



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL COMMITTEE

Wednesday 9 October 2013

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**CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL COMMITTEE
4th 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:

Tom Ballantine (Portobello High School Parent Council)

Alison Connelly (Portobello Park Action Group)

Stephen Hawkins (Portobello Park Action Group)

Roy Martin QC

Rosemary Moffat (Portobello for a New School)

Jennifer Peters (Portobello Park Action Group)

Sean Watters (Portobello for a New School)

CLERK TO THE COMMITTEE

Mary Dinsdale

LOCATION

The Chamber

Scottish Parliament
City of Edinburgh Council
(Portobello Park) Bill Committee

Wednesday 9 October 2013

[The Convener *opened the meeting at 09:30*]

The Convener (Siobhan McMahon): Good morning and welcome to the fourth meeting of the City of Edinburgh Council (Portobello Park) Bill Committee. I ask everyone to switch off their mobiles phones, as we are in public session.

Before dealing with the business that is before the committee, I will comment on a letter that the committee received from one of the objectors whose objections were rejected by the committee at the preliminary stage on the ground that the committee did not feel that the objector's interests were clearly adversely affected. The objector has asked the committee to reconsider and reinstate the seven objections that were rejected.

Under rule 9A.8.2 of the Parliament's standing orders, private bill committees are required to give preliminary consideration to all admissible objections and to

"reject any objection where the objector's interests are, in the opinion of the Committee, not clearly adversely affected by the ... Bill."

I confirm that, in fulfilling that part of the process in relation to the City of Edinburgh Council (Portobello Park) Bill, the committee considered each of the 66 objections individually. Factors such as whether the objector lived in the immediate vicinity and used the park, whether they lived not in the immediate vicinity but in the city of Edinburgh boundary and used the park, and whether they lived outside Edinburgh were taken into account.

In reaching its decision on each objection, the committee had regard to the particular facts and circumstances of each objection. That involved a judgment about the degree to which there was a clear adverse effect and whether that effect on the objector's interests was sufficient for the objection to be continued to the consideration stage, if the bill proceeds to that stage.

Having taken advice, I am satisfied that there is nothing in the letter that would justify revisiting the committee's decision that the objector's interests are not clearly adversely affected by the bill, and I propose to write to inform the objector accordingly. If members are content with that, I will arrange for the correspondence to be published in due course. Are members content?

Members indicated agreement.

Decisions on Taking Business in Private

09:31

The Convener: Agenda item 1 relates to the committee making a decision to take items in private. Does the committee agree to take in private item 3, which is on consideration of its next steps on the scrutiny of the bill at the preliminary stage?

Members indicated agreement.

The Convener: Does the committee also agree to take in private at future meetings its consideration of the main themes and issues arising from evidence, to inform its draft preliminary stage report?

Members indicated agreement.

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

09:32

The Convener: I invite the witnesses to introduce themselves.

Jennifer Peters (Portobello Park Action Group): Hi, I am Jennifer Peters.

Alison Connelly (Portobello Park Action Group): I am Alison Connelly.

Stephen Hawkins (Portobello Park Action Group): My name is Stephen Hawkins.

Roy Martin QC: My name is Roy Martin. I am a Queen's counsel and I am instructed to appear with the group in the event that I can assist the committee with any legal questions.

The Convener: I remind witnesses that the questions at this stage will focus broadly on issues relating to the bill's general principles and whether the bill should proceed as a private bill. If anyone has an opening statement, you can make it now for up to 10 minutes.

Jennifer Peters: Good morning, and thank you for inviting us to give evidence on the bill's general principles. We shall cover the legality of the bill, the consultation on it and the alternative sites.

The committee will have seen the timeline of events that we submitted with our objection, but we would like to remind you of a few key points. Early in 2006, the council announced its intention to build two schools and a substantial amount of housing on Portobello park and golf course. Initially, the council disagreed that Portobello park was common good land, and it acknowledged the park's inalienable common good status only in January 2008. Soon after, the council announced its intention to go to court to seek permission to build on the park. However, it then changed tack and obtained a legal opinion that said that it did not need the permission of the courts. On the basis of that advice, the council decided in December of that year to give Portobello high school priority over other schools that were scheduled for replacement.

