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Official Report

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL COMMITTEE

Wednesday 11 September 2013

Session 4

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CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL COMMITTEE
2nd Meeting 2013, Session 4

CONVENER

*Siobhan McMahon (Central Scotland) (Lab)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Alison McInnes (North East Scotland) (LD)
*Fiona McLeod (Strathkelvin and Bearsden) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Baker (City of Edinburgh Council)
Andrew Ferguson
Charles Livingstone (Brodies LLP)
Billy MacIntyre (City of Edinburgh Council)
Iain Strachan (City of Edinburgh Council)

CLERK TO THE COMMITTEE

Mary Dinsdale

LOCATION

Committee Room 1

Scottish Parliament

City of Edinburgh Council (Portobello Park) Bill Committee

Wednesday 11 September 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Siobhan McMahon): Welcome to the second meeting of the City of Edinburgh Council (Portobello Park) Bill Committee. I remind everyone to switch off their mobile phones as we are now in public session.

I welcome those who are sitting in the public gallery, and, of course, our witnesses.

Item 1 on our agenda is a decision on taking in private item 3, which is private bill procedure and the preliminary stage work programme. Are members agreed?

Members *indicated agreement.*

City of Edinburgh Council (Portobello Park) Bill: Preliminary Stage

10:00

The Convener: Item 2 is evidence from our witnesses. I welcome you all, and ask you to introduce yourselves briefly.

Billy MacIntyre (City of Edinburgh Council): Good morning. I am the head of resources in the children and families department in the City of Edinburgh Council, and the sponsor for the project.

Iain Strachan (City of Edinburgh Council): I am a principal solicitor in legal services in the council.

John Baker (City of Edinburgh Council): I am senior project manager in the services for communities department in the council, and project co-ordinator for the project.

Charles Livingstone (Brodies LLP): I am an associate with Brodies LLP.

The Convener: Before we hear your opening statement and take questions from committee members, I will ask members a few questions regarding future meetings and the decisions that we must take in relation to the objections to the bill that we must go through and the evidence that we have already received. Are members content to take those matters in private at this stage?

Members *indicated agreement.*

The Convener: Are members also content to take in private discussions to come up with a plan for future witnesses?

Members *indicated agreement.*

The Convener: I would like to put on record something that has come up in much of the evidence that we have received on both sides of the debate. Although information may be submitted to the committee, the volume of written evidence that we have been receiving is quite high. I advise those who wish to put information to us at present that the committee's sole role at the preliminary stage is simply to consider the general principles of the bill in order to decide whether it should proceed as a private bill.

Although, as I said, parties are entitled to submit as much information as they would like, the Parliament's guidance on written evidence states:

"submissions should not normally exceed 6 sides of A4 in length".

I want people to be aware of that, because the more information we are given, the harder it will be

for us to wade through it. If today's witnesses can make their points pertinent and to the point, that would also be helpful.

I am aware that there have been many objections from people who are concerned that the committee's role might interfere with the local planning process. Again, I remind people that our role relates to dealing with the legal purpose of the bill under the Scotland Act 1998. The bill does not deal with planning permission, and any relevant permissions are subject to a separate process.

Finally, I understand that some objections have been raised with regard to the Scottish Parliament legislating in an area where there has been a decision by the inner house of the Court of Session. I clarify that the role of Parliament is, within the confines of its legislative competence, to make the law and to interpret that law. The question of whether the Parliament is able to legislate following a decision of the inner house of the Court of Session therefore does not arise.

We now move to the witnesses. If anyone has any brief opening statements, please let that be known and we will listen to those first.

Billy MacIntyre: Convener, I have an opening statement, which I will restrict to the 10 minutes that I believe I am allocated.

The Convener: Thank you.

Billy MacIntyre: I thank you for the opportunity to speak to the committee this morning. In my opening statement I will address the key issues: the urgent need to replace Portobello high school and why Portobello park is by far the best option for a new school; the legal obstacle to our proposals and why the bill is required; and our consultation on the bill and the support that it has among the public and the City of Edinburgh Council's elected members.

Portobello high school is the largest school in Edinburgh and is in urgent need of replacement. It is outdated and in poor condition, and is not suited to modern teaching requirements. Since 2009 more than £2 million has had to be spent on essential works just to keep the school open, and significant further investment will be required to keep it safe and fully operational until a new school can be built.

The decision to use Portobello park as the site of a new school has not been taken lightly, and followed an extensive assessment of potential sites. It has been extremely challenging to find a suitable site for the school in the local area, but Portobello park is by far the best option.

The park is centrally located for both the school catchment population and the wider community, and has good access. It is the only site of a suitable size that meets all the requirements for a new school and—importantly—allows us to provide all curricular physical education requirements on site. At present, valuable educational time is lost as pupils need to be bussed to off-site facilities.

The park option would not disrupt the existing pupils' education, as there would be no protracted on-site construction works. It would also avoid the need to relocate the neighbouring St John's primary school to another site, for which there are no ideal options.

Our proposals would enable a currently underused area of open space to be more widely used by the local community, while at the same time allowing those activities that currently take place on that site to continue, but in much improved surroundings. The site would continue to be used for the benefit of the whole community, and the community's children would be educated in a new and inspiring state-of-the-art school with excellent modern facilities.

In addition, the new school, the fantastic outdoor sports facilities that would be created—which would be freely accessible to those in the local area—and the improvements that would be made to amenities and landscaping while still retaining a large area of open space, would be a tremendous community asset that we believe would encourage many more people to use the site than the number that do so at present.

The council has committed to creating a significant area of new open space on the site of the existing school if our proposals go ahead. A budget of £1 million has been identified, and we would involve the local community in the development of that new open space to ensure we deliver the type of facility that would become a well-used local asset.

The council has committed to giving that new area Fields in Trust status to ensure that it would remain as open space in the future. In total, the net loss of open space in the local area would be around half a hectare—about two thirds of the size of a football pitch—but we believe that, by improving the overall quality of the open space in the area, public use of it would increase.

We have identified two back-up options that could be taken forward if the bill was not enacted: a phased rebuild on the existing school site; and building on a site at Baileyfield industrial estate. The latter is currently not a definitive option, as the council does not own that site and the bidding process is on-going. We have pressed the seller for an answer but, at present, we do not know whether our bid has been successful or when a decision will be made.

Although it would be remiss of the council not to have any back-up options, we are clear that both

those options would take far longer to deliver and produce considerably inferior results for the school, the local community and the public purse. The reasons for that view are set out in the promoter's memorandum and the council report of November 2012, which we have submitted to the committee.

We currently have in place planning permission, for which renewal is being sought, and a very competitive contract for the construction of the new school on the park. In any event, using the park would be not only the best option, but considerably less expensive than the others, and if the bill was enacted, the moneys saved would be invested in other schools in the city.

However, the benefits of using Portobello park as the site of a new school cannot be delivered without the bill.

Portobello park is inalienable common good land and is therefore subject to certain legal controls. The law in this area is very complex and, in 2008, when funding became available to progress the project, we obtained a legal opinion from two Queen's counsel prior to the council approving the progression of the project to build the school on Portobello park as the priority in the school estate for replacement. Their opinion was that it would be lawful for the council to appropriate the park for use as the site of a new school—appropriation meaning to change the site's use from one of the council's statutory functions, in this case, leisure and recreation, to another, which is education.

However, in 2011, the council's decision was taken to judicial review by a group of local residents. Although the Court of Session initially agreed with the council's assessment of the law, the inner house decided, on appeal, that existing legislation does not provide any mechanism for local authorities to appropriate inalienable common good land.

It is important that the committee understand that the court was not asked whether the council should be allowed to use the park as the site of the new school. It was not required to judge the merits of the council's proposals, but had simply to decide whether there was any mechanism under existing legislation that would enable the council to appropriate the park for our education functions. The inner house's interpretation of that legislation was that no such mechanism is available.

The council respects the inner house's decision and is not seeking to overturn it. The court was constrained by existing legislation and common law; however, the bill would have no effect on the issues that the court considered, and would leave existing legislation untouched. The bill has been drafted specifically to work within the existing legislative scheme.

Under that legislation, local authorities can dispose of—either sell or lease—inalienable common good land with the consent of the court. However, there is no mechanism by which a council can change the use of such land by appropriation, regardless of the merits of its alternative use. That means that the council could seek the court's permission to sell the park to an independent school but cannot seek its permission to build its own school there. That is an anomaly in the legislation. The issue is further explained in the recent opinion of Gerry Moynihan QC, which we have submitted to the committee.

The council considered whether any other legal options existed that might allow appropriation of the park notwithstanding that anomaly, and took the decision to proceed with a private bill only after deciding that no such options existed. The problems with the potential alternatives are set out in the promoter's memorandum and in the council report of November 2012.

The council is using the private bill process for its intended purpose: empowering a person—in this case, the council—to do something that would not otherwise be possible under general law. The Parliament can assess the merits of the council's proposal, consider the arguments of those in favour and those against the proposal, and decide whether it should proceed.

We have deliberately restricted the scope of the bill as much as possible. It applies only to the park and not to the adjacent golf course. The bill would empower us only to use the park for our education function, nothing else. We are not seeking to remove any of the legal protection that the park otherwise has as inalienable common good land. It is also important to note that the bill does not affect any other inalienable common good land, either in Edinburgh or elsewhere in Scotland. The general law as it relates to common good, including the inner house's decision on this case, would be unaffected.

Passing the bill would not set any sort of precedent that would allow local authorities to appropriate inalienable common good land. Any authority wishing to pursue a similar proposal would have to introduce its own private bill, which would be decided upon, on its own merits, by the Parliament. Passing the bill would not make such a process any easier, and rejecting the bill could not bind future committees or Parliaments to reject similar bills in future.

Our extensive consultation demonstrated clear and resounding public support for our proposal to promote the bill. At more than 12,000, the number of responses that the council received was one of

the largest ever to one of its public consultations. After discounting duplicates, those with incomplete details and those from outwith Edinburgh, there were just under 10,000 responses that we considered to be valid, of which 70 per cent supported the council's proposal to promote the bill. Approximately two thirds of the valid responses came from the local area, within which there was 76.1 per cent support for the council's proposals.

The committee has a copy of the detailed report on the consultation, which the council considered on 14 March 2013. The recommendation to promote the bill was unanimously supported by all elected members present across all five of the council's political groups. In reaching its decision, the council took account of representations for and against the proposed bill. It carefully weighed up the views of all parties who made representations and it is satisfied that the proposals for the park, including those for providing new alternative open space, are fair and proportionate.

