

15 NOV 2012

Client: City of Edinburgh Council
Subject: Common Good / Title Issues – Portobello Park
Date: 14th November 2012

1 Introduction

1.1 This Note has been prepared for The City of Edinburgh Council ("**the Council**") in respect of land owned by the Council at Portobello Park, Edinburgh ("**the Property**") and, specifically:

1.1.1 to re-assess the Common Good status of the land and whether it falls within the categories of 'inalienable' land; and

1.1.2 to comment on the status and current enforceability of title conditions contained in the Feu Disposition under which the Council's predecessors acquired the Property.

1.2 This note is an updated version of the note previously issued by us dated 18th October. In updating the note we have considered the historical documents relating to s74 of the Edinburgh Extension Act 1896 provided to us by the Council and the views of senior counsel, Gerry Moynihan QC.

2 Ownership of the Property

2.1 In preparing this Note we have reviewed a copy of the Feu Disposition granted by Sir James Miller in favour of the Lord Provost, Magistrates and Council of the City of Edinburgh (the "**Lord Provost, Magistrates etc**") dated 12 November 1898 and recorded in the Division of the General Register of Sasines for the County of Edinburgh (now Midlothian) on 16 November 1898.

2.2 In terms of the Feu Disposition the Lord Provost, Magistrates etc are stated to have paid a consideration of £25,000. Entry was given on Martinmas (i.e. 11 November) 1898.

2.3 You have confirmed to us that there have been no title transfers of the Property since it was acquired by the Council.

3 Description of the Property

3.1 The Feu Disposition conveyed "that area or piece of ground part of the Lands of Easter Duddingston belonging to me [i.e. Sir James Miller] as the said area of piece of ground is shown and delineated and coloured pink on the plan annexed and signed by me as relative hereto

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extending to fifty five acres and two hundred and forty four decimal or one thousandth parts of an acre [i.e. 55.244 acres] of thereby Imperial Measure". The copy Feu Disposition we have seen includes an uncoloured copy of the plan which shows that the Property is bounded on the north by a proposed road (which we understand is now Stanley Street), on the south by Milton Road, on the east by Hope's Road (now known as Hope Lane) and on the west by Duke Street (now known as Park Avenue).

4 Common Good – General

4.1 The Council is the statutory successor of the Lord Provost, Magistrates etc in terms of the Local Government (Scotland) Act 1973 and subsequent legislation, and all Common Good within the City of Edinburgh has therefore been transferred to the Council as unitary authority.

4.2 In order to identify whether assets held by the Council are Common Good it is necessary to look at the guidelines laid out in the case of *Magistrates of Banff v Ruthin Castle Limited* (1944) SLT 373. This case established that there is no requirement for the titles to contain a dedication to the Common Good. There is, instead, an assumption that all property owned by a former Burgh was, and will continue to be, Common Good unless there is clear contrary evidence to displace the assumption. The assumption will be displaced, and assets will not form part of the Common Good, if:

- (i) they were held by the Burgh as a trustee in a specific trust (in other words, the trust must be 'real' with a clear purpose and constitution – a simple statement in a title that a property was transferred to the Burgh 'as trustee for the behoof of the people' does not qualify); or
- (ii) they were acquired or dedicated by the Burgh for specific statutory purposes or specific statutory powers (the Burgh's general statutory powers to acquire and dispose of property are not sufficient, there must be reference to a specific statutory provision relating to the acquisition of the asset).

5 Common Good – Relevant Information

5.1 Council Records

5.2 We have examined an extract record of the Lord Provost's Committee meeting at Edinburgh on 20 July 1898 (approx 4 months prior to completion of the purchase). The Committee approved of their Sub-Committee's Report in terms of which:

"The Sub-Committee have carefully considered the provision of a Public Park at Portobello. They have through the Town Clerk been in communication with the Agents of several proprietors of lands in the District. They have carefully considered the offers made and they are of the opinion that a field extending to 56 acres or thereby on the estate of Sir James Miller of Manderston and situated to the south of the Railway Station would be a most suitable one for a Public Park. It can

be acquired at the price of £25,000, the Sub-Committee recommend that the Town Clerk should be authorised to accept the offer and adjust the conditions of sale."

