

SPICe Briefing The City of Edinburgh Council (Portobello Park) Bill

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This Briefing explains the City of Edinburgh Council (Portobello Park) Bill, the purpose of which is to remove a legal obstacle in order to allow the City of Edinburgh Council to use Portobello Park, Edinburgh, as the site of a new Portobello High School.



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EXECUTIVE SUMMARY

The City of Edinburgh Council (Portobello Park) Bill was introduced in the Parliament on 25 April 2013. The purpose of the Bill is to remove a legal obstacle in order to allow the City of Edinburgh Council to use Portobello Park, Edinburgh, as the site of a new Portobello High School. At present the Council is unable to do so, because the Park is inalienable common good land.

The issue of a new high school for Portobello has a long history. Following the conclusion of an extensive consultation, in December 2006 the Council agreed that, taking all factors into account, Portobello Park would be the best location for the new high school.

Planning permission was granted in February 2011 and the Council proposed to appropriate the Park to be used as the site of the new school. However, this proposal was challenged in the Court of Session and, in September 2012, the Inner House of the Court of Session decided that the Council could not appropriate the Park due to its status as inalienable common good land.

The Bill therefore seeks to change the status of the land to common good land which the Council is permitted to appropriate for the purposes of the Council's functions as an education authority; and for connected purposes.

Prior to the introduction of this Private Bill, the Council held a consultation exercise, which indicated that around 70% of valid responses supported the Council's proposals.

PURPOSE AND PROCEDURE OF THE BILL

The [City of Edinburgh Council \(Portobello Park\) Bill \[the Bill\]](#) was introduced in the Parliament on 25 April 2013. The purpose of the Bill is to remove a legal obstacle in order to allow the City of Edinburgh Council [the Council] to use Portobello Park, Edinburgh, as the site of a new Portobello High School. At present the Council is unable to do so, because the Park is inalienable common good land.

The Bill will be subject to the Private Bill procedure. A Private Bill is introduced by a promoter, who may be a person, a company or a group of people, for the purpose of obtaining particular powers or benefits that are in addition to, or in conflict with, the general law. In this case, the Promoter is the Council.

Private Bills are subject to a parliamentary process which includes scrutiny by a Private Bill Committee established for the purpose. Private Bills are different to other Bills in that they involve measures sought in the private interests of the promoter, and to which others may object. The role of the Parliament is to consider the Bill and to arbitrate between the promoter and objectors. Those people that do participate in the process are given ongoing procedural guidance by the clerks in the Non-Government Bills Unit.

Private Bills are subject to a three Stage process.

- Preliminary Stage: Committee consideration of the general principles of the Bill and whether the Bill should proceed as a Private Bill and preliminary consideration of objections; Parliament debate on general principles and whether the Bill should proceed as a Private Bill.
- Consideration Stage: Committee consideration of the details of the Bill, including objections and all remaining amendments.
- Final Stage: Parliament's consideration of amendments to the Bill and a decision whether to pass or reject it.

There is detailed [Guidance on Private Bills \(Scottish Parliament 2013\)](#), which explains every aspect of the process.

At the time of publication of this Briefing, the Committee to consider this Bill has yet to be established.

BACKGROUND AND CONTEXT

HISTORY OF PLANS FOR A NEW PORTOBELLO HIGH SCHOOL

The [accompanying documents to the Bill](#) (the Explanatory Notes and the Promoter's Memorandum) explain the history of the Council's plans for building a new Portobello High School and the reasons for doing so.

The Promoter's Memorandum states that "The existing Portobello High School needs to be replaced as a matter of urgency." It lists a number of factors as to why the high school needs to be replaced, including—

- The school has a capacity of 1,400, making it the largest school in Edinburgh in terms of pupil numbers.

- It occupies a restricted 2.79 hectare site that has no full-size playing fields, meaning pupils have to be bussed to nearby facilities.
- The central feature of the current school building is a nine-storey tower built in the 1960s which is outdated, in poor condition and not suited to modern teaching requirements.
- Essential repair works totalling £1.5m have been identified for the 2013/14 financial year in order to keep the school fully operational, and further costs may be necessary in future years until a new replacement school is built.