We believe that Portobello park offers by far the best opportunity to build the school that the children and community of Portobello deserve, and there is clear public support for pursuing that option through the bill.

Thank you again for the opportunity to address you. We are happy to take any questions.

The Convener: Thank you. Before we go to questions, I should mention that the committee has received written evidence from Andrew Ferguson, Professor Robert Rennie and Roderick McGeoch, who have indicated other local authorities that have been involved in examples of disposal of common good land, including South Lanarkshire Council and North Lanarkshire Council. I put on record the fact that those local authority areas are in the region that I represent. I had no direct or indirect involvement in any of those decisions—that is a matter for the record.

Do other members have similar declarations?

Alison McInnes (North East Scotland) (LD): I understand that, in his paper, Professor Rennie also refers to Aberdeenshire Council. I was previously a councillor in Aberdeenshire, but I have not had any direct dealings on the matter.

The Convener: Mr MacIntyre, you spoke briefly about this issue in your opening statement, but the council has indicated that it is keen for the bill to be enacted before the current planning consent for the park site ends in February 2014. What were the main factors in the timing of the bill's introduction?

Billy MacIntyre: The bill was introduced as soon as the council could practically do so. There has been a requirement to replace Portobello high school for a considerable period of time. When we got the outcome of the inner house decision in September of last year, we very quickly looked at alternative back-up options in the event that our desire to deliver a new school in the park could not be delivered in another way, and at ways of achieving the objective of building on the park through other legal means. We undertook that assessment and quickly concluded that there were no other legal means at our disposal to achieve the objective of building on the park. That informed our request to the council to progress with a private bill, which was approved on 22 November 2012. Essentially, we started the process as quickly as we could thereafter.

The planning consent expires on 23 February next year. We have an agreement with the existing contractor, Balfour Beatty, which has held its contractual terms—subject to an inflationary uplift—until the end of February next year, but we have started the process to renew the planning application, because we would not wish to find ourselves in a position in which, should the private bill process extend beyond February next year, we did not have planning consent. A planning application renewal was lodged several weeks ago, and it will be considered by the planning committee in November of this year.

10:15

The Convener: Thank you for that answer. The promoter's memorandum outlines that other avenues were open to you, such as appealing the inner house's decision to the Supreme Court. Although you mentioned the reasons for not going down other routes in your opening statement, it would be helpful if you could expand on what you said, because it appears to others—mainly the objectors—that the full process has not been gone through. I have outlined the committee's role, but it would be helpful if you could explain why the council did not pursue another option by way of a remedy.

Billy MacIntyre: My colleague Iain Strachan will answer that.

Iain Strachan: I am happy to. As Mr MacIntyre said, we outlined the other potential options in our report to the council in October 2012. Obviously, the committee needs to be convinced that there are no such alternative options.

I will take each of the options in turn and will be happy to answer questions on them at any time. The first option was to appeal the decision to the Supreme Court. Ultimately, having taken legal advice, we took the view that an appeal was unlikely to succeed. I emphasise that that does not mean that we believe that there was a weakness in our position up to that point. The inner house's

decision provided views on a matter that had not previously been considered in such detail. Given that we could appeal only on a point of law, and given the clarification that the inner house provided as regards the provisions of the Local Government (Scotland) Act 1973 on appropriation, we did not feel that there was any realistic prospect of success. As such, we did not feel that that was an option that we could take forward.

In addition, we had to be mindful of the additional time that an appeal might take—it could have taken nine months or so—and the additional costs that would be incurred. Moreover, it is very likely that we would have been left in the same position.

There was the possibility that the site might not even be inalienable common good land. Following the inner house's decision, it was prudent for us to reassess the suggestions that it was not common good land. Had that been the case, the council would have been free to appropriate the site for the new school without going to court. We had thought that it was inalienable common good land, but we took external legal advice on the matter from Brodies LLP and Gerry Moynihan QC. The law in this area is complicated, but the opinion was that it was highly likely that it was inalienable common good land, and we were advised that we should not seek a declarator that it was anything but, as the prospects of success were extremely low. We were mindful of the fact that the costs involved could amount to £50,000 or £60,000, and that we might have to spend another six to nine months in court. We felt that that would be inappropriate and wasteful from the point of view of time and public funds, and that it was likely to leave us in the position that we were already in. I would also add that we shared the legal advice on the council's website.

We could have sought an alternative route under the 1973 act—under section 75(2) we could have set up a council company and approached the court for consent to dispose of the site. Given the inner house decision, it was felt that—we took legal advice on the matter—such an approach would likely be seen as a mechanism or a contrivance by the council and was unlikely to succeed. In weighing up the pros and cons and the time and the expense, we felt that that was not a viable option.

At the same time, we could have also sought to take a different action under that same provision, because although it covers disposals, we could have argued in front of the court that it should adopt a more purposive interpretation of the act and that the provision should also apply to appropriation, which would have been consistent with our approach up until that time. Again, given the inner house's decision, we felt that that was unlikely to succeed.

Linked to that, we could have sought to petition the Court of Session to exercise the nobile officium, which, in essence, is the power to provide a legal remedy where one is otherwise unavailable—in this case, the power to appropriate inalienable common good land. However, given the terms of the inner house's decision and the fact that the nobile officium is—rightly—not exercised lightly, we again felt that the prospects of success would be highly uncertain at best and likely, on the basis of the advice received, to be low.

We also felt at the time that, were we to advance an alternative interpretation of section 75(2) to allow appropriation or the use of the nobile officium, we would have to demonstrate clearly to the court that the merits of the proposals had widespread support and were appropriate. As such, we would need to carry out consultation to provide good evidence of that. In November, the council decided to commence the private bill process to start that consultation, which would potentially also inform subsequent court action.

Further options were to pursue other legislative routes. One was the private bill process and another was the public bill process. We were mindful that a consultation was under way on the community empowerment and renewal bill. The initial consultation was at an early stage at the time of the inner house's decision, and did not include a draft bill. The consultation covered a wide range of matters, including common good law, but there was no certainty that the bill would be progressed, what its scope would be or whether it would provide the required solution in the required time. Furthermore, we could not be presumptuous about what the Parliament might decide to do, so that route did not seem to be an option.

A further possibility was the use of a ministerial order to provide a mechanism. We identified a couple of potential routes, but the one with the most realistic chance of success is an order under section 57 of the Local Government in Scotland Act 2003, which basically enables the Scottish ministers to make an order to overturn or supplement a piece of legislation that prevents a local authority from exercising either its power to advance wellbeing or its objective to achieve best value. Given that that is what the Court of Session's judgment does, we felt that such an order was something that ministers could potentially take forward if they were so minded. We had informal discussions with Scottish Government officials about that but, understandably, they made the point that any change would be to the general law and that

ministers would need to consult widely before taking such a step. Again, there was no certainty that that would be taken forward or that it would produce the legal effect that we were looking for in the required timescale.

When considering all that together, the only viable option was to take forward a private bill, which then led to the consultation process and the position that we are in today.

The Convener: Thank you, Mr Strachan, for a comprehensive response.

I have a follow-up question. You mentioned that other options that were considered were a ministerial order and proposed legislation. Clearly, Parliament would already be looking at the issues covered in the proposed legislation, which some may argue would have been more substantive. You have discussed the timescales for the various options, but there is obviously no guarantee that the committee will accept the bill and you do not know how long it will take for the evidence to be considered. What are the advantages and disadvantages of going down the private bill route as opposed to going through the process of a ministerial order or looking at legislation that was already being consulted on?

Iain Strachan: We would never be presumptuous about what the Parliament might wish to do. We assessed private bills that had previously gone through the Parliament—I believe that there have been 12. If we exclude the works bills—this is not a works bill, as we already have the necessary consents—from introduction to royal assent the passage of private bills through Parliament took between 79 and 266 days, or between two and a half months and nine months, with an average period of 206 days. That gave us a suitable level of comfort that this approach, if we are able to make the case and so on, could give us the legislative solution that we were looking for within the appropriate timescale. However, we appreciate that that is outwith our control.

James Dornan (Glasgow Cathcart) (SNP): You say that you have considered a number of alternative sites. Will you tell us about the comparative analysis of all the possible sites that is contained in your memorandum and other relevant documents? Is it adequate? What factors were taken into account and what methodology was adopted in detailing the information that is provided on each site's advantages and disadvantages?

Billy MacIntyre: The initial analysis of sites that were potentially available for a new school was undertaken back in 2006. That predated the council's original decision to identify Portobello park as the preferred site for a new school, which was made in December 2006 after an education statutory consultation process.

A full analysis that was undertaken at that point looked at site size, accessibility, transport issues and a wide variety of other factors. It concluded that there were three potential options, which were subject to a statutory consultation. The first was a rebuild on the current site; the second was building on the golf course; and the third was building on Portobello park. That was the original process. An independent analysis, which was done by a company called Smith Scott Mullan + Associates, was used to inform the process. That predated my joining the authority, as I joined it in the middle of 2008.

In 2008, we did not update the assessment of the available sites, because a council decision had already been made, but in advance of the planning application, we reappraised the original assessment that Smith Scott Mullan undertook and came to the same conclusion. We looked at whether any new sites had become available in the area, and they had not, so at that point the conclusion was that Portobello park remained the best site for a new school.

On the conclusion of the inner house decision on the appeal in September, we again looked substantively at all available sites in the area. The sites were considered according to a variety of factors, which are detailed in appendix 2 to the report that was submitted to the council in November last year. I will come back to that and pull out the salient points in it.

We looked at the sites that were previously available and at any new sites that had become available in the intervening period. There were two new sites, but one was too small—it was smaller than the existing site. The new site at Baileyfield had come on to the market, perhaps somewhat coincidentally, just after the outcome of the appeal decision.

We looked at the sites and undertook initial analysis. I will draw out the key elements from appendix 2 to the report. We were looking for sites that had a central location in the catchment area. Portobello park is such a site, as is the existing site. Baileyfield is not; it is very much on the periphery of the catchment area and away from the main centres of population.

On the drawing that is behind the committee, members will see the Baileyfield site—which is triangular—indicated towards the top of the catchment boundary. The existing site and Portobello park are more centrally located and closer to the school population. They also have safe and convenient user access routes. Baileyfield is less accessible for pupils and the community than the other two sites are.