We made it clear to the council at that point that we would challenge that decision, and we made two offers to go to court jointly with the council to resolve the legal issues, both of which were declined. Following the council awarding itself planning permission in February 2011, we lodged a judicial review, and the Court of Session ruled in 2012 that Portobello park could not be built on. Accordingly, it is the council's actions that have allowed the timescales to slip; had it gone to court

in 2008, the new school could have been built by now.

The private bill is now being promoted as a means of helping to get the council out of the impasse that it has reached over the replacement of Portobello high school. The council chose not to seek early resolution of the legal issues and to pursue only one option. That is why it has a problem with the delivery of the school now. It is clear that urgency has not always been top of its agenda.

On the legality of the bill, we draw your attention to paragraph 5.8 in part 5 of the guidance on private bills, which states:

"A Bill should not proceed as a Private Bill if a statutory remedy is not necessary to achieve the result sought; nor should it proceed if the result sought would more appropriately be achieved by means of changes to the general, public law (i.e. by a Public rather than a Private Bill) that would give the same powers or benefits to others in a similar position, without the need to single out the promoter."

This is the first-ever private bill to be promoted to overcome an unequivocal and categorical ruling from the courts. This is a matter of the principles of the Parliament, not just a legal issue. This is a legacy.

For the Parliament to be willing to consider the bill, it must be satisfied that the private bill procedure is the correct way to consider the issues. As well as the legal opinion of Roy Martin QC, other legal opinion has submitted in evidence that this is a wider issue and not just an isolated case and that it would be better dealt with by substantive legislation.

Despite the council's public assertion that the pursuit of the private bill is purely a local matter, it agrees privately that the issue has a significance that goes beyond Portobello and Edinburgh. A letter dated 9 October 2012 from the council to the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, makes that point clear. It says:

"Whilst this request is being made on behalf of the City of Edinburgh Council, we are sure that this matter will be of interest to other local authorities."

In other words, the issue is of national importance and the bill could have wider repercussions for the use and misuse of common good land.

We argue that the issue should be addressed in a public bill so that the process and safeguards for common good land are properly examined and considered on a national basis instead of through a piecemeal approach that could set an unwelcome precedent for all common good land. The private bill's wider implications were recognised by other objectors from within and outwith Edinburgh. Unfortunately, their objections

have been excluded, which shuts them out from contributing to and informing the democratic process, although the bill could affect common good land all over Scotland. A private bill should be used only when no other options are available to achieve the objective, which is in this case to provide a new school. There are suitable alternative sites for the school, which I will cover later.

On consultation, paragraph 2.24 of the guidance on private bills states:

“The Private Bill Committee will wish to satisfy itself that the promoter undertook a consultation process that was open, accessible, helpful, clearly timetabled and, where possible, adopted and demonstrated innovative and best practice.”

We do not believe that the consultation carried out by the council adequately meets those criteria, so it cannot be relied on with any confidence. The consultation was designed to promote the preferred option. It lacked balance and included questions about usage of the proposed replacement park space, which is not part of the bill's scope. The information that was provided was a sales pitch by the promoter for a school on the park, instead of being about the private bill. The timing—over the festive period—made it in effect a six-week consultation, although consultations on private bills usually last 12 weeks.

Distribution problems meant that a significant number of people who live closest to the park received consultation material only five weeks into the process. Information was not equally accessible by all—for example, forms were not distributed with the leaflets, so those without internet access were at a disadvantage.

The targeted area was virtually identical to the school catchment, even though it was presented as an Edinburgh-wide exercise. The information that was presented and the language that was used were biased, flawed and misleading. For example, the leaflet said:

“Does this affect other parks or open spaces?”

to which the answer was:

“No, absolutely not. This ... Bill would apply only to this site in Portobello”.

There was no mention of the strong legal view on precedence.