The accompanying documents also outline the history of the issue. In summary—

- In 2006, an extensive and exhaustive assessment was undertaken to identify any potential sites for a new school in or around the school catchment area. Three potential sites were short-listed and taken forward as the subject of a full statutory consultation.
- Following the conclusion of this statutory consultation, in December 2006 the Council agreed that the Park would be the best location for the new high school.
- The Council approved the project to build the new school on the Park on 18 December 2008.
- Planning permission was granted on 24 February 2011.
- The Council proposed to appropriate the Park to be used as the site of the new school. This would change the function for which the Park was held and the use to which it was put, though title to the Park would remain in the Council's name. The change would include moving the Park from the Council's Services for Communities Department to its Children and Families Department.
- This proposal was challenged in the Court of Session and, in September 2012 the Inner House of the Court of Session decided that the Council could not appropriate the Park due to its status as inalienable common good land. (The legal history of the case is discussed below.)

In terms of the existing school, the Council proposes that, if the new school is built on Portobello Park, then a "new area of open space" will be created on the site of the existing school. However, these proposals are not part of the Bill.

THE COUNCIL'S PRE-BILL CONSULTATION

In order to inform the Council's decision on whether to proceed with the Bill, it carried out a consultation exercise between 3 December 2012 and 31 January 2013. In addition to the original consultation referred to above, the Council had previously consulted on other aspects of the proposals, for example the pre-planning consultation process in May-August 2010. The Promoter's Memorandum sets out in detail the different consultation methods used by the Council. The consultation asked respondents three questions:

- Did they support the Council's proposals to change the use of Portobello Park from a public park to being the location for a new Portobello High School? (Yes/No response)
- Did they have any reasons for their view that they would wish the Council to consider?
- What would they like to see in the new area of open space if it was created?

Full details of the consultation are included in [a paper presented to the Council on 14 March 2013](#) (City of Edinburgh Council 2013), including a detailed breakdown of respondents and analysis of the substantive responses received to the second and third questions.

Overall level of support for the proposals

In terms of the core question, 12,018 responses were received. However, of this total, 2,060 were removed for various reasons (set out in the Promoter’s Memorandum), and a small number did not express an opinion. The Council states that, of the remaining “valid responses”, 70% supported the Council’s proposals, a figure based only on those who expressed an opinion either in favour or against the proposals.

In terms of valid responses from the “local area” (defined at figure 1 below), the Council states that 76.1% supported the proposals.