10:30

The Baileyfield site is not in council ownership, which is clearly an issue for timescales and the effectiveness of having that as a site for disposal. A six-month statutory consultation would be required for Baileyfield, were we to acquire it, but no conclusions would be guaranteed. The council agreed to buy the site, but we have not yet undertaken a statutory consultation and the council would still have to decide whether that was an appropriate site for the school.

Under the appropriate legislation, a school the size of Portobello should have an area of 6.8 hectares—2.8 hectares for hard standing and 4 hectares for playground space. However, recognising the constraints of all the sites that were available in the area, we set a target of 4.5 hectares, with the objective of building on that the school plus the appropriate parking, cycling amenities and two pitches. Only the Portobello park site would achieve that objective; the other two sites would not.

On the flexibility of the design and layout, Baileyfield's 3 hectares provide a reasonable size of site but, given that at least one full-size football pitch has to be incorporated, the Portobello park site is by far the best option. I believe that the committee has the details of the school design, which has had planning consent and has been well received in the local area.

If the existing site were used, it would have to be extended to include the area currently occupied by St John's primary school. That would provide greater flexibility for design and layout than the Baileyfield site. The Baileyfield site is rather small in the drawing, but members can see that it is triangular with some indents, so the boundary around it is not clean. That imposes some restrictions on accommodating the building and the pitch on the site. Although Baileyfield was inferior to the other options, we nevertheless concluded that it was possible to use.

Another more substantive issue was the requirement to relocate St John's primary school. The existing site comprises roughly 3.5 hectares; the primary school occupies 0.7 hectares and the secondary school occupies the remainder. Neither area is large enough for each school's purpose so, in considering options, it was concluded that to put both schools back on that site would compromise both schools.

In renewing and replacing St John's primary school, we wished to increase the size of site afforded to it to 1.3 hectares, to allow a small pitch to be accommodated beside it. The displacement of St John's would be required under the option to extend on the existing site. Given the issues created by moving the school to a different site, the St John's primary school community has indicated that it would wish to stay where it is.

We assessed those and other options, including a site at Brunstane. We looked at extending the existing site with no phasing, which would have involved an off-site decant. We also looked at some options for a combined school with Craigmillar. That would have necessitated creating a school of 2,200 pupils, which, from an educational and organisational point of view, we did not want to progress.

We undertook informal consultation with the local school communities. Although we did not ask this question specifically—the consultation was about fallback options—the conclusion was that Portobello park remained the preferred choice. There was no clear consensus between a phased build on the current site and the option to do a new build in Baileyfield, which resulted in my recommendation to the council to progress with the bid for the Baileyfield site, which the council accepted.

James Dornan: At present, you have the option before us, if the bill is successful, or the existing site, because you do not have the Baileyfield site, as such. Will you remind me when the bidding process finishes?

Billy MacIntyre: The council approved the proposal to acquire Baileyfield in November. We submitted an initial bid in December and we were successfully shortlisted. Our final bid, which was produced in accordance with the parameters that we set out in our November council report, was submitted towards the end of January.

We still do not have an answer. I sought clarification from our agents in our estates department as late as 9 o'clock this morning and they confirmed that we still do not have a decision about the Baileyfield site. The situation is somewhat unusual, to say the least. We have continued to press the agents and the sellers for an answer. It is in the hands of the Irish National Asset Management Agency. We understand that it has a number of significantly higher-value transactions that are occupying its time. However, our estates team is in regular contact with the agents, DTZ, and is pressing them for a decision.

James Dornan: I have a question about the common good status. Paragraph 15 of your memorandum states that the bill's purpose is to change the status of the park from inalienable to alienable,

"though only insofar as permitting its appropriation for the purposes of the Council's education authority functions."

The senior counsel for the Portobello park action group, Roy Martin QC, claims that,

"Once the land has been appropriated for the purpose of their education functions, the land will cease to be common good land and will be held without restriction as a part of the general landholding of the Council."

However, in his legal opinion, Gerry Moynihan QC concludes that the bill allows the council to appropriate the park only for the purposes of its education functions and that that intention is given effect to by section 1(2), so well-established principles of statutory interpretation would not allow any other use of the park before or after it had been appropriated for those purposes. Will you comment further on those two opinions?

Billy MacIntyre: I will pass that over to my colleague Mr Livingstone.

Charles Livingstone: The council's intention is that the land would remain inalienable common good land for all other purposes, if and when the bill is enacted and following any appropriation under the bill.

It might go without saying, but we agree with Mr Moynihan's approach to the interpretation of the bill, which is that the courts would consider the council's stated intention, including in the promoter's memorandum and evidence sessions such as this one, and would interpret the legislation accordingly. The bill has been drafted to be as narrow as possible in order to allow appropriation only under the specific conditions that are set out in the bill. There is no intention that it would allow anything else.

If the land were appropriated for use as a school, the council's intention is that the land would be available for educational purposes or for the existing social and recreational purposes. The purpose of section 2(2) is to ensure that the recreational powers remain available.

If there is any doubt in the committee's mind about whether the bill gives effect to the council's stated intention, the position could be put beyond doubt by means of a suitable technical amendment at consideration stage. However, I confirm that the council's intention is that the site would remain inalienable common good land following any appropriation.

The Convener: My colleague Alison McInnes will ask about the consultation process.

Alison McInnes: In your introductory remarks, Mr MacIntyre, you stated that there was resounding public support for the bill. The committee needs to be satisfied that the consultation that you carried out was comprehensive and open. To start at the beginning, regarding notification, will you explain the ground rules that were used to determine affected persons, the sources of the information that was used to ascertain the identity of those people and the details of your delivery methods?

Billy MacIntyre: Will you clarify those three points?

Alison McInnes: At the beginning of the process, whom did you notify about the consultation? Will you tell me how you determined who the affected people would be, the sources of information that you used to ascertain the identity of those people and the details of the delivery methods that you used?

Billy MacIntyre: We notified people of the intent of the consultation in a number of ways. Advertisements were placed in the local press. We used our social media—Twitter and Facebook—to advertise it. In light of the sensitivity of the matter, a number of articles about it also appeared in the local and national press.

We considered that the most important people to notify were those in the area, which we defined as not only the school catchment area but a geographical area that is set out in the council report of November 2012. It encompassed about 14,500 households in the area that we believed we needed to get to directly, because they would be most directly affected by the consequences of the bill.

We achieved the notification in two ways. We produced an information leaflet and had it published. We tried to write it in plain English and to make it as user-friendly as possible, and we distributed it through a letterbox drop to the 14,500 households in the area.

There were some difficulties with the initial distribution. In some areas, the delivery was not up to the standards that it should have achieved. We recognised that and undertook a second leaflet drop on 7 January in advance of the first public meeting. The distribution company was specifically asked to deliver to the areas around Portobello park where there appeared to have been difficulties with the first drop, according to the feedback that we received.

We wanted to ensure 100 per cent coverage. The nature of leaflet distribution is such that one can never fully guarantee that, but we wanted to have as much of a guarantee as possible. The company identified 83 address points where access for delivery had not been possible and leaflets were then posted first class to those addresses.

There were other ways in which people in the area could find out about the process and the public meetings. The December 2012 issue of *The Portobello Reporter* ran a front-page article about the consultation, including the dates of the public meetings. That newspaper is delivered to about 12,000 people in the area. As I said, we followed up with adverts in the *Evening News* on 7

December 2012 and 4 January 2013 to promote the consultation.

On determining who was affected, although we wanted to encourage as wide and as broad a response as possible, it was always our intention to restrict the consideration of who was in favour and who was against to those in the City of Edinburgh Council area, because the bill relates to the inalienable common good land of the city of Edinburgh. Obviously, we also wanted to understand the view of the local community, and the local Portobello community was defined as the 14,500 households to which we did the direct leaflet drop.

10:45

On services to check identification, we relied on the people who submitted information to do so honestly and openly. The only way in which we could have checked the identification of all parties would have been to write back to all 12,000 people who made submissions to ask them to confirm that, which would have been a time-consuming and disproportionately expensive process. However, we sought to identify any potential abuse of the system. All 12,000 responses were reviewed and duplicate entries were identified and removed. In addition, incomplete responses were identified and removed from consideration. Often, there would be a response from an address with either a surname or a partial first name and no further details. The risk was that such responses had not come from a valid person, so they were disregarded.

We had about 5,000 responses electronically. We set up an online way for people to respond and it proved popular, albeit that hard-copy responses proved the most popular means of responding. There is an internet protocol address that identifies the computer or the system from which a response has been submitted, and we wanted to check that nobody was submitting in bulk hundreds of responses from one given computer, so we checked the 5,000 responses back to individual IP addresses. Of the 3,974 valid responses, more than 3,000 came from separate IP addresses. A number of responses came from the same IP addresses, and sometimes there were 11 or 12 or more from the same address, but it was clear that in those cases people had used their business system to submit entries. Examples include the systems of the national health service, the City of Edinburgh Council and other large organisations in Edinburgh.

We also undertook a process of validation back to the electoral roll. Although non-appearance on the electoral roll would not have been a reason to exclude a response, the process gave us a degree of comfort about the level of genuine responses. Of the 9,958 individuals who responded, 7,700 appeared on the electoral roll. When we looked at the data, similar proportions appeared. Some 7,678 of those responses expressed an opinion on the bill. A number did not express an opinion. Of that total, 71.8 per cent supported the council's proposals, compared with 70 per cent in the overall aggregate. Of the 7,678 responses, 5,135 were from the local area, and 75.9 per cent of them were in support, which is broadly consistent with the figure in the overall population.

Alison McInnes: Thank you for that detail. When you were notifying people who would be affected by the bill, you sent out an unaddressed information leaflet. Is that correct?

Billy MacIntyre: We did not send it to given addresses. We sent an information leaflet to each household in the area. It was not a referendum, so we did not wish to address leaflets to individuals, nor did we wish to suggest that we were inviting responses from only one particular person at a given address.

When the leaflet went to an address, it would have been accessible to all parties living at the address. There was evidence in the submissions that people in the same household had different opinions on the matter. For us to have addressed leaflets to specific individuals in households would perhaps have precluded the wider household having access to them.

Alison McInnes: Did the distribution company that you used deliver other things at the same time or did it do a single drop for you?

Billy MacIntyre: I do not have that information to hand, but I would be happy to confirm that in writing to the committee.

Alison McInnes: It would be useful to know whether the leaflet went out with the pizza menus and so on or separately.

Billy MacIntyre: We can find that out for you.

