

# **NATIONAL GALLERIES OF SCOTLAND BILL**

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## **PROMOTERS' MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the National Galleries of Scotland Bill introduced in the Scottish Parliament on 28 October 2002. It has been prepared by Rees & Freres on behalf of the promoters, the Board of Trustees of the National Galleries of Scotland (hereafter referred to as the Trustees), to satisfy Rule 9A.2.3(b) of the Parliament's Standing Orders. The contents are entirely the responsibility of the promoters and have not been endorsed by the Parliament.

2. Explanatory Notes and other accompanying documents published by the Parliament are available separately as SP Bill 68-EN. That document contains details of the accompanying documents published by the promoters, and where those documents may be inspected or purchased.

### **OBJECTIVES OF THE BILL**

3. The Bill relates to a small rectangular piece of land (hereafter referred to as the relevant land) which comprises an area of approximately 319 square metres and currently forms part of Princes Street Gardens (hereafter referred to as the Gardens). The relevant land lies east of, and adjacent to, the Mound and is required by the Trustees as a site for the construction of part of the Playfair Project which is described at paragraph 7 below. However, a statutory restriction (more fully described in paragraphs 10 to 13 below) prohibits the construction of buildings on any part of the Gardens. The objective of the Bill is to enable the proposed construction to be carried out on the relevant land by removing that land from the Gardens and by disapplying that restriction so far as it relates to the relevant land.

### **Background**

4. The Trustees were established by the National Galleries of Scotland Act 1906 (c.50) in order to manage the National Galleries of Scotland (hereafter referred to as NGS), comprising the Royal Institution, the National Gallery and the National Portrait Gallery, Edinburgh, and for such other purposes connected with the fine arts in Scotland as may be prescribed. Section 4A of the 1906 Act (as inserted by the National Heritage (Scotland) Act 1985) now provides that the Trustees' general functions are to—

- “(a) care for, preserve and add to the objects in their collections;
- (b) secure that the objects are exhibited to the public;

- (c) secure that the objects are available to persons seeking to inspect them in connection with study or research; and
- (d) generally promote the public's enjoyment and understanding of the Fine Arts both by means of the Trustees' collections and by such other means as they consider appropriate."

5. The Trustees are authorised, amongst other matters, to provide education, instruction and advice and carry out research.

6. The National Gallery was authorised to be constructed by the National Galleries and Museums (Scotland) Act 1850. Section II authorised the construction of "all such Buildings, Apartments, Appurtenances and Enclosures as shall be necessary for a National Gallery of Art and other purposes connected therewith and with the Promotion of the Fine Arts".

7. In pursuance of their statutory functions and their policy objectives, the Trustees propose to carry out certain improvements to the National Gallery and the adjacent Royal Scottish Academy building, including the linking (at below ground-level) of these two buildings and the provision of education and visitor facilities including a lecture theatre, seminar room and restaurant. The scheme, known as the Playfair Project, will enable the NGS to continue in the twenty-first century to play an important part in the artistic and educational life of Scotland.

8. The Playfair Project will involve certain works being undertaken in the Gardens which will complement the restoration of the Royal Scottish Academy building at The Mound to provide Scotland with exhibition galleries of an international standard. These works, the provision of a lecture theatre, classrooms and other educational facilities and visitor facilities, and access improvements to both the National Gallery and the Royal Scottish Academy building, will enhance the education provision of the NGS to the people of Scotland and, by the visitor facilities improvements, increase access to the NGS collections and temporary exhibitions by all sections of society in Scotland, as well as visitors from other parts of the United Kingdom and beyond, and particularly all those with mobility problems or other forms of disability. The extent of the works affecting the Gardens is a projection over the relevant land from the existing Mound plateau of approximately 5.5 metres in width, 59 metres in length and 6 metres in height.

9. The Gardens (including the relevant land) are held by the City of Edinburgh Council (hereafter referred to as the Council) for the common good and are used as public greenspace. The relevant land is proposed to be transferred by the Council to the Trustees so that it may be used as part of the new development forming part of the Playfair Project. The disposal of any part of the Gardens by the Council to a third party needs to be authorised by a Court Order as described in paragraph 36 below.