Surgery sessions fell under the radar of many. I have children at one of the feeder primaries and I live in the vicinity, yet I knew nothing of the surgeries. The consultation was heavily weighted towards the school community—special efforts were made to engage it through visits to schools, stalls in playgrounds and emails sent to parents on school mailing lists.

No minimum age was set for the consultation, which had a clear objective: to tell 1,300 children and parents that this is the quickest and cheapest way to a new school, with no other site in a good location that can offer the same facilities. The potential outcome was obvious. If the quality of the consultation is poor, the outcome means very little.

Approximately 2 per cent of Edinburgh's population took part in the consultation, so it is very misleading to say that 76 per cent of people are in favour of the bill. The council made it clear at the time that the exercise was not a referendum or vote.

The alternative site options have never been presented in a balanced way. They were described as poor and inferior substitutes for the ultimate prize of the park site. The council is investing everything in the bill, and the proposed twin-track approach has disappeared without trace. No progress has been made with other site options and the delay continues. The inconsistency of the council's approach to school replacement is illustrated by the fact that two other secondary schools that are being replaced—Boroughmuir and James Gillespie's—are being rebuilt on brownfield sites that are proportionately much smaller than either of the two leading alternative sites for Portobello high school.

Boroughmuir, with a school roll of 1,150, will be built on a new 1 hectare site, which is part of a much larger ex-industrial site. Gillespie's, which has a similar roll, will be built on its current site of 2 hectares. Portobello high school's current site and the Baileyfield option site are both 3 hectares for a potential school roll of 1,400, but they have been branded too small by proponents of building on the park. Either of those sites would be able to accommodate one full-sized pitch, in line with the pitch provision in many other city high schools. Is it really justifiable to lose a whole park of 6.4 hectares for the marginal benefit of one extra pitch on the park site?

The fact is that there are other means of delivering the school with the same standard of educational facilities. For all the above reasons, the bill should proceed no further.

The Convener: Thank you very much. We will now go to questions.

In your opening statement, you said that the issue of the park's status as common good land predates 2008, and that was mentioned in your written submission. When did Portobello park action group take the view that the land is common good land and on what basis was that decision made?

Alison Connelly: From the original announcement in January 2006, we identified the fact that the council intended to build on Portobello

park. PPAG formed and took advice early on and, in spring 2006, it came to the view that the land is common good land. The group obtained a legal opinion from Mr Martin to that effect, so it might be helpful for him to speak.

Roy Martin: Yes, madam. I have the opinion with me, if the committee wishes to see it. I was instructed to give an opinion on whether the park is common good land, and I gave the opinion that it is. I could give you the date of that opinion, but it was certainly in 2006.

The Convener: We have your written submission as evidence, but we just wanted to clarify the dates.

Stephen Hawkins: In April 2006, there was a public meeting at St Mark's in Portobello, when the councillors who were involved—Ian Perry and Ewan Aitken—were told that our opinion was that the land is common good land, that it belongs to the people of Edinburgh and that it is not for the council to do what it wants with the land. The reply was, "Oh well, if it's common good, we won't be building on it." The approach obviously changed afterwards but, as early as April 2006, councillors were warned in a public meeting that we intended to pursue the common good issue.

The Convener: Thank you for clarifying that. Further to that, why is PPAG of the view that the council should have gone to court in 2008 to settle the common good land issue?

Alison Connelly: That is because, in the early stages, the council contended that the land is not common good land, and then the council said that it is common good land but that court permission was not necessary. We asked the council whether we could clarify the matter by going to court with the question.

The Convener: That was why you wanted the council to go to court.

Alison Connelly: We wanted clarification once and for all, and the only way in which we could envisage getting that was by asking the courts.

Roy Martin: I wonder whether I might assist. There is a procedure whereby, if a matter of law is in dispute, the Court of Session can give a ruling on it, either in a summary trial, which is before a single judge, or in a special case, which is before three appeal court judges. On my advice, that was suggested to the council as a way of resolving the dispute earlier.

