburgh Corporation Order Confirmation Act 1933 and from that time the park would have fallen under Part XI of the 1933 Act. I have considered whether it could be argued that this park was been held under statutory powers and falls to be regulated by those powers and not by the common law. If tenable, that argument would now place the land within sections 73 and 74 of the 1973 Act because, the previous Acts having been repealed, the land would fall to be regulated under the 1973 Act.

8. Even before I was informed of the history behind the specific terms of section 74 of the Edinburgh Extension Act 1896 I doubted that the Council could escape the default position advocated by *Lord Osborne*. The complication is that section 74 required the land to be dedicated for public use as a park or recreation ground. That is reflected in the terms of the disposition as well as the statute. Dedication to public use is the paradigm indicator of common good land: *Lord McLaren* in *Murray v Mags of Forfar* (1893) 20R 908 at 918-919.

9. I have since been provided with historical material relating to section 74 of the Edinburgh Extension Act 1896. That Act included both a general enabling power giving discretion to provide parks (section 64) and also the more specific statutory duty to "acquire dedicate and thereafter maintain for public use a public park or recreation ground in some situation convenient for the inhabitants of the present burgh of Portobello" (section 74). It is clear from the historical material, and in particular the correspondence between the two Councils, that the provision of this park was one of the terms agreed in order to persuade Portobello to proceed with the amalgamation. A proposal to leave the provision of a park to the discretion of the merged Council at some later date (i.e. under section 64) was rejected in favour of the promise to provide one within the seven year period specified in section 74.

10. To my mind this confirms that the park was not in the ordinary run of parks provided by the Council in implement of its statutory powers. That is confirmed by the use of the verb 'dedicate' in section 74. As I have previously said, dedication to public use is the paradigm indicator of common good land: *Lord McLaren* in *Murray v Mags of Forfar* (1893) 20R 908 at 918-919.

11. The correspondence does indicate that there was an expectation that the park might be as beneficial to day-trippers from Edinburgh as to the residents of Portobello but that does not affect matters. The fact remains that the park was to be acquired and dedicated to public use and it does not matter whether the public was confined to one narrow area or more widely dispersed.

12. As I have observed, the original statutory provisions have long since been repealed but the critical dedication to public use remains enshrined in the title via the terms of the disposition.

13. The historical materials reinforce my view that the default position applies here: the park is part of the common good of the Council.

Inalienability

14. The authorities were reviewed most recently in a case involving Edinburgh: *Capacity Building Project v City of Edinburgh Council* [2011] CSOH 58. *Lord Malcolm* gave this summary at §[40]:

"(a) Common good land consists of grants of territory made to the community in the original charter or by subsequent grant. A council's powers to raise or receive funds, and the fruits of those rights, do not fall within the common good. Subjects acquired under statutory powers or held under special trusts are not part of the common good. Common good is inalienable if its retention is necessary for the proper administration and trade of the burgh or for the convenience of the inhabitants.

(b) Generally speaking common good must be applied for the benefit of the community in such manner as, using a reasonable judgement, the council in its discretion considers proper. (Thus in the present case it is not sufficient for the petitioners simply to demonstrate that the subjects form part of the common good of the city).

(c) A limitation on the use to which common good land may be put can be imposed in the original charter or grant. Alternatively, ancient or immemorial usage can explain the purpose of the original grant, indicating that the subjects have been appropriated or dedicated to a particular purpose, for example as a golf links, a bleaching area, an area for public recreation and resort, etc. Such subjects are vested in the local council as steward or guardian purely for maintaining that state of affairs. The true owner of the subjects is the community at large, with each citizen having a right to enforce the particular conditions against the magistrates. Such privileges are a pertinent or adjunct of the title. It is not a matter of servitude, trust or subordinate right, but of the quality of the title of the magistrates. However, if the use to which common good land is put is the result of a decision or permission of the council, no such inalienable right or privilege is vested in the community."

15. It is the third of those propositions that is of concern in relation to Portobello Park. It implies that land dedicated to recreational use is inalienable. Three of the cases cited by *Lord Malcolm* are consistent with that view. In *Sanderson v Lees* (1859) 22 D 24 the Council was interdicted from selling off part of a golf links. The second case is *Paterson v The Magistrates of St Andrews* (1881) 8 R(HL) 117, in which the House of Lords made a limited exception for the construction of a road that did not interfere with the playing of golf. That is to be contrasted with

Grahame v The Magistrates of Kirkcaldy (1879) 6 R 1066 and 9 R (HL) 91 where, but for the fact that the Council had completed construction pending the action and offered an alternative site, the Courts would have held that the Council had no right to construct stables for use of the police on land that was used as a bleaching green and for general recreation.

16. More modern cases under section under section 75 of the 1973 Act, including *Motherwell District Council Petitioners* 1988 GWD 15-666, proceed on the premise that recreational land is in the inalienable category.

17. Among the peculiarities of the law relating to common good is that 'inalienable' does not carry its ordinary meaning. It is more akin to a fiduciary duty to permit the land to be used by the public, in this case, for the purpose of recreation. Moreover, the duty is not absolute. The case of *Paterson v Mags of St Andrews* (1881) 8 R(HL) 117 clearly establishes that the Council is at liberty to make alternative use of the land provided that it does not prejudice the ability of the community to use the land for its primary, recreational purpose. This can involve a question of fact and degree. The Inner House has addressed that argument at §§36-38 of its opinion and concluded that the Council cannot appropriate part of the park for the construction of a school. That conclusion is supportable by reference to *Grahame v Mags of Kirkcaldy* (1879) 6 R 1066 and (1882) 9 R(HL) 91 (the facts of which are closer to our case), where interdict was granted to prohibit construction of stables on common good land, though in the end the stables (which were under construction when the action commenced) were allowed to remain.

18. The same issue can be approached from another perspective. In *Wilson v Inverclyde Council* 2003 SC 366 at § 45 *Lord Drummond Young* summarised three situations in which common good may cease to be inalienable. One of those was where the continuation of the existing use would be 'wasteful':

> *"...if an item of common good property is no longer of use to the inhabitants of the town or area where it is situated, it may be sold. Cockenzie and Port Seton CC v East Lothian DC, [1997 SLT 81] is authority for this qualification."*

19. The question whether the present use of the land as a park is 'wasteful' is also one of fact and degree. While I would have to give careful consideration to the

merits of any argument that the Council might advance in this context, I note the averments for the Council in Answer 7.5 in the present proceedings (which include the finding that the park is underutilised). If that be the limits of the argument that the Council could advance, I cannot see that that would attain the standard of 'wasteful' use of property. The Council may consider that the park can be put to better use but it cannot be said that it is "no longer of use to the inhabitants of the town or area where it is situated". I cannot see a realistic prospect of success on the proposition that the land has ceased to be inalienable.

Conclusion

20. I would accordingly conclude that Portobello Park is inalienable common good of the Council.

21. That takes the site outside section 75(1) of the 1973 Act, which applies the powers of appropriation and disposal in sections 73 and 74 of that Act to alienable common good. Accordingly, the Council does not have the power under section 73 of the 1973 Act to appropriate part of the site for the construction of a new school.

THE OPINION OF

Gerry Moynihan

22 November 2012

Gerry Moynihan Q.C.