10. The Gardens are subject to a statutory restriction upon the construction of certain buildings. That restriction is contained in section 22 of the Schedule to the City of Edinburgh District Council Order Confirmation Act 1991 (c.xix) (hereafter referred to respectively as section 22 and the 1991 Act).

11. The transfer of the relevant land by the Council to the Trustees will not, by virtue of that transfer, have the effect of removing the relevant land from the Gardens. The transfer will only pass the ownership of the relevant land from the Council to the Trustees. Without further legislation, the relevant land will continue to be part of the Gardens and the statutory restriction contained in section 22 will continue to apply to the relevant land. In particular, section 22 prevents the construction on the relevant land of any part of the improvements forming part of the Playfair Project.

12. Section 22 reads as follows—

**22 Restrictions on buildings in certain parks**

Subject to the provisions of this Order there shall not be constructed in any of the parks specified in the first column of the following table any permanent buildings other than buildings of the description specified in the second column of that table in relation to such park—

1	2
<i>Park</i>	<i>Description of buildings</i>
The Meadows Bruntsfield Links Leith Links	Bandstands, public conveniences, police boxes and buildings for housing apparatus for the supply of electricity or gas.
Princes Street Gardens	Lodges for gardeners and keepers, hothouses and conservatories, monuments, bandstands, public conveniences, police boxes and buildings for housing apparatus for the supply of electricity or gas.
Calton Hill	Monuments, observatory, churches, museum or other public buildings including facilities for a restaurant, public conveniences, police boxes and buildings for housing apparatus for the supply of electricity or gas.”

13. The effect of section 22 is to prohibit the construction (whether by the Council or anyone else) of a permanent building in one of the specified parks, other than the buildings described in the second column of the table in relation to that park. Neither section 22 nor any other provision of the Schedule to the 1991 Act contains a definition of Princes Street Gardens, whether by reference to a plan or otherwise.

14. Section 22 is the latest in a series of statutory provisions dealing with what are now the Gardens. The earliest such provision was in the Edinburgh Improvement Act 1816. This authorised the erection of a chapel and burial ground at the west end of Princes Street which at that time was occupied by a nursery for trees. Section III of the 1816 Act provided that no buildings were to be erected either for the chapel or land which now comprises West Princes Street Gardens, except for a gardener’s or keeper’s lodge, outhouses or conservatories. Section

XIII stated that it was lawful for the Lord Provost, Magistrates and Council to erect houses and other buildings on the Eastern Mound.

15. The Edinburgh Improvement Act 1827 (section LIII) provided that the Provost, Magistrates and Council could not (without the express sanction of Parliament) erect buildings on an area comprising what is now East Princes Street Gardens.

16. It is significant that the 1827 Act contemplated the erection of buildings in the area in question, albeit with Parliamentary sanction. The first example of such sanction occurred in 1841 with the passing of an Act for the Erection at Edinburgh of a Monument to the late Sir Walter Scott. The Act repealed so much of the 1827 Act as precluded the erection of buildings on the area of Princes Street eastwards of The Mound so as to enable the Scott Monument to be constructed (together with a keeper's house).

17. The enactments restricting building in the area south of Princes Street were further repealed by the Edinburgh and Glasgow Railway Act 1844 which authorised the extension of the Edinburgh and Glasgow Railway from its then termination near the Haymarket to the North Bridge.

18. The National Gallery and Museums (Scotland) Act 1850 provided that the buildings mentioned in that Act should be erected on The Mound irrespective of any plans or provisions in earlier Acts concerning the erection of buildings there.

19. The Edinburgh Corporation Order 1922 provided that, notwithstanding anything in earlier legislation, the Corporation could provide, erect and maintain in East and West Princes Street Gardens "suitable buildings for the purpose of and to be used as lavatories, water closets and urinals for the use and accommodation of the public".

20. Further buildings in the Gardens were authorised by section 30 of the Edinburgh Corporation Act 1930. These consisted of "buildings or erections to be used for police purposes of the nature of police kiosks".