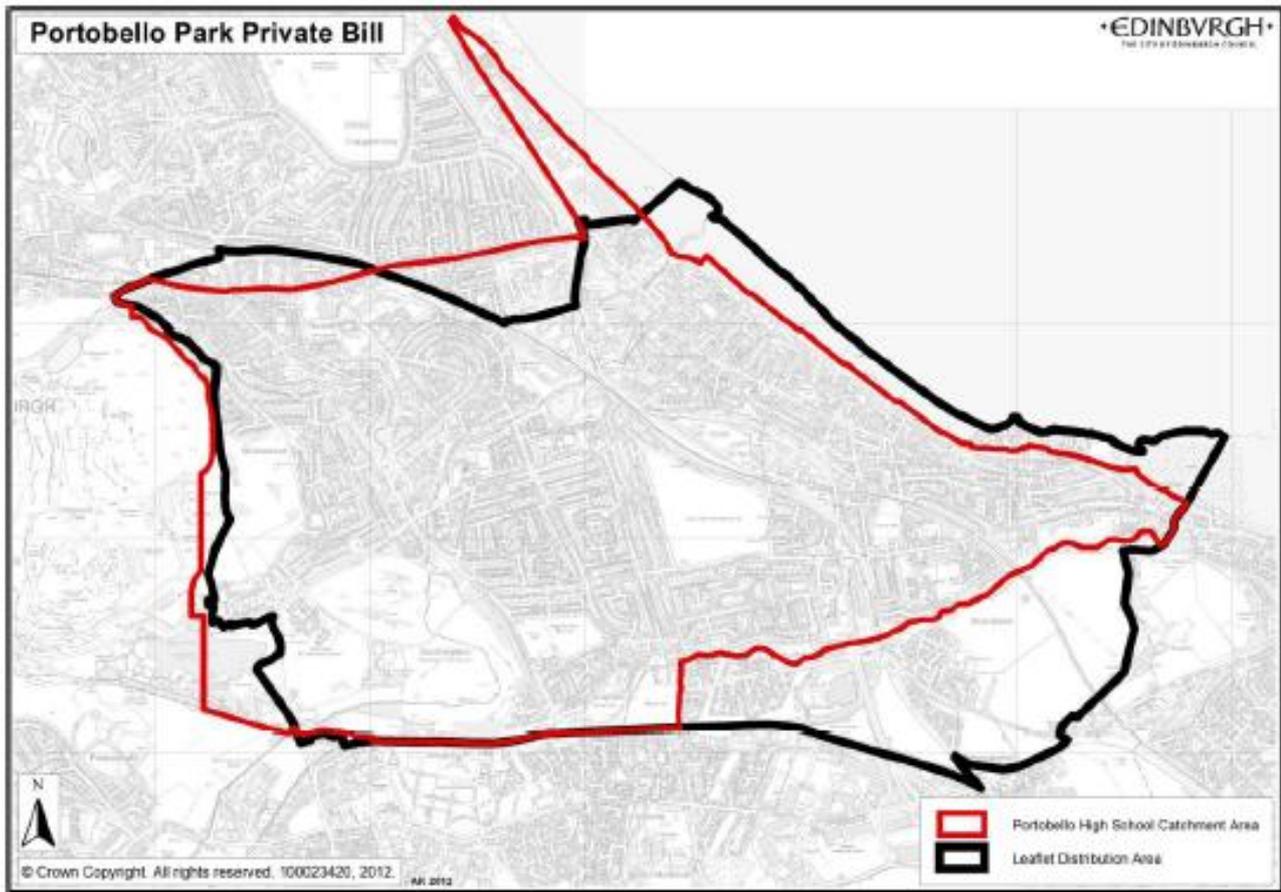
These figures are presented in Table 1 below.

Table 1: responses to Pre-Bill consultation

	Support proposals	Do not support proposals	Total (expressed opinion)	% Support of those expressed an opinion
Total responses received	8,330	3,625	11,955	69.7%
Total “valid responses” received	6,945	2,977	9,922	70.0%
Total “valid responses” received from the local area	4,921	1,544	6,465	76.1%

Source: City of Edinburgh Council (2013).

Figure 1: Local area, as mapped by City of Edinburgh Council



Responses to other questions

Appendix 3 of the Council paper contains the Council's analysis of the substantive comments received in relation to the additional two questions asked in the consultation. According to this analysis, four main themes arose in the responses, from both those who supported and opposed the proposal—

- Possible loss of Common Good land;
- Development on existing green space;
- Proposed location of the school on Milton Road; and
- Possible delays in building the new school.

The main arguments made under these themes, together with Council comment, is included in the Council paper of 14 March 2013 (City of Edinburgh Council 2013).

Regarding the “new area of open space” which the Council has agreed will be created on the site of the existing school if the new school is built on Portobello Park as planned, the Council summarised responses to this question as follows—

“A large majority favoured the use of the land as a park, green space, social facilities or leisure facilities. A minority favoured previous proposals to sell the land and/or develop housing or shopping facilities. The Council has referred the question of the use of the proposed new area of open space (for which provision of £1m has been identified within the Council's project budget) to the Craigentiny & Duddingston Neighbourhood Partnership for further consideration and consultation with the local community. This

reference is limited to considering only uses of the space as parkland or other green space and/or for social and recreational purposes.”

LOCAL GROUPS

As indicated above, the issue of a new High School for Portobello has been ongoing for some time, and a number of local groups have been established, representing both those in favour, and those opposed to the Council’s proposals.