5.3 We understand that in The City of Edinburgh Report on Common Good dating from 1905 the Property was not stated to be part of the Common Good. The Report provided, however, that:

"It may be noted that the benefits which the Common Good is fitted to confer upon the community are being supplemented in our time, in another direction, by the provision of Parks and other assets, which will be handed on for the benefit and use of the community in perpetuity. All these are being paid for by instalments from the rates which will, in the course of from twenty to fifty years – no great period in the life of a City – clear off all the original purchase price, so that the Edinburgh citizens of the future may enjoy not merely the old Common Good, but this new and ever-growing Common Good contributed by the rates under Statute."

5.4 We understand that the 1905 City of Edinburgh Report on Common Good contains a list of expenditure on Common Good assets, and that the Property is not included either as a listed asset or as benefitting from the expenditure of any Common Good funds. Further, we have been provided with a copy of what we believe to be the Edinburgh Municipal and Police accounts which shows a sum of £25,000 being paid to Sir James Miller in connection with the acquisition of land at Portobello. This would suggest that the consideration for the Property was not paid from the Common Good account. In 2008 the Council reviewed the status of the Property and amended its accounting procedures to include the Property in its list of Common Good assets.

5.5 Legislation

5.6 We have been referred to the following statutory provisions in terms of which the Lord Provost, Magistrates etc were empowered from time to time to acquire land:

5.6.1 The Edinburgh Extension Act 1896 (the "**1896 Act**"), Section 74 provides that:

"The Corporation [i.e. the Lord Provost, Magistrates etc] shall within seven years from the passing of this Act 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 and under such regulations as the Corporation may from time to time make."

5.6.2 The 1896 Act, Section 64 provides that:

"the Corporation may provide and maintain such public parks, pleasure or recreation grounds as they may from time to time deem necessary for the city or the royal burgh and they may purchase and acquire by agreement or take on lease any lands necessary for those purposes."

- 5.6.3 Section 64 is broadly akin to the provisions of the Public Parks (Scotland) Act 1878 (the "1878 Act") that are referred to below. However it is notable that in the 1896 Act specific provision is made in respect of a public park at Portobello and that the provision is in the manner of a duty rather than a discretionary power.
- 5.6.4 The 1878 Act Section 3 provides that:
- "Local Authorities may provide places of public recreation – Any local authority may purchase or take on lease, lay out, plan, improve and maintain lands for the purpose of being used as parks, public walks, or pleasure grounds provided by any person whomsoever"
- and Section 5 provides that:
- "Power to purchase lands – Any local authority may, for the purposes and subject to the provisions of this Act, purchase or take on lease, sell, or exchange any lands, whether situated within or without their district."
- 5.7 We have also been referred to Section 58 of the Public Health (Scotland) Act 1867, which we note was repealed in 1897, and Section 233 of the Edinburgh Municipal and Police Act 1879, which we note was repealed in 1889. These provisions were therefore not in force when the Property was purchased so we have not considered them further.
- 5.8 The Feu Disposition
- 5.9 The Feu Disposition expressly states that the Property was conveyed to the Lord Provost, Magistrates etc "representing the community of the said city" and that the Property is to "be used exclusively as a Public Park and Recreation Ground for the behoof of the Community of said City".
- 5.10 The Feu Disposition does not include any statement that the Property was acquired under a specific Act of Parliament or other statutory regulation.
- 5.11 Use of the Property
- 5.12 We understand that the northern section of the Property has been used as a golf course for a considerable period of time. It is currently under the control / management of Edinburgh Leisure under a lease that was granted in 1998. Prior to that time it was operated directly by the Council, open to members of the Portobello Golf Club on a fee paying basis, for in excess of 50 or 60 years. A pavilion was built on the Property to service the golf course in the 1950's, and we understand that other buildings existed prior to that date.
- 5.13 We understand that the southern section of the Property has been used as a park, with public access, for the whole of the period since the laying out / establishment of a park following its purchase by the Lord Provost, Magistrates etc in 1898.