Alison McInnes: Thank you.

You chose to run the consultation from 3 December 2012 to 31 January 2013, which straddled the Christmas festive period. Did you consider extending the time to compensate for the holiday period? What measures did you take to ensure that no one was disadvantaged by what seems quite a truncated consultation?

Billy MacIntyre: We felt that the consultation period, which was, in aggregate, two months, was adequate for us to reach all the individuals in the area and ensure that they had ample opportunity to consider the matter fully. That is best evidenced by the level of response. We received 12,000 responses to the consultation. Most of them were from the Edinburgh area, but there were some

from as far afield as America, Canada and New Zealand. We received responses from all over the world, so clearly the message was getting out there.

In an earlier answer I explained the various means by which we sought to put the information out. We also ran a series of roadshow events throughout the area during December and January to raise awareness. There was information in the local libraries and we ran two public meetings. As a measure of the level of understanding and appreciation of what was happening, I note that the first meeting was attended by 350 people and the second by 300. In advance of the first public meeting, we had received 3,000 responses. By the second, we had received a further 1,800. We believe that during that period—before the last two or three weeks of the consultation process—the message was out there and people had, and were taking, the opportunity to respond.

We were conscious that the consultation was running over the Christmas and new year holiday, but there were three-week periods before and after the holiday when people had the opportunity to consider the matter. Indeed, by the end of the first week of the consultation we had received nearly 1,000 responses. The majority—certainly of the hard copy responses—came in during the last week of the consultation. I think that 2,500 were delivered—in a couple of very large boxes—within an hour of the end of the consultation process.

That has been our experience of consultations historically. I use the example of consultations that the children and families department does under the Schools (Consultation) (Scotland) Act 2010, for which the consultation period is much shorter. We typically get a significant number of responses towards the end of the process, when people have had the opportunity to consider the matter properly. In this case, I was surprised by the level of response that was received during the process. By 7 January, which was the end of the holiday period, we had already received just under 3,000 responses.

Alison McInnes: You mentioned the public meetings. Your memorandum indicates that the two local community groups that are, respectively, for and against the proposals had the opportunity to make a presentation. What was the focus of the meetings? How much did the discussion focus on the bill process?

Billy MacIntyre: We visited both the community councils in the area. At the public meetings, though, we wanted not only to afford the wider public the opportunity to hear the council's opinion on the matter—we had set out our stall by virtue of the fact that we had made it clear that we wished to pursue a private bill—but to afford the community in the widest sense the opportunity to have its say. It is the first time that we have done that, and we will reflect on and consider the model in future.

In the interests of openness and transparency, we invited the two interest groups on either side of the debate—the Portobello for a new school group, which is in favour of building on the park, and the Portobello park action group, which is against building on the park. It was left to their discretion whether to attend the meeting. The top table comprised representatives from the council, PFANS and PPAG. The two groups were left to make whatever presentation they deemed appropriate—it was not prescribed in any way—and they chose to give their perspectives on the matter.

The meeting was independently chaired by Colin Mackay, who is a well-known local journalist, because we wanted somebody who was completely impartial to control the questions and ensure that everybody had an opportunity to have their say. Questions came from the floor to the council, PFANS and PPAG, and two or all of us responded when appropriate. An independent committee clerk attended the meetings and there is a record of what was discussed in the council report of 14 March 2013.

It is fair to say that the discussion was wide ranging, covering alternative sites, the necessity for the private bill process, the rights and wrongs and the whys and wherefores, whether we were flying in the face of the Court of Session and a variety of other matters. We wanted to ensure that the process was open and participative and that nothing was off the agenda. Another reason why we had Colin Mackay independently chairing the meetings was to ensure that everybody who wanted to ask a question had the opportunity to do so, and not in a way that would make them feel encumbered.

Alison McInnes: If you do not mind, convener, I will take some time to explore the consultation process, as it is important. I have a few more questions.

The guidance on private bills refers to the importance of ensuring balanced and participative engagement. You talked about trying to do that. How did the council ensure that all the alternative options relating to the park's status and the alternative sites for the school were outlined in the consultation material and the information provided by the council in a balanced and unbiased way? Is the council satisfied that it adopted a balanced approach to the consultation process and presented all the relevant arguments and alternatives?

Billy MacIntyre: We are satisfied, but it will be for you to judge. The purpose of the bill is not

about the site of the school; it is about changing the use of the park. However, the information leaflet, in addition to identifying the purpose of the bill and the alternative legal options that we had discounted, deliberately referred to the other fallback options that the council was considering. It made it clear that we could not presume the outcome of the private bill process and that we had identified two fallback options. We sought to provide at a high level the respective pros and cons of those, albeit that the bill process is not about deciding a site for the school. In my earlier evidence, I gave some of the reasons for that.

Because of the nature of the consultation process and the fact that it extended to the whole of Edinburgh, we included information about relative costs and the time that it would take to deliver the school. As I said in my introductory statement, the cost of delivering the school in Portobello park would be significantly lower than the cost of either of the other options for two simple reasons. First, for any of the other options, we would have to go through a full design and planning process, which would take time and money. Secondly, the school would take longer to deliver and, given the way that construction inflation is going, the longer that it takes to deliver a project, the more expensive it will be. We already have a competitive price that was secured some years ago. We anticipate that the cost of delivering either of the alternatives would be significantly higher because of expected inflation in the intervening period together with the indicative timescales for delivery.

We estimated that the Baileyfield option would take about 18 months longer than the park option largely because of the design and planning process. To build on the existing site would take considerably longer than that—perhaps another two years. That is not just because of the time taken for planning and design; we would also have to relocate St John's primary school before we could start the phased build on the site, which would add further time and complexity to the process. Intrinsically, rebuilding a school on a site that already has pupils on it takes longer because it has to be done in phases. That information was also included in the material.

11:00

Alison McInnes: With the benefit of hindsight, is there anything in the consultation process that you think you could have done better?

Billy MacIntyre: I meant to add that, as well as issuing the information leaflet, we signposted people to either the hard copies of the material that were held in libraries or the council website, where we included all the detailed information. A series of detailed option appraisals was produced. All the council reports and the independent legal opinion that we had received on a variety of matters were published on the website as well.

With hindsight, could we have done anything better? Although we resolved the distribution issue, we will ensure that, if we do such a thing again, there is a more robust process. We took the necessary corrective action—that was done, essentially, halfway through the process. We were accused of perhaps being wasteful, but we considered it better for somebody to get something twice than for them not to get it at all.

On reflection, we have some experience of such consultations. We have done many consultations in the children and families department, and not just as a result of the statutory requirements for consultation on school catchment reviews, school amalgamations and the like. We followed similar processes for planning applications for James Gillespie's and Boroughmuir, as well as the new Portobello high school.

For the recent Boroughmuir high school planning consultation, we had an earlier engagement with stakeholders as a discrete group. With hindsight, that is something that we would consider were we to do something like this in future. It was helpful to have a more discrete and focused group with which to discuss the matter. I am not sure that that would necessarily have achieved a different outcome in this case because of the polarised views but, in response to your question, I note that that is something that we would consider in future.

Alison McInnes: Respondents to the questionnaire were asked to indicate whether they supported the council's proposals and the reasons for their view. However, it also strayed into the issue of what respondents would like to see in the new area of open space. Many people have remarked that that seems inappropriate. Will you explain why that approach was taken and why that issue was included in the questionnaire?

Billy MacIntyre: It was included because we felt that it was relevant and appropriate. We wanted to gauge the three things that you have just outlined and to find out whether respondents believed that our proposals were good. In order to get a deeper understanding of the logic that underpinned people's views on the matter, we asked for comments in support of their views, and we received a huge number.

The extensive comments that we received either in favour of or against the council's proposals were reviewed by our business intelligence team elsewhere in the council—it is unrelated to the children and families department. The team went through thousands of individual comments and aggregated them to the key issues on both sides

of the argument. We responded to those in appendix 3 of the report to the council in March 2013. I think that 6,000 detailed responses to questions were received.

Because the new open space was an intrinsic part of the proposals to deliver a new school on Portobello park, we wanted to gauge public opinion on that. Some had suggested that its inclusion was just a ruse or a worthless bribe, but we wanted—[*Interruption*.]

The Convener: Sorry, Mr MacIntyre, but let me stop you there. I ask those in the public gallery to refrain from commenting, as they have now done on a few occasions.

Billy MacIntyre: We wished to get the community's views while the matter was current and topical. Given that we were consulting the local community and, indeed, the rest of Edinburgh, we took the opportunity to ask people what they felt the best use of the open space would be. Again, we received a huge number of responses, which business intelligence team colleagues analysed for us. We conveyed detailed information on that in appendix 2 to our March 2013 report to the council.

We also wanted to use those views to inform what the next steps would be. We wanted to see both whether there was a strong consensus in the local community about what the land should be used for and whether any wider ideas required to be explored. The response was, I have to say, hugely positive. People viewed the proposal as providing a significant asset to the area. To take things forward, we referred the issue to the local neighbourhood partnership for a more detailed consultation and engagement with those in the local area, who would benefit the most, in order to find out what the best proposals would be.

Concerns were also raised about whether we were serious about ensuring that the land would continue to be open space in future, as some people thought that we would renege on that. In our March 2013 report to the council, we were cognisant of those concerns. In an effort to respond to and allay concerns, we asked the council to agree—and it did so—that Fields in Trust status should be conferred on the land should the proposals for Portobello park go ahead. That status had recently been conferred on other, adjacent sites including the golf course. The purpose of conferring Fields in Trust status is largely to ensure that the land's status as open space is protected into the future.

Alison McInnes: Thank you. You have been very patient and you have covered most of the areas that I wanted to explore.

Finally, you have told us the outcome of the consultation, but who analysed and interpreted the results? Did you at any time consider asking an independent organisation to carry out the consultation?

Billy MacIntyre: To answer your second question first, we considered that, but it would have made the process expensive and it would have added a considerable amount of time. We felt that, as with every consultation regardless of the emotion surrounding the issue—this certainly applies to the consultations that the children and families department has undertaken under the 2010 act—the consultation should be undertaken by the council. To verge into the territory of asking an independent organisation to undertake a consultation on our behalf would have set a precedent for the council for many things on which we need to consult.