[Portobello For a New School \(PFANS\)](#) are a group in favour of the Council’s proposals.

The [Portobello Park Action Group \(PPAG\)](#) are a group opposed to building the new school in Portobello Park, although they recognise that a new school is needed.

Both groups were given the chance to make presentations to a public meeting in January 2013, and answer questions from the public. Full details of the main points from the presentations and the question and answer session can be found in the Council paper of 14 March 2013.

LEGAL ISSUES

As indicated above, the Bill’s objective is to remedy the legal obstacle raised by the Court of Session’s judgment that the Council could not appropriate the Park as it is inalienable common good land. An outline follows below of the key legal issues.

COMMON GOOD LAND

Common good land is a common law principle.¹ It has its origins in the use of common areas of land for shared grazing or other communal uses and was also a part of the Scottish burgh system, where burghs administered areas of land on behalf of their inhabitants.²

In simple terms common good land can be thought of as land which, unlike private land, has a public purpose and where title is held by a local authority subject to fiduciary obligations (i.e. to administer the land on behalf of the community). However, from a legal perspective, the position can be complex and assessing the nature of common good land generally involves an analysis of amongst other things: the title deeds, the local authority’s actions as regards the land and the use to which the land has been put over time.³ In this respect, there is a large body of case law which is largely focussed on two main issues:

1. whether land held by a local authority can be considered to be common good land and, if so;
2. whether common good land can be considered to be “inalienable” - i.e. whether there is a prohibition on it either being disposed of or used for a different purpose (i.e. appropriated).

Since the Council appears to have conceded that the Park is inalienable common good land, this briefing will not examine this case law.⁴

¹ The “common law” is the traditional law formed by the decisions of judges in individual cases

² See Ferguson, Andrew C (2006) *Common Good Law*, Chapter 1

³ See, for example, *Murray v Magistrates of Forfar* (1893) 20 R 908 at 918–919

⁴ For an analysis of the case law see Ferguson, Andrew C (2006) *Common Good Law*, Chapters 4 and 5

JUDGMENT OF THE COURT OF SESSION

As outlined above, PPAG lodged a petition with the Court of Session in July 2011. The petition sought judicial review of the Council's decision to build the school on the Park (i.e. a legal challenge claiming that the Council was acting outwith its powers). The petition argued *inter alia* that the Park was inalienable common good land and could not be appropriated by the Council for the use of a school. According to the Association, this conclusion can be drawn from the disposition which conveyed the land to the Council's predecessors in 1898. This disposition provided that:

“... the area or piece of ground hereby disposed shall be used exclusively as a public park and recreation ground for behoof of the community of said city and it shall not be competent to nor in the power of my said disponees or their foresaids to erect or build or give liberty to any person or persons to erect or build houses or buildings of any kind whatsoever thereon except buildings to be used as a house or houses for the park officers and gate keepers to be employed by my said disponees or for other purposes appropriate to the uses of the area or piece of ground hereby disposed as a public park or recreation ground ...”

On 7 March 2012, Lady Dorrian sitting in the Outer House of the Court of Session (i.e. the Court of Session's court of first instance) dismissed the petition on procedural grounds, holding that the judicial review application was time barred as there was undue delay in bringing an action.⁵ She also expressed a view on the merits which was unfavourable to the Association.

The Association subsequently appealed this decision to the Inner House of the Court of Session. On 12 September 2012, the Inner House issued its judgment.⁶ The Inner House did not agree with the decision of the Outer House. It firstly held that there was no undue delay in bringing an action. It secondly examined the merits.

As regards the merits, since the Council had conceded that the Park was inalienable common good land, the Inner House focussed on interpreting the provisions of the [Local Authority \(Scotland\) Act 1973](#) (“the 1973 Act”) which altered the common law framework outlined above, giving local authorities certain statutory rights to appropriate common good land.

The key provisions of the 1973 Act are as follows:

"73. - Appropriation of land

- (1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959⁷ 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 ...

74. - Disposal of land

- (1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish ...