21. The Edinburgh Corporation Order 1933 replaced the restrictions contained in the earlier legislation, concerning construction in the Gardens. The 1933 Order, however, exempted from the restrictions a number of buildings, namely monuments, shelters, band stands and "other buildings of a like nature", for which provision had not been made in the earlier enactments.

22. The provisions in the 1933 Order were themselves replaced by section 145 of, and the Fifth Schedule to, the Edinburgh Corporation Order 1958. This Order provided a further exemption for electricity substations.

23. In turn, the 1958 provisions were replaced by section 52 of the Edinburgh Corporation Order 1967. This Order abolished the separate treatment of West and East Princes Street Gardens, by providing a set of exemptions common to both Gardens as follows—

“Lodges for gardeners and keepers, hothouses and conservatories, monuments, band stands, public conveniences, police boxes and buildings for housing apparatus of the electricity board or the gas board”.

24. As a result of this conflation, it became possible for gardener’s lodges, hothouses and conservatories to be constructed in East Princes Street Gardens.

25. The 1967 Order also permitted for the first time the construction in the Gardens of buildings housing apparatus of the gas board. Section 22 replaces the provisions contained in the 1967 Order.

26. As the above historical analysis makes plain, the statutory restrictions upon building in Princes Street Gardens, far from being immutable, have been amended over the years as occasion has demanded, in order to reflect changing public needs and expectations.

### **Need for disapplying effect of section 22 to the relevant land**

27. Section 22 is a protective provision by which Parliament intended, for the public benefit, to safeguard the Gardens against development; and that section was intended to be of unchanging effect.

28. It is acknowledged that there is a presumption that an Act is in most cases intended to be an ongoing Act and that Parliament intends that the courts will apply an interpretation that continuously updates its meaning to allow for changes since the Act was initially framed. For example, in the case of section 22, it could be argued that the reference in column 1 of the section to “Princes Street Gardens” means so much of the Gardens as, for the time being, are held by the Council and used as such. It could be further argued that, once the relevant land is transferred to the Trustees, the relevant land will cease to form part of the Gardens and that the restriction contained in section 22 will cease to apply to the relevant land.

29. However, there are exceptions to the presumption that an Act is intended to be ongoing. One exception is where the Act (or a provision in an Act) is of the nature of a contract which must remain fixed as at the time of its enactment. An example of such a contract is a private Act which is regarded in law as a contract between its promoters and Parliament. Such an Act is construed by the courts most strictly against its promoters. For example, in the case of *Perchard v Heywood*, ((1800) Term.Rep.468) it was held that a private Act conferring on the promoters exemption from “all taxes whatsoever” applied only to taxes in force *at the time of its passing*.

30. To achieve an ongoing effect a private Act would need to be expressed in clear and unambiguous language. Such an effect was achieved in section 2 of the Port of London Act 1968 (c.xxxii). That section contains the following definition—

““port premises” means the docks, landing places and all other works and land *at any time* vested in, belonging to or administered by the Port Authority [emphasis added]”.

The effect of that definition was demonstrated by the sale of St Katherine's Dock. The Dock was owned by the Authority as part of its port premises. When the Dock was sold by the Authority some years ago to a third party for use for leisure purposes, the Dock ceased to form part of the "port premises" of the Authority and, accordingly, ceased to be regulated by the provisions of the 1968 Act. A similar ongoing definition is contained in section 3(1) of the Schedule to the Cromarty Firth Port Authority Order Confirmation Act 1973 (c.xvi) which reads as follows—

““the port premises” means the docks, landing places and all other works and land *for the time being* vested in, or belonging to or administered by the Authority as part of the undertaking” [emphasis added].

Similar ongoing definitions are contained in many other Acts and Orders relating to harbours. See, for example, section 2 of the Vale of Glamorgan (Barry Harbour) Act 1978 (c.xvii) and article 3 of the Montrose Harbour Revision Order 1991 (S.I. 1999/200).