As you know, a significant number of responses came in. They were recorded by temporary staff who were employed for that purpose. For the analysis that appeared in the report, the data was analysed by me personally—I am a chartered accountant by profession, so I am familiar with numbers and data—as I wanted to ensure that the data were correct and accurate and, ultimately, that is my responsibility. However, in light of the suggestion that the data might have been manipulated, PricewaterhouseCoopers was commissioned to provide an independent review of key elements of the data, including those responses that had been excluded, to ensure that no responses had been wrongly removed.

I think that PWC identified two responses that proved to be from a father and a son at the same address, so one of those was reinstated. PWC took a sample of the final spreadsheet back to origin to validate that the details were correct and that the yes, no or not applicable responses were correct. It also validated all the electronic responses back to source data. There is a way of doing that electronically through the tools that it has, so it undertook that validation directly.

Alison McInnes: Finally finally, were any changes made to the draft proposal as a result of the consultation?

Billy MacIntyre: The proposal is very brief. It was always intended to be restricted in nature because we did not want to ask for more powers than were considered absolutely necessary to deliver a new school.

The substance of the proposal, which was to seek to change the park, was unchanged. What changed as a result of the consultation process was that, although we had already proposed the creation of roughly 2.2 hectares of new open space on the existing site, the proposal did not include the conferring on that site of Fields in Trust status. That productively came out of the process.

The process identified a concern and we sought to respond to it by making the recommendation to the council, which it accepted.

The Convener: My colleague Fiona McLeod has some questions about the human rights implications of the bill.

Fiona McLeod (Strathkelvin and Bearsden) (SNP): Thank you, convener.

As you know, every bill that goes through the Scottish Parliament must be compliant with the European convention on human rights. In any case, the City of Edinburgh Council, as a public authority, must act in a manner that is consistent with the ECHR. How did the council take into account the requirements of ECHR law when it drafted the bill?

Billy MacIntyre: I hand over to my colleague Mr Livingstone.

Charles Livingstone: The question of compatibility with convention rights was discussed with the Parliament's solicitors before the bill was introduced. Questions were raised and Brodies submitted a detailed letter addressing human rights issues. If that letter is not available to the committee, I am sure that it can be made available to you. The Presiding Officer has given her statement that the bill is within legislative competence, which I imagine is based on the advice that came out of the exchange that we had with the Parliament's solicitors.

We are satisfied that the bill does not raise any human rights concerns and that any challenge to it as being outside legislative competence based on convention rights issues would be doomed to fail.

I will go into a little more detail on the particular right in the European convention that was discussed with the Parliament's solicitors and that I suspect people would chiefly have in mind. It is the right in article 1 of protocol 1 to the peaceful enjoyment of possessions and to not be deprived of possessions other than in the public interest and in accordance with the law.

The first point is that, regardless of the assessment of the legal position, no claim could arise due to the enactment of the bill. The point at which any claim would arise would be when the council appropriated the land, because any claim would have to look at the context in which that happened. The bill obviously does not require the council to appropriate the land, so any claim would arise when the council exercised its discretion.

On the substance of the legal issue, the right refers to "possessions". That term has never been held in any of the case law on the European convention on human rights to include the sort of communal interests that would be in question in relation to the bill, in the sense of the community benefit that can be derived from common good land. The term "possessions" concerns things that would in ordinary terms be regarded as the possessions of identifiable individuals, such as a person's house, money or business. The communal or community benefit that we are talking about here has never been held to be a possession.

On the common good for the city of Edinburgh, the local authority has responsibilities in relation to the people who happen to reside in the city at any one time. A person who moves into Edinburgh one day gains the benefit of the common good, whereas a person who moves out of Edinburgh the next day loses the benefit. That is not really the sort of possession with which the convention is concerned.

11:15

If, however, we assumed that possessions were being dealt with, the second stage would be to consider whether there was interference with them. In that case, any right relating to the common good would be that the community should get the benefit of the site. As Mr MacIntyre laid out in his opening statement and his answers, the community would still benefit from the site being used as a school. Its purpose would change, but it would still be put to a communal use, and there is public support for that. Therefore, to view the proposal as interfering with the right that the public enjoys would be slightly odd. In any event, interference with possessions is allowed under the convention if it is proportionate and in the public interest. Much of what is being discussed here is whether it is in the public interest to allow the council to make this appropriation.

Other factors would also have to be taken into account. For example, even if, as part of the proportionality exercise, we took the view that compensation was required, the council's package of proposals contains significant compensatory measures. There is the benefit of the school in and of itself as well as the compensatory measures that are set out in paragraphs 63 to 65 of the promoter's memorandum—the community uses to which the school buildings and sports facilities, including the outdoor pitches, can be put; the improvements to the remaining area of open space at the site and to the planting and paths and other elements of the site; and the new area of open space, which, as Mr MacIntyre has explained, is to be designed in accordance with what the community would like the council to deliver.

If one looks at the package of proposals and considers it in the whole context, even if we got to the stage of having to have a proportionality argument, it would be difficult for any challenger to

say that what the council has in mind is disproportionate.

Fiona McLeod: That is interesting. I want to home in on the compensatory measures that you talked about under article 1 of protocol 1 of the ECHR. You talked about the school, the facilities and the new paths and areas. On what basis does the council assert that the park is not well used at the moment? You have told us how you propose to compensate for the loss of facilities, but what assurances and guarantees can you provide that the planned replacement green space will be created and will be protected in the long term?

Charles Livingstone: I will start with what is possibly a supplementary and narrow legal point, which is that, in relation to proportionality under article 1 of protocol 1, compensation is a legal requirement only where there is a deprivation of possessions, whereas a restriction of the enjoyment of possessions does not necessarily require compensation. I just wanted to make that narrow legal point, and Mr MacIntyre can deal with the measures.

Billy MacIntyre: One condition that was associated with the council's original decision in December 2006 to proceed with Portobello park as the preferred site for the school was for an audit of the usage of the current park to be undertaken to inform the reprovision of adequate facilities to meet that need.

We commissioned an organisation called Ironside Farrar to undertake an audit of the usage of the park in June and July 2009. I believe that the outcome of that audit has been submitted to the committee in detail, but I will draw on its key points. In compliance with the council's condition, we wanted to ensure that in designing and delivering a new school at Portobello park we preserved as far as possible the right of local residents to use the park in the future for the purposes for which they presently used it.

Ironside Farrar undertook the audit in the summer months of 2009. We deliberately looked at June and July 2009 because we felt that the usage would be at its highest in those summer months during the school holiday period, which is when most open spaces benefit from the greatest use. However, Ironside Farrar found that there was not significant usage of the park at that time and that the usage was rather limited. The report stated:

"The visitor numbers in an hour long period was between 5 and 23, an average of 17 for the site. The primary activities were dog walking (98 out of 165 visitors were dog walkers) and walking, often using the park as a short cut from Milton Road to Hope Lane. There were a few instances of the football pitch being used for informal kick-about football and informal play. Other activities, including cycling, picnics, ball games, formal football, sitting/relaxing and other sports were rarely if ever observed."

In framing our design proposals for the site, we took cognisance of the key usages to which the current park was being applied, which were walking, dog walking and football.

The network of paths around the site and the adjacent golf course would be improved as a consequence of our proposals to give everybody better access, especially people with pushchairs and those with disability and mobility issues. Our proposals would improve the public paths down the east and west edges of the golf course and would introduce a cycle path along the eastern edge to fill a missing link in the Sustrans cycle network in Edinburgh.

A good-sized grass area of about 0.6 hectares would be created between Hope Lane and Milton Road for recreation and play, and two all-weather pitches would be created. We originally planned what we called cat-flap access, with a mini-gate in the fence to allow access for informal use. However, we have extended the access as a result of the recent enhancement of the open-space compensatory measures so that the facility would be freely bookable by those in the local community when it was not otherwise being used by the school.

Those are the ways in which we felt that the design of the school and the amenities surrounding it in the park would respond to requirements and allow the park's uses not just to continue, but ideally to be enhanced. Other measures include keeping mature boundary trees where possible around the perimeter to help preserve the look and feel of the park. The design of the school building means that it will be relatively low level. It will have two storeys at the front and three at the rear, because the site slopes down from the main road. We sought to design and deliver that building so that it would not go above the height of the adjacent residential properties.

The purpose of the audit was to establish, in response to the council's commission, what the park was being used for, but it was also, importantly, to allow us to gauge how best we could design the new facility to ensure that it continued to accommodate the needs of those who have used the park in the past and will use it in the future. We believe that we have done that.

Your second question was about how we can guarantee that the open space will be delivered. In November 2012 the council approved the proposal that, should the new school be delivered in Portobello park, a new area of open space would be created. That is an established decision on the

record, which was approved by the council on 22 November 2012.

Fiona McLeod: You mentioned Fields in Trust. Could you tell us more about that?

Iain Strachan: Over the past few years, a large number of parks and green spaces in the city have been dedicated as Fields in Trust. In essence, it is a legal agreement with the National Playing Fields Association, a charity that I believe was established by royal charter, which dedicates the areas concerned to public use, recreation and similar uses in perpetuity. We still own the land and control it but, in essence, giving that dedication to the charity provides a good level of third-party independent oversight, ensuring that the dedication remains for perpetuity. We felt that that was a better, more open way of achieving that, and that it was suitable and consistent with what the council has done with other public parks in recent years.

Fiona McLeod: You spoke about the current Portobello site also being used as part of the compensatory measures. Could you tell us a wee bit more about that? Will that also be Fields in Trust?

Billy MacIntyre: That is the area that would be assigned as Fields in Trust. If the proposals to build the school in Portobello park go ahead, it is the area of the existing school site that remained that would be afforded Fields in Trust status, as open space.

Fiona McLeod: I have completely misunderstood. I thought that what you were telling me about was the area left of Portobello park, the audit of use and what you were going to do there—and that that would also be Fields in Trust. Have I misunderstood that?

Billy MacIntyre: Apologies if I have introduced any misunderstanding on that. If I can find my notes I will explain, roughly, how the current area of Portobello park would be allocated in space terms.

Fiona McLeod: I will explain the clarification that I am seeking. When you were telling me all about the paths that would be put in, about how they would be accessible, about the usage audit, about dog walkers and so on, was that about the current Portobello park?

Billy MacIntyre: That is about the current Portobello park, yes.

Fiona McLeod: Will that be Fields in Trust or not?

Billy MacIntyre: The vast majority of the park would no longer be open space, so it could not be afforded Fields in Trust status. What we sought—and received council approval for—was the new area of open space that would be created on the existing school site, if the proposals to build on Portobello park were to proceed. I am sorry if I have introduced any misunderstanding.