6 Common Good – Analysis

6.1 The documentation which has been exhibited to us by the Council is, in our view, as comprehensive as could reasonably be expected, given the historical nature of the purchase of the Property. We consider that the following factors are relevant in any consideration of the Common Good status of the Property:

6.1.1 The initial assumption is that the Property is assumed to be Common Good unless (i) it is held in a specific trust; or (ii) it has been acquired or dedicated for specific statutory purposes or powers.

6.1.2 There is no evidence to suggest that a specific trust exists in respect of the Property.

6.1.3 We understand that it is likely that the Lord Provost, Magistrates etc purchased the Property to discharge its obligations under the 1896 Act. At first glance this would appear to satisfy the statutory purposes / powers exception and would suggest that the Property is not Common Good – however, we note the specific wording of Section 74 of the 1896 Act: "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". This would, on the face of it, appear to be a clear obligation on the Lord Provost, Magistrates etc to dedicate the Property to Common Good use. So far as we are aware there has been little, if any, consideration by the Courts of the statutory purposes / powers exception (the point was not disputed in the Magistrates of Banff case) but we are of the opinion that Section 74 could be seen as a statutory provision requiring the purchase of land specifically for the Common Good. In other words, if the Property was purchased under Section 74 of the 1896 Act this would, in our view, mean that the Property became a Common Good asset. We would stress, though, that we are not aware of any court authority that either supports or contradicts this view.

6.1.4 We have not been provided with any evidence which clearly states that the purchase was in exercise of Section 74 of the 1896 Act. Absent any such evidence, it is possible that the purchase could have been carried out in terms of Section 5 of the 1878 Act. There is no similar language in that Section which would indicate a dedication to Common Good, so we are of the view that if evidence can be found that the Lord Provost, Magistrates etc acquired the Property in terms of the 1878 Act then this would qualify for the statutory purposes / powers exception, and the Property would accordingly not be Common Good. We note, however, that there is a key difference in the language used in the Acts – the 1878 Act states that the local authority "may" acquire land; whereas the 1896 Act states that it "shall" acquire land. In other words, the power under the 1878 Act is discretionary whilst the 1896 Act obliged the Lord Provost, Magistrates etc to purchase land. Given that the purchase of the Property completed in 1898 it would in our view be reasonable to assume that the

Lord Provost, Magistrates etc purchased the Property in compliance with their mandatory obligation under the 1896 Act, rather than the discretionary power which by that time had been in effect for 20 years. The historical documents that have been located by the Council also lend weight to our view that the Property was purchased in satisfaction of the aforementioned statutory duty and we also understand that the Council has not been able to locate any evidence which demonstrates the Property was acquired in terms of the 1878 Act.

- 6.1.5 It would appear that the funds used to acquire the Property did not originate from the Common Good fund, and prior to 2008 the Council did not include the Property in its Common Good account. It has, however, been established by the courts that the Council's internal accounting procedures should not be relied upon as evidence of the Common Good status of assets (*Cockenzie and Port Seaton Community Council v East Lothian District Council* (1997) SLT 81). The accounting treatment is required to reflect accurately the status of the asset, and not vice versa.
- 6.1.6 The Feu Disposition contains language which is a feature of Common Good, referring to use "exclusively as a Public Park and Recreation Ground for the behoof of the Community of said City". This is not, however, inconsistent with the principles set out in the *Magistrates of Bannf* case (see paragraph 4 above) so does not determine the Common Good status of the Property – although it would be a relevant factor in determining the alienability or otherwise of the Property if it is Common Good.
- 6.1.7 It is clear that the Council was in the process of expanding the Common Good in the period following the purchase of the Property through provision of new Parks and similar assets, with the intention that they would be for "the benefit and use of the community in perpetuity". Again, dedications of this type are a feature of Common Good land. It is possible for land to become Common Good even if it did not possess that status at the point at which it was first acquired by the Council's predecessors. Land can, for example, be appropriated to the Common Good fund to replace assets which are being released. We are not aware of any clear authority as to whether land can become Common Good as a result of a decision by the relevant Burgh to simply treat it as such – but it is clear that (i) a transfer of land is not a pre-requisite to the creation of Common Good; and (ii) dedication towards a statutory purpose can remove Common Good status; so it would seem logical that the actions of the Council's predecessors could amount to the creation of Common Good status for the Property in order to satisfy a statutory obligation.
- 6.1.8 As mentioned above, it is possible for land to cease to be Common Good depending on the specific circumstances. The information which we have as to the history of the Property since it was purchased in 1898 is consistent with a continuing Common Good use, and there is no evidence of any decision by the Council to appropriate the