31. Whilst it may be considered appropriate for a commercial harbour undertaking to enjoy the flexibility of an ongoing definition of its landside property, it would not have been appropriate for the purposes of section 22. Had the promoters of the 1991 Act sought to include an ongoing definition of the Gardens in that section, it is likely to have met with considerable opposition either from local bodies such as amenity societies or even from the Secretary of State who could have refused to make the Order set out in the Schedule to the 1991 Act unless that definition were first removed. The reason why such a definition would have been inappropriate is that it would have enabled the promoters to have defeated the purpose of the restriction at any time or times by transferring parts of the Gardens to third parties and so removing those parts from the Gardens and thereby disapplying the effect of the restriction to those parts.

32. In the circumstances, the promoters of the 1991 Act did not see fit to defeat the protection given by section 22 by seeking an ongoing definition of the Gardens. In the absence of such a definition, the extent of the Gardens will not be reduced by the transfer of the relevant land to the Trustees and the restriction contained in section 22 will continue to apply to that land. The Bill is therefore necessary to remove the relevant land from the Gardens and to disapply the effect of section 22 to that land.

## **ALTERNATIVE APPROACHES**

33. There are no other means of achieving the objective referred to in paragraph 3 above other than by means of the Bill.

## **CONSULTATION**

34. As an integral part of the development of the Playfair Project, consultations were, and continue to be, carried out with a wide range of bodies as an ongoing process. The bodies so consulted included, in particular, the following—

- City of Edinburgh Council (the Departments for Planning, Leisure & Recreation, Estates & Development and Highways & Network),
- Historic Scotland,
- the Scottish Civic Trust,
- the Cockburn Association (Edinburgh Civic Trust),
- Edinburgh World Heritage Trust,
- the Architectural Heritage Society of Scotland,
- the Royal Fine Arts Commission for Scotland,
- the Royal Incorporation of Architects in Scotland,
- the Royal Institute of British Architects,
- Edinburgh New Town,
- Broughton and Pilrig Community Council,
- The Royal Scottish Academy,
- The Exhibiting Societies of Scotland Association (comprising; the Scottish Society of Artists,
- The Royal Scottish Society of Painters in Watercolours and Visual Arts Scotland),  
The Scottish Museums Council,
- The Saltire Society,
- the Scottish Cultural Resources Access Network,
- The Scottish Network for Art and Design in Education,
- The Scottish Consultative Council on the Curriculum, and
- The University of Edinburgh Department of Fine Art.

Consultees were selected on the basis of three main areas of interest: first, existing and potential user groups for the exhibition facilities; secondly, heritage and civic amenity groups, both locally and nationally constituted; and, thirdly, educational user groups. Rather than construct a prescriptive methodology, consultation was based on targeted approaches to each organisation, led by the NGS Project Advisor, assisted as appropriate by other departments, with group specific briefings and visits, with the input and response of each consultee being passed directly to the most relevant section of the project and design teams for incorporation into development documents or designs. These developed documents and designs were then further discussed with the originating and other affected consultees. The consultation has not been a closed process, but remains live throughout the project; and will continue beyond the physical completion of the project for user groups.

### **Other consents**

35. Authority to carry out the proposed works on the relevant land was obtained on 18 April 2002 by a planning permission (reference No. 01/04617/FUL) given by the Council pursuant to

the Town and Country Planning (Scotland) Act 1997 and on 10 May 2002 by a listed building consent (reference No. 01/04617/LBC) given by the Council pursuant to the Planning (Listed Building and Conservation Areas) (Scotland) Act 1997.

36. Section 75(2) and (3) of the Local Government (Scotland) Act 1973 reads as follows—

- “(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 for the same purpose for which the former land was used.”.

Because the Gardens are held by the Council for the common good (see paragraph 9 above), the Council has obtained from the Edinburgh sheriff court an order to dispose of the relevant land to the Trustees as part of the Playfair Project and the Trustees have agreed to dispose of other land to the Council, being land which lies to the west of the Royal Scottish Academy and the National Gallery of Scotland and which forms part of the Mound in exchange for the relevant land.





*This document relates to the National Galleries of Scotland Bill (SP Bill 68) as introduced in the Scottish Parliament on 28 October 2002*

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