Fiona McLeod: Thank you.

Billy MacIntyre: Did you wish clarification on the area on the existing site, or have I covered that?

The Convener: Would you like clarification on that?

Fiona McLeod: Yes. That is what I am confused about—not the existing site, but the existing Portobello park.

Billy MacIntyre: Now that I have found my notes, I can explain that the existing Portobello park is an area of 6.43 hectares. I do not know whether there is a schematic of the designs for the new school.

Charles Livingstone: There is. The plan that has been submitted that shows the boundary line between the park and the golf course has the envisaged plans on it.

Billy MacIntyre: Referring to the copy before us, on the left-hand side of the drawing, there is an area with lines through it, which is the hard-standing area of the school. That would be the school building. To the right of that, you see the two pitches.

Below the middle pitch is the car and cycle parking area, and below the pitch to the right-hand side is the area of open space that would remain. Members can see the new paths that would be introduced along the front of the site. In effect, there would be a boundary at the front of the school building and car parking and open space along the frontage of the site.

11:30

The overall site within the red line boundary is 6.43 hectares. The hard-standing area of the school and the car parking would take up 2.64 hectares, and approximately 1.62 hectares would remain as woodland, public paths or cycle paths. That is the area to the back of the school, which has millennium planting round the boundary. The area on the lower right-hand corner is the open space that would remain.

As I mentioned earlier, the existing site is the site of Portobello high school and St John's primary school. If we were able to proceed with building the new school in the park, we would wish to increase the size of the site allocated to St John's primary school from 0.67 hectares to 1.3 hectares, which would leave 2.16 hectares of open space that would be assigned Fields in Trust status, and its use would be subject to

consultation with the local community through engagement via the neighbourhood partnership.

I apologise for any misunderstanding.

Fiona McLeod: To sum up, the compensatory measures are the school and the new facilities, but there are also the paths and a new area on the old school site.

Billy MacIntyre: There is one thing that is worthy of note. A large area of the existing park consists of grass pitches that are used for football. They would be replaced by the two 3G pitches, which would be much more widely accessible, not only in school time, because they would not be subject to the vagaries of the weather, which affects many grass and municipal pitches in Edinburgh.

Fiona McLeod: Okay. Thank you.

Iain Strachan: I would like to add a small point. If there is concern about green space in the locality of Portobello park, the council has already afforded the golf course to the north Fields in Trust status. It is likewise protected by that dedication in perpetuity to open public recreational use.

The Convener: I have a point of clarification about the audit that was conducted, which we have discussed. We have talked about the use of the land predominantly by dog walkers, but we are also talking about provision for playing football. Written submissions say that the goalposts were removed from the field. So that we can get that in our timelines, was that before or after the audit took place?

John Baker: Perhaps I can clarify that point. The area there is currently managed by Edinburgh Leisure on behalf of the City of Edinburgh Council. During its normal series of events, it is responsible for arranging the hiring of those areas for football, and annually at the end of the season it takes away the goalposts.

The Convener: So that was not to do with work that was being carried out.

John Baker: No. I believe that that was part of the normal process for the summer.

The Convener: I am sorry, but for clarification, the goalposts are removed during the summer months, when there are school holidays.

John Baker: Yes. That is often done to open up the area for general park use when the areas are not being hired out for clubs at the end of the season. However, I am more than happy to clarify the exact dates and to come back to the committee and give it details of that if that would be helpful.

The Convener: That would be helpful. Thank you.

My colleague James Dornan has questions about traffic and road safety issues.

James Dornan: You talked briefly about the height of the building. It is clear that the building of the school will change the character of the area to some extent. It will potentially have a visual impact for local residents. It could affect views and there could be a loss of natural light in neighbouring buildings and light pollution from floodlighting and lighting columns. What plans do you have to mitigate those effects? I know that you have already spoken about the height of the building being two storeys at the front and three at the back. Can you give us further details, please?

Billy MacIntyre: My colleague Mr Baker will answer that.

John Baker: I will take the first point and discuss the overall way in which the building would sit on the site. We believe that the building is well rooted into the site—as Mr MacIntyre explained, it is two storeys in the main elevation and it increases to three storeys and drops away towards the north and west. The initial considerations were taken up with the planning authority and there were discussions on the need to ensure that the building would sit well in the site. The design has been—and continues to be—developed on that basis. People would, in effect, enter the school at mid-level, and go up or down one floor.

The points about floodlighting and the use of the external areas were raised during the planning consultations, and at that stage they were subject to prescriptive planning conditions regarding the duration of their use for the school's operation and for general operation. The hours that were prescribed in the planning permission ran, as I recall, from 8 in the morning until 10 o'clock at night; that was a specific planning requirement.

Likewise, to minimise any light pollution, the lights have been specifically designed so that they will not spill light into the adjoining areas. Again, there are, in the planning conditions, specific requirements on the need to adhere to definite conditions to ensure that there is no disruption to the residential areas that would be adjacent to the pitches.

The pitches would, in any case, be set considerably lower than the main road—they would be sunk well down, and even the lighting columns would be beneath the overall height of the tree canopy.

Billy MacIntyre: I have a few comments to add to what my colleague said. Mr Dornan, you mentioned daylight and views, on which I can offer some observation. Those matters are obviously considered as part of the statutory planning process, but, to give you some comfort—I hope—

on that matter, the school has been designed to ensure that it is no higher than any of the neighbouring houses and far enough away from the houses on the opposite sides of Park Avenue and Milton Road to avoid any overshadowing. It would not impact on daylight reaching those houses.

The council's planning guidelines identified a number of key views across the city that would—and should—be protected. Although the view to Arthur's Seat from Portobello park falls within that category, the view to Fife is not deemed to be a key view and is restricted by the planting between the park and the golf course.

The decision to allow development in the area was, as part of the planning process, subject to a requirement for the school building to be designed to incorporate planning requirements specifically to retain the view of Arthur's Seat, and the building height will not exceed the height of the existing trees.

James Dornan: Right—thank you for that. I will move on to the issue of traffic and road safety. The location's surroundings will likely experience an increase in traffic volume and noise disruption both during and after construction, and there are potential road safety issues. What assessment has the council carried out in that regard?

Billy MacIntyre: My colleague Mr Baker will answer that.

John Baker: As part of the initial planning submission, a full transport assessment was carried out by specialist consultants to analyse the local road network. Since then, that has been revisited and updated with regard to the renewal of planning permission. As part of the planning process, a specific evening workshop was held with local residents to identify issues in relation to transport and the impact of changes to the road network.

A variety of issues were raised at the workshop, most of which had already been dealt with in the previous analysis. Those were explained in more detail, and the measures for putting in variable speed restrictions on the main roads and the introduction of other road safety measures around the area were included in the current planning submission.

There was, in addition, a new suggestion about one particular crossing at the north end of Hope Lane, which was raised directly by some of the local residents. The issue was taken away and examined in detail, and discussed with transportation colleagues in the highways department. They felt that no further measures were needed in relation to the issues that had been raised, and that the set of proposals that had been included were consistent with the necessary solutions for the area.

James Dornan: So you are comfortable that you have done all that you can to alleviate any concerns around traffic issues.

John Baker: We are confident in going into the planning application, and recognise that there are some points of detail on which there will be on-going discussion with the highways department.

James Dornan: As a final point, what impact do you foresee on the adjacent golf course and its users?

Billy MacIntyre: I will answer that point. We do not foresee any direct impact on the golf course. It was suggested that pupils crossing the golf course to get to the school would interfere with the use of the golf course. In the initial proposals for the school there was an access to the north of the site that would have perhaps resulted in that eventuality, but, as one of the outcomes of the pre-planning consultation process that was undertaken for the planning permission that was granted back in 2011, that was removed. There is therefore no need or obvious requirement for pupils to cross the golf course to get to the school because there is no entrance at the north of the site.

I would hope that a relationship could be established with the golf course that would be of mutual benefit to both parties. The school is keen to explore the idea of a golf academy located adjacent to an excellent sporting facility, which would afford it the opportunity to provide a degree of specialisation that it cannot offer just now. I know that the headteacher and the management team are keen to explore that at a future juncture so that the golf course can be used more extensively, but on a planned basis, by pupils of the school.

The golf course is also an area of inalienable common good land and is therefore for the benefit of all the community, not just those who use it for golf.

The Convener: Members have no further questions. I thank the witnesses for coming along, and I thank everyone for all the information that has been provided—it has been very helpful. We will be in touch if we require further information following our discussions and we will, it is hoped, receive some written evidence from the witnesses on the points that were raised in evidence this morning; thank you very much for that.

11:42

Meeting suspended.

11:50

On resuming—

The Convener: I welcome our next witness, who is Andrew Ferguson. Would you like to give a brief introductory statement, Mr Ferguson?

Andrew Ferguson: The committee has my written evidence. I do not have an opening statement as such, but I can comment on a couple of points that have come up in your deliberations so far if that would be useful.

The Convener: Yes.

Andrew Ferguson: First, I apologise for the length of my written evidence. Once I got going, it seemed hard to stop, so I am sorry, but I have exceeded six pages of A4.

Secondly, on the point that exercised the committee earlier about the other avenues that could be open to the City of Edinburgh Council, which were covered by Mr Strachan in particular, I stress that the other avenues that are open in terms of court action are not terribly great. Certainly from my experience, no council enters into a court action raised by itself lightly. I wanted to make that point. I note in particular that Mr Moynihan, who is one of the QCs who has been advising the City of Edinburgh Council, said that if it was to advance an argument that the land was not common good, he would decline to act. Again in my experience, if an advocate says that he will not act for you on a particular matter, it is a pretty good indication that—in his opinion at least—you really do not have a chance.

My other comment on the evidence so far is about the drafting of the bill as it stands and whether, if the bill became law and the council took the property, it would then be competent for the council to do anything else with the property. There are two opinions, one from Roy Martin QC and the other from Mr Moynihan QC. For me, there are two questions. Would the bill take the property out of the common good? In common law, if a property is used by a council for something else, it would normally come out of the common good. I am with Mr Martin that the probable effect of the bill as drafted would be to take the property out of the common good.

As regards whether the council could then use the property for anything else, though, I am rather more with Mr Moynihan when he says that it would be difficult for the council to argue that it could do anything other than use it for the education purposes that are specifically set down in the bill. If the committee is concerned about that point, drafting could probably be put into the bill to make it clear that, should the educational purpose no longer be required, the property is specifically transferred back into the common good.