75. - Disposal, etc, of land forming part of the common good.

⁵ See [Opinion of Lady Dorrian, Outer House, Court of Session \[2012\] CSOH 38](#)

⁶ See [Portobello Park Action Group Association against the City of Edinburgh Council \[2012\] CSIH 69 P780/11](#)

⁷ The Town and Country Planning (Scotland) Act 1959 requires local authorities, inter alia, to carry out a consultation exercise before “exercising any power of appropriation in relation to land which consists, or forms part of a common or of an open space” and to consider any objections.

- (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 ..."

The Inner House decided that:

- section 75(1), read in conjunction with sections 73–4, gives local authorities a general right to appropriate or dispose of common good land where there is no question as to the right of the authority to alienate the land; and
- section 75(2) provides for a right to apply to the Court of Session but only to dispose of such land where a question arises as to the right of the authority to alienate.

However, the Inner House held that, since section 75(1) does not deal with inalienable land and section 75(2) does not mention appropriation, no right exists under the 1973 Act which could give a local authority the power to appropriate inalienable common good land. The Inner House therefore noted that, “for present purposes, the Council can claim to no statutory power of appropriation under the 1973 Act” and concluded that the Council could not use the powers in this Act to appropriate the Park.⁸

The Inner House also considered, and rejected, certain alternative arguments made by the Council.⁹

LEGAL ALTERNATIVES

The aim of the Bill is to change the status of the land to common good land which the Council is permitted to appropriate for the purposes of the Council’s functions as an education authority; and for connected purposes.

In its Promoter’s Memorandum the Council indicates that it has considered the following legal alternatives to the Bill:¹⁰

- Appealing the Inner House’s decision to the Supreme Court.

⁸ For these arguments see pages 14–17 of the Inner House’s judgment

⁹ Notably that the powers granted to a local authority by section 20(1) of the [Local Government in Scotland Act 2003](#) to do “anything which it considers is likely to promote or improve the well-being of the area” could not be construed to give local authorities a blanket right to appropriate inalienable common good land. See pages 17–21 of the judgment

¹⁰ See 3–7 of the Promoter’s Memorandum

- Reviewing the status of the Park to establish whether it might be categorised as alienable common good or not part of the common good, and if necessary seeking a declarator (i.e. a judicial ruling) to that effect from a court.
- Disposing of the Park under section 75(2) of the 1973 Act, with the approval of the Sheriff Court or the Court of Session (i.e. by selling off the land to a Council owned company which could then develop the land).
- Applying to the Sheriff Court or the Court of Session seeking authority to appropriate the Park under section 75(2) of the 1973 Act (i.e. inviting the court to adopt a “purposive interpretation” of section 75(2) so as to include appropriation).
- Petitioning the Court of Session under the nobile officium (i.e. the Court of Session’s power to provide a legal remedy where one is otherwise unavailable).
- Changing the existing legislation either by a Government Bill revising the 1973 Act or a statutory order made by the Scottish Ministers under existing legislation.

The Promoter’s Memorandum contains an overview of the Council’s view on the strengths and weaknesses of the above options. The Council ultimately concluded that:

“... none of the alternative approaches relating to a reassessment of or change to the Park’s status, or the Council’s ability to appropriate it notwithstanding its status, would be likely to be as quick or as cost-effective as promoting a Private Bill in the Scottish Parliament. In addition, the Private Bill process offers greater certainty in terms of both legal effectiveness and likely timescales.”¹¹

The Council also noted that the Bill has the advantage:

“... of being more open, transparent and participative. It requires significant consultation and notification of interested parties and is significantly easier and cheaper for those with an interest in the proposals to object or otherwise participate in the process.”¹²

NEXT STEPS AND KEY DATES IN THE PROCESS

Once the Private Bill Committee has been established, the Committee will consider its approach to the Preliminary Stage of the Bill, including from whom and when it will take oral evidence. The Objection Period is open until 5pm on 24 June 2013.

¹¹ See para 41 of the Promoter’s Memorandum

¹² See para 42 of the Promoter’s Memorandum

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