Property for a specific statutory purpose that might remove it from the Common Good. You have also confirmed that there have been no transfers of title to the Property which could have removed any status of Common Good from the Property (for example, if the Council or any its predecessors had transferred title to a 3rd party and then subsequently re-acquired the Property).

- 6.2 We note that the process which we have followed broadly reflects the approach adopted by the Council in 2008. We consider paragraphs 6.1.3 and 6.1.4 above to be key in determining whether the Property is Common Good. Based on the evidence that is available (all of which points towards a dedication to and use of the land for the benefit of the community) we take the view that the Property became Common Good when it was purchased (and note our comments at paragraph 7.2 in respect of the alienability). We cannot, however, be certain of this - the law relating to Common Good is, unfortunately, sparse and largely historic in nature.
- 6.3 We understand that the Council is considering all of the options available to it, with a view to reaching an informed decision on how best to proceed once that process of assessment has been completed. As part of that process the Council might consider whether the status of the Property might best be determined by the Court. However, our advice is that this route should not be followed.
- 6.4 In 2008 the Council reviewed the status of the Property and concluded that it was inalienable Common Good. The Council now has our opinion in which we concludes that it is more likely than not that the Property is inalienable Common Good. The balance of proof in civil proceedings is the balance of probabilities, which, in lay man's terms, means that the Court requires to be satisfied that something is more likely to be the case than not to be the case. We think it is more likely that the Court would decide that the Property is Common Good than that it is not Common Good. We also think that if the Court decides the Property is Common Good, that it will also decide that it is inalienable Common Good.
- 6.5 The Council has also taken the opinion of Gerry Moynihan QC who has opined that, on the information before him, the Property is Common Good and is inalienable. Counsel has had access to a substantial body of documents and he is aware of the views held by others that the Property is not Common Good. Nonetheless the strength of his opinion is such that he has confirmed he would decline to act for the Council should it seek to assert that the Property is not Common Good or that it is not inalienable Common Good.
- 6.6 Whilst the Council might appoint alternative counsel, our advice is that the Council should not seek to assert that the Property is not Common Good. We believe that the prospects of such an action succeeding are very poor and that it would also prove very difficult to persuade alternative counsel to support such an action.

7 Disposal of Common Good

7.1 Once it has been established that a particular asset (land or buildings or otherwise) forms part of the Common Good then, where change of use, appropriation or disposal (whether on sale, lease or licence) is contemplated, it is necessary to consider whether that asset is capable of alienation by the Council. The law on this subject is complex, being the distillation of a considerable volume of (mainly 19th century) case law. There are 3 recognised categories of Common Good land which are to be regarded as inalienable:

- 7.1.1 Use from time immemorial by the public – use of land by the public for public recreation of any kind (including but not limited to sporting activities such as golf, cricket and/or football) or for the holding of markets, or for other activities attributable to a public right of use may, in qualifying circumstances, constrain the Council's powers of disposal or appropriation to another use. The law requires evidence that "the land has been so used and enjoyed since time immemorial". In practice this requires that the title be 'ancient' and that the use has continued for the appropriate prescriptive period (now 20 years, prior to 1973 40 years). It does not matter that the particular use has been discontinued, or that the public use is infrequent. What matters is that the use made by the public for the appropriate period may be established and that the use must be 'meaningful and consistent' in some way. Relevant evidence or testimony may be difficult or impossible to source, however any indicators of prior use by the public should be investigated;
- 7.1.2 Dedication for public uses – certain assets which have been put to particular public use are generally regarded as being inalienable. These uses include "town houses, market places, churchyards, public streets and corporation halls". In this sense town house is believed to mean town hall or burgh chambers. If, however, substitute alternative facilities are being provided by way of replacement, the case law supports the view that the quality of inalienability migrates to the replacement asset, rendering the original asset (upon being decommissioned from the particular use) alienable; and
- 7.1.3 Dedication within title – the third category of title regarded as inalienable are those which contain provisions within the title grant in favour of the Burgh which restrict the uses to which the property may be put, or expressly constrain alienation. Often expressed in the form of a trust these are generally insufficient in law to comprise public trusts, however where the intention of the grant of the title is clearly expressed – such as an obligation to 'hold [the property] in trust for behoof of and solely for the use, recreation and enjoyment of the inhabitants of the Burgh as a [public park etc]' then such titles are characterised as inalienable.

7.2 On the basis of the documentation exhibited to us we consider that the Property – if determined to be Common Good - should be considered to fall within the category of inalienable Common Good. Again, it may be possible to displace this assumption if evidence exists that the Property has not

been used for public or community use for a significant period of time since it was purchased by the Lord Provost, Magistrates etc in 1898 – but we are not aware of any such evidence.

8 Title Conditions affecting the Property

8.1 The Feu Disposition imposes the following title conditions:

- 8.1.1 a prohibition against the erection or building of any houses on the Property, except for as a house or houses for the park officers or gate keepers or for other uses appropriate to the use of the Property as a park or recreation ground;
- 8.1.2 an obligation to form a continuation of Stanley Street to the north of the Property and to thereafter maintain Stanley Street and the continuation thereof;
- 8.1.3 an obligation to pay eight hundred and thirty nine pounds, seventeen shillings and sixpence as a repayment of costs incurred by Sir James Miller in forming Duke Street;
- 8.1.4 an obligation to maintain Duke Street and the sewer formed therein;
- 8.1.5 an obligation to erect suitable fencing with gates and accesses on the south, east and west boundaries of the Property and to maintain same in good order in all time coming; and
- 8.1.6 an obligation to pay a yearly feu duty of one pound.

9 Enforceability of Title Conditions

- 9.1 You have confirmed that no preservation notice was served, or Lands Tribunal Order made, in terms of the Abolition of Feudal Tenure (Scotland) Act 2000 and that the above conditions ceased to be enforceable as feudal title conditions as at 28 November 2004. On the basis of this information we would agree with the Council's conclusion as regards the enforceability of the conditions as feudal title conditions. We are therefore unable to agree with the conclusion of the Inner House (paragraph 44 of the judgment) that "regardless of the Council's statutory powers of appropriation, an unresolved difficulty would be the continued existence of the title restriction"
- 9.2 We have similarly assumed that the obligation to make payment of feu duty has prescribed.
- 9.3 The legislation relative to the abolition of feudal tenure did not extinguish any contractual rights which might still remain between original contracting parties. However, we have obtained searches against the superiority interest which confirm that there are no contractual rights which remain enforceable.

9.4 We have also considered whether the burdens may still be enforceable as community burdens. We do not consider that any community scheme exists in relation to the Property, so merely mention it for completeness.

9.5 In conclusion, we consider that the title conditions contained in the Feu Disposition are not now enforceable.

10 Reliance / Further Information

10.1 **This advice note is subject to legal professional privilege. That privilege may be waived (i.e. lost) if the note, part of the note or summary of the note is made public or shared with any third party, including if the contents of the note are discussed in any public forum (e.g. by elected members in a public meeting). If privilege is waived the Council may lose the ability to withhold this note under the Freedom of Information (Scotland) Act 2002. If the Council wishes to share this note with any third party then we can advise on ways in which that can be done without waiving privilege.**

10.2 This note has been prepared for the Council and subject to the limitations and conditions of our Terms of Engagement with the Council; liability to third parties is excluded.



Brodies LLP

Ref: EAM/JMG/CIT13.23

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