I hope that those initial comments are helpful. I am in the committee's hands as to what you want to ask me.

The Convener: That is helpful—thank you.

James Dornan: Mr Ferguson, can you provide details of the specific situations in which land can be regarded as common good land?

Andrew Ferguson: I can. I think that I set out some examples in my written evidence. The key thing to bear in mind is that only former burghs can have common good. There are burghs scattered throughout Scotland. There are 26 of them in Fife, for example—most of them around the coastline—but not all towns or villages are burghs. That is the first qualification.

Secondly, it is probably easier to look at the issue from the point of view of what is not common good. If land is held by a burgh that either acquired it under statutory powers that generally started to come into play in the 19th and 20th centuries, or if the land is held in trust—some particular, special trust—it is not regarded as common good. Other than that, if the Magistrates of Banff v Ruthin Castle Ltd case from 1944 is followed to the letter, almost anything else would be common good. That can include all types of property. The most common type of property and those types of property that are inalienable common good are the three categories that are set down in Murray v Magistrates of Forfar. Either the property is being used for a dedicated public purpose by the council, or it is recreation land that has become common good through long-term public use, or there is a specific dedication in the charter or title deeds that makes the property common good. Those are the three most common types of common good land.

James Dornan: Thank you for answering my second question before I asked it. What are the difficulties of applying those rules to a particular case?

Andrew Ferguson: The difficulties are usually partly to do with interpreting the law. They are often also to do with the provenance of the land, or where it came from in the first place. The legal position is perhaps a little bit better known nowadays. The provenance of a piece of land, where it came from and whether the council has title to it at all, can all be issues. Much common good land came by way of the original burgh charter that goes back to the medieval period and might be necessarily vague about the boundaries of the original grant. It might just be about local knowledge.

For example, when Fife Council carried out a full audit of its common good land, it was very reliant in certain areas on local historical knowledge of what land had been used for in the past. We are

still discovering bits of land that we did not know we owned that now fall into the common good.

James Dornan: Thanks very much for those full responses. I have no further questions.

Alison McInnes: It would be useful if Mr Ferguson could give us a view on whether alienability is difficult to establish and what the specific challenges are around that particular idea.

Andrew Ferguson: It is difficult to establish, because it is a mix of the legal position and facts and circumstances. To give an example that is closer to my home in Burntisland that also involved building a primary school on a park, the council took the view that the land was alienable common good land. It had been sold to the council in the 1940s and there was nothing specific in the title, but there had been some recreational use of the land. The extent of that recreational use, how much of the land was being used and how much the building of the proposed school would affect it were all issues that needed to be worked through. We often do not get agreement with everyone in the community over the facts. The historical circumstances and the facts often lead to uncertainty, and as long as there is uncertainty, the council will have a difficult decision to make on whether to proceed.

The remedies that are open to people who do not want a particular development to take place are far from ideal. Essentially, if the council takes the stance that the land is alienable common good and it goes ahead, the only option that is available to residents is a judicial review, which is not a cheap option.

Alison McInnes: This might be putting you on the spot, but can you give a view on whether the City of Edinburgh Council's approach to assessing whether the park is common good land was sensible and correct? Should it have realised sooner that there was a problem?

12:00

Andrew Ferguson: Are you asking whether the council should have realised that there was a problem to do with whether the land is inalienable common good land?

Alison McInnes: Yes.

Andrew Ferguson: I have not looked in detail at all the titles and the facts and circumstances around that decision. From what I know, a fairly full assessment was made. The fact that the issue of whether Portobello park is alienable or inalienable common good land is still floating around several years later, with QCs giving differing opinions, demonstrates how difficult an issue it is. Although you might expect me, as the author of a book on the subject, to say that common good law is a very interesting topic, it might not be the best way to determine a community's wishes on such an issue.

Alison McInnes: You mentioned that Fife Council carried out a comprehensive review. It would be helpful for us to get a greater understanding of that and of the degree to which councils in general review—or, indeed, have a record of—their common good land.

Andrew Ferguson: A few years ago, Audit Scotland recommended that councils in general should look into their common good assets and, where possible, produce a common good asset register. There were a number of stages to the process that Fife Council went through. We started by establishing what we owned that we thought might be common good land. That involved a fairly exhaustive search through several thousand title deeds. To simplify things, we had a checklist to identify which requirements a particular title hit, whether there was a clear indication that it had been acquired for statutory purposes and so on. The title audit was the first stage of the process.

We then published an initial list, on which we consulted the community councils. It is fair to say that there were varying degrees of input from the community councils. In some areas, we got quite a lot of useful input from the community in the form of historical information. That was the main process for establishing what we thought was common good land. Any members who have served on councils will know that the left hand sometimes needs to communicate with the right hand when it comes to systems and registers. There has been a process of reconciliation between finance systems and asset management systems in an effort to get them all in one place. That was the basic process.

Alison McInnes: So the trigger for Fife Council to do that was the Audit Scotland report. Is that right?

Andrew Ferguson: We had the intention of doing it before Audit Scotland produced its report.

Alison McInnes: Do you know how many other authorities have followed suit?

Andrew Ferguson: I cannot say for definite. I know that Glasgow City Council had agreed with Audit Scotland that it would do so on a case-by-case basis, as queries came up.

James Dornan: I used to be a member of Glasgow City Council, and I believe that its approach is to consider common good ownership at the time of purchase or sale of land. You will have a clearer idea of that than I do. I can understand why Glasgow City Council would be loth to go down the route that Fife Council went down, given the size and complexity of the city. Do

you think that it is a worthwhile process to go through? Would it benefit Glasgow City Council to undertake such an exercise?

Andrew Ferguson: I cannot speak for Glasgow City Council. It is true that all the councils have different numbers of titles to go through. My understanding is that, if a title comes up because the land is up for sale or there is a query on it, Glasgow City Council will deal with it at that stage.

I honestly believe that it is a useful process for a council to go through, in two ways. First, the next resident who wants to make a query about common good status will get an answer that we can, I hope, back up. It is also useful for the council's information systems. It is not that useful for common good information to be carried around in people's heads, because people tend to retire eventually. Fife Council's thinking was that it would be an advantage to have a robust system that would allow us to say whether something was common good and why we thought that.

The Convener: Your written evidence has an overview of the workings of sections 73 to 75 of the Local Government (Scotland) Act 1973, as interpreted by the Court of Session decision in the Portobello case. Given that your written evidence discusses interpretations in other cases regarding the powers of local authorities to dispose of inalienable common good land, can you briefly explain for the record the workings of the relevant sections of the 1973 act?

Andrew Ferguson: Okay. The 1973 act still provides the basic bone structure for how our modern councils operate. Although there was local government reorganisation in 1996, which was set up by a piece of legislation in 1994, basically, things to do with, for example, the disposal of property reach back to the 1973 act. The general provisions of the 1973 act provide that normally a council is free to dispose of property, usually for the best consideration that it can reasonably obtain. There are other provisions now under regulations if councils want to dispose of property for less than that.

Section 75 of the 1973 act is the key section, but there is specific provision in section 73 that allows appropriation of land for another purpose, which I understand reaches back to the Local Government (Scotland) Act 1947. However, section 73 makes it clear that in certain situations a council may wish to use land that was formerly used for one thing for something else. Section 75 deals specifically with common good and refers to the other bits of the act about disposal and appropriation. However, there is really unfortunate wording, in that it refers to a question arising

"as to the right of the authority to alienate".

For our purposes, though, the section 75 provision basically means that, if a council wants to dispose of or appropriate land that is alienable common good, it can do so. If the council wants to dispose of land that is inalienable, it can do so only after it has gone either to the Court of Session or the sheriff court to get authorisation.

There is nothing in the wording of section 75, though, that expressly says that, if common good land is inalienable, a council can appropriate it for something else—there is nothing specific on that. When the Portobello case came to the inner house of the Court of Session, it took the view that, if there is no specific power in section 75, there is not a power and the council cannot appropriate Portobello park if it is inalienable common good.

I hope that that explains it.

The Convener: That is helpful. Paragraph 7.1 of your written evidence states:

"The decision, in my opinion, correctly interprets the provisions of the legislation as containing no power, express or implied, for councils to appropriate land which is inalienable common good land."

Your view contrasts, though, with that of Professor Rennie, who said in paragraph 5.0 of his written submission that

"the court's interpretation was a strained one."

He went on to say that it could be regarded as illogical, because

"it means that local authorities have greater powers to ... dispose of common good land by obtaining the consent of the court than they have to appropriate land and simply change its use to another function for the public good."

Can you give your views on that issue?

Andrew Ferguson: I would always hesitate to disagree with Professor Rennie, particularly as he described my book as "excellent" in his submission.

The Convener: I am sorry—I forgot to mention that in my question.

Andrew Ferguson: I kind of have to repay the compliment.

Professor Rennie's view is perfectly valid. Although the court's interpretation of the particular provision makes logical sense, it is not necessarily a commonsense view. Indeed, I believe that Mr Moynihan, in one of his opinions, points out that William Hutton, in his commentary on the 1947 act, which is the predecessor to the 1973 act, says that "presumably" appropriation is also included, as it is seen as a lesser measure than disposal. Surely if a council is allowed to sell the land to an outside party, it can appropriate it for its own uses.

I think that that is where Professor Rennie is coming from. However, although I see the force of

his argument, if one interprets the provision in the section in question narrowly and strictly, one will conclude that the power is simply not there. One view of interpreting legislation is that, if the power is not there, you cannot invent it or add it in, even if that might be the commonsense approach.

The Convener: Thank you. Fiona McLeod has a few more questions.

Fiona McLeod: Paragraphs 7.3 to 7.5 of your written evidence refer to rulings in respect of Motherwell District Council, Kirkcaldy District Council and West Dunbartonshire Council. Can you give us a bit more detail about the factors that the Court of Session took into account in those cases and, indeed, their dates?

Andrew Ferguson: Yes. For future reference, the dates of the cases and the case references are set out in appendix 2 of my submission.

The three cases that you mentioned are the best and most pertinent string of case law that we have about how a court should interpret a request to dispose of common good land. In the Motherwell District Council case, which was in 1988—or before the current unitary authorities came into existence—the court looked at a park in Wishaw in respect of which there were a number of proposals. Some of the park was to be turned into a car park for a retail food store, while some of it was to be the site of a replacement primary school that, at that time, was being provided by the regional council. That is why the matter was considered as a disposal rather than an appropriation. If I remember correctly, the park was something like 7 hectares and was being reduced to 4—I think that those proportions are right even if I have got the actual sizes wrong—and in that case the court said, "Well, the current park is somewhat rundown and the money generated by these sales could be ploughed back into regenerating the remaining bit of it. That seems to be the best use of this common good property and in the residents' best interests." Instead of nothing happening and the park continuing to be underfunded by the council—I cannot remember how well utilised it was—that was seen as the best use for it.

The Kirkcaldy District Council case, which was in 1989—I had just joined the district council but was not involved in the case—was about a caravan park that had been built on common good land back in the days when a lot of west of Scotland holidaymakers used to spend a lot of time on the Fife coast. Although it was still being used by some people, the park had not been terribly successful and was pretty much running at a loss. In that instance, the proposal was that the land be sold to British Alcan Aluminium to extend its premises. It was the major local employer, so selling off the land was seen as being in the best interests of the residents of the burgh, so that the proceeds would then come into the common good fund and could be used for other community-based things.

The West Dunbartonshire Council case went the other way. There was an existing courthouse in Dumbarton, and there was a proposal to build a new one, and the court felt that there had not been enough of an options appraisal as to whether it was a good thing not to rebuild on the existing site. It was exercised by the fact that the park that was to be developed there was seen as a green lung of the town and a useful thing.

In those disposal cases, the court looked at the advantages and disadvantages of allowing the disposal or not allowing it, and at what would happen to the land if it allowed or did not allow the proposal to go ahead, and what would benefit the residents of the burgh.

Fiona McLeod: It is interesting to learn that in greater detail, rather than just reading the stark paragraphs in your written submission. I was interested in what you said from paragraph 7.10 onwards, where you talk about the North Lanarkshire Council and South Lanarkshire Council cases, which were not opposed and therefore went through. Can you give us your insight into that whole process?

Andrew Ferguson: Professor Rennie may have been involved in one of those cases, so he can give you chapter and verse better than I can. However, I understand that the initial South Lanarkshire Council case was to do with a public-private partnership or private finance initiative arrangement. A school was being built in a park, or on open land that was recognised as being common good. In the circumstances, to be on the safe side, the council went to court and said, "We think that we need to petition you for disposal of this, because it is going into one of these complex lease and leaseback arrangements with a PPP operator."

My understanding of the case is that it was not opposed. At the initial court hearing session, the judges indicated that they were not at all sure that the petition was necessary, because they did not think that it was a disposal, as such, because the land was not going out of the council's hands entirely. So, after a lunch break and a hurried consultation with QCs, the council went back and argued that, in fact, the petition was not necessary. It was a satisfactory conclusion for the council, because it was able to say, "Well, we've been to court and gone through the process," but it was not a very satisfactory conclusion for anybody else, because it was just a case of the council saying, "Do we need this? No, we don't." Nobody else was involved, and the question of appropriation was never dealt with.

The South Lanarkshire Council case was not reported, so there was no written judgment for the subsequent North Lanarkshire Council case. However, from what the judge in the North Lanarkshire Council case could glean from the reasoning for the South Lanarkshire Council case, it followed that what was proposed in North Lanarkshire did not count as a disposal, and there was therefore no locus for the court in that regard.

James Dornan: Are you saying that the judge basically said, "This is an appropriation," without actually saying it. Are you suggesting that he was saying that it was more an internal matter than a disposal, because there was a council connection through the PPP process?

Andrew Ferguson: Court writs always have to be phrased carefully and precisely.

James Dornan: I accept that.

Andrew Ferguson: The writ was framed in terms of a petition under section 75 for disposal. When they look at such petitions, the courts tend to limit themselves only to the question that is being asked, so I am not suggesting for a minute that the court gave any opinion on whether or not it was an appropriation.

James Dornan: Except for the fact that he says that there does not seem to be anything because it is not a disposal.

Andrew Ferguson: Except for the fact that it is not a disposal, and if it is not a disposal then you—

James Dornan: So they felt that the change of use was okay.

Andrew Ferguson: The court looked at whether the land was being disposed of to a third party. It took the view that, because the relationship between the council and the PPP operator was so close and the council would, in essence, not lose control of the property, it was not a disposal in the conventional sense of selling it off to Tesco or whoever. That was the question that the court was asked, so that was the question that it dealt with.

James Dornan: Okay. Thanks.

Fiona McLeod: I want to go slightly forward from that into the interesting area of alternatives to pursuing the matter through a private bill. Mr MacIntyre said that

"the bill does not affect any other inalienable common good land".

I would be interested in your comments on that. On the alternatives, Mr Strachan said that the council had looked at the proposed community empowerment and renewal bill and at the ministerial order process, but he gave various reasons why it decided not to pursue those options. My feeling is that it was all about timing rather than the fact that those alternatives would not produce the result that the council wanted. Would you like to comment on that as well?

Andrew Ferguson: I absolutely agree that the bill will not affect other inalienable common good land. The bill will affect only Portobello; it will not have any general effect or provide anything that other councils will be able to rely on. Whether it will be seen as a test case and other councils will see it as the safest possible way of dealing with such an issue is another matter.

I am aware that the proposed community empowerment and renewal bill has been discussed and worked through, and I understand that the Government intends to publish it. I have been involved in some discussions, mainly through the Society of Local Authority Lawyers and Administrators in Scotland. However, to be frank, we are already at the stage of considering this private bill whereas, as far as I know, the proposed community empowerment and renewal bill is still being drafted and has not been published yet. I understand entirely why the City of Edinburgh Council wants to proceed at its own pace, particularly given the history of the Portobello park issue.

The Convener: On the general impact of the Portobello park decision, your view is that similar issues are likely to occur in the future in other parts of Scotland. I am talking not about the bill setting a precedent, but about common good land or other land being used for schools. Professor Rennie appears to share your general view on that and has said that

"the legislation will need to be examined and changed".

Mr McGeoch, on the other hand, appears to be of the view that instances of councils seeking to appropriate inalienable common good land are relatively rare. It would be helpful to explore further the issue of the general impact of the Portobello park case and the potential long-term solutions, be they achievable through the Parliament or the courts.

Andrew Ferguson: I can only estimate how common the problem is going to be, from discussions with colleagues in other councils. On the day-to-day dealing with common good land and how it might be treated, there is a danger that, unless there is legislation, councils will become much more defensive and unwilling to deal with common good land in any way. Local residents might welcome that but, as I say in my written submission, councils are under pressure to deliver the best value they can for the public pound and to use their assets as meaningfully as possible. There will be always be a tension there.

If you look back at the cases that are described in part 7 of my written submission, you will see that, over the years, there have been a number of cases of schools being built on public parks. That is quite common.

The simplest way to amend the legislation would be to amend section 75 of the 1973 act specifically to include appropriation, but I am not saying that that is the best way. It would mean that, if a council wanted to do something along the lines of the proposal, it would have the option of going to the Court of Session or the sheriff to petition for authority to appropriate inalienable common good land. Whether that is the best forum in which to discuss such an issue is a matter for policy makers, not for me. However, if councils had the option of going to the Court of Session, for example, rather than the local sheriff court, that would be quite an expensive option for anybody who did not like the proposal to go to to stand up and defend their position.

Another way of looking at it would be to ask whether the best way of deciding such an issue is to refer to a 40-year-old piece of legislation that itself refers back to an old, arcane and, possibly, interesting legal concept. The committee may have concerns about whether, if the bill is promoted, there will be a flood of other bills and whether that would be the best use of the country's Parliament's time. If it is not, should there be a simplified procedure that is, perhaps, more localised and enables all views to be input at a local level—a better way of deciding whether common good land or, indeed, any other publicly owned land is used in such a way?

Burghs went out of existence in 1975 but, to some extent, whether a town is a burgh or not is a historical accident. The towns that are not burghs do not have the benefit of common good law so, if councils want to appropriate parks there, they do not have such a provision to protect them.

The Convener: You said that amendment of the 1973 act would be the simplest way to address the matter but perhaps not the best way. What would be the negative effects or the pitfalls of doing that?

Andrew Ferguson: If you amended section 75 of the 1973 act only and introduced a provision that allowed for appropriation of inalienable common good land, it would basically mean that, if a council decided that something was inalienable—as we discussed earlier, whether land is alienable or inalienable and common good or not is always open to interpretation—there would need to be a court action in the local sheriff court or in the Court of Session.

The process for that is that a petition is raised and it is advertised for 21 days, I think from memory, in the local press so that local objectors have a chance to enter the action. However, even if the action was in the local sheriff court, it would mean that objectors would be entering the legal arena where legal arguments would be made. My only point about that is to ask whether that is necessarily the best forum for raising concerns about, or expressing support for, such a proposal.

James Dornan: Mr Ferguson, I have a question touching again on the legal opinions of Roy Martin QC and Gerry Moynihan QC. You have stated that you do not disagree with Roy Martin's legal opinion but

"wonder whether … the Council could ever appropriate the land in question for another use without such a decision being challengeable on the grounds of being unreasonable"—

that is, based on an action for a judicial review. In essence, that is a related argument to Gerry Moynihan's. However, you also indicate that, if necessary, the issue

"could be dealt with by means of an additional provision in the Bill."

It would be helpful to have more detailed comment on that point and also whether you have any views on Gerry Moynihan's legal opinion.

Andrew Ferguson: As I said at the start, if a council appropriates an alienable piece of common good land—let us leave aside the issue of inalienability—for a school or whatever, it normally comes out of the common good. There are examples of that in Burntisland, which I mentioned, where, in the 1930s, the council used a piece of common good land to build a new housing estate. There was a specific transfer to the council as a housing authority. Normally, in that situation, an appropriation would take the park out of the common good. However, we are in slightly new territory, in that there would be a piece of legislation. If there was a concern about the issue, the relevant section could be amended to make it clear that not only should the park be used only for education purposes but, if it were ever used for anything else, it would fall back to the common good.

In essence, both Mr Martin and Mr Moynihan have a point, but I do not really see that it is anything that a draftsman could not sort.

The Convener: Thank you, Mr Ferguson. That was helpful. As I said to the other witnesses, if we have any other points, we may follow them up but, as you said, your briefing was very detailed. Thank you for the time that you took to do that and for coming along this afternoon.

Andrew Ferguson: Thank you. It is an honour.

The Convener: That concludes our public session. We now move into private.

12:31

Meeting continued in private until 12:56.

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