My advice was that, if that procedure was adopted, costs would be shared. In a sense, that would not be a traditional litigation with somebody pursuing and somebody defending; it would be two parties bringing the issue to the court, presenting their competing arguments and accepting the court's decision.

09:45

The Convener: In its submission, PPAG argues that

"it is widely acknowledged that the project of re-provisioning Portobello High School has been catastrophically mismanaged by the City of Edinburgh Council from the start".

What do you mean by "mismanaged"?

Stephen Hawkins: The idea of mismanagement comes, for instance, from the fact that the council maintained for two years that the land is not common good land, then suddenly flipped that decision, with no clear announcement—it was discovered in a paper to the council's finance committee. The council could have considered that two years earlier, started a management process that accepted that the land is common good and dealt with what it would do with the land, but it delayed for two years.

After the council decided that the land is common good, Marilyne MacLaren, the then convener of the children and families committee, announced that she would go to court—as Roy Martin indicated—to get clarification. We would all have known where we stood if the council had done that in 2008. We have presented as evidence a letter from Marilyne MacLaren to one of our supporters at the beginning of February 2008, in which she said that the council would go to court to clarify the matter.

After that, the council obtained a legal opinion that indicated that the council could do what it wanted with the piece of land. Our contention at that point was, "Yes, fine—you have an opinion." There are probably many opinions. As this committee has seen, several legal opinions have been presented in the evidence that you called for.

We said that the council had an opinion, but there had been no decision, so we should go together to test that. However, the council refused and hung on to its piece of paper like Chamberlain hung on to the piece of paper at Munich. It said, "We've got this piece of evidence—we can do what we want," rather than recognising and managing the risk of the process. That has been the approach all the way through.

In 2006, the council promised that there would be replacement open space. It then reneged on that—it overturned that. Now, suddenly, the promise of replacement open space has reappeared. In that process, how the council would compensate for the loss of the common good land has been mismanaged. It said, "Yes, we will compensate—no, we won't. It's in the wrong place. It's a waste of public money—now it isn't." It has flipped through the whole process, with no clear management guidance as to how to deliver a new school as quickly as possible.

The Convener: Thank you for that clarification.

In oral evidence to the committee, the council said:

“The purpose of section 2(2) is to ensure that the recreational powers remain available”

for the park and that

“the position could be put beyond doubt by means of a suitable technical amendment”.

It also confirmed that the site would remain

“inalienable common good land following any appropriation.”—[*Official Report, City of Edinburgh Council (Portobello Park) Bill Committee*, 11 September 2013; c 27.]

Do you have any further comments on the council’s assertions about the land’s status?

Stephen Hawkins: Roy Martin is probably the best person to comment.

Roy Martin: I have read that evidence. I confess that I find it slightly difficult to understand, although I do not think that this is a situation in which a suitable amendment could not resolve the issue. I start by accepting that, but the position is slightly unclear.

At various points in the court proceedings, it was unclear what the council thought would be the status of the land on which it would build the school, if we assume that it could overcome the hurdles to doing that. The answer to which the convener referred might be read as suggesting that, despite a school having been built on the land, it would remain common good land. The alternative is that the remainder of the park—by and large, the golf course—is not affected by the bill and will therefore remain as inalienable common good land.

I am sorry if I cannot help the committee much further. There is uncertainty as to what the council thinks the status of the land to which the bill applies will be, if it appropriates the land and builds a school. My legal view—my opinion was to this effect—is that the land will cease to be common good land. As I have said, conditions could be imposed and amendments could be lodged that would limit what could be done with it. I do not dispute that. However, a slight concern has been raised in my mind that the council is not absolutely sure what the status of the land will be when the bill is passed, if it is passed. I am sorry if my answer is less than helpful.

The Convener: That was very helpful.

Alison McInnes (North East Scotland) (LD): Good morning. The memorandum that accompanies the bill sets out the alternative legal approaches to addressing the legal obstacle. In her opening remarks, Ms Peters suggested that it would be more appropriate to pursue the bill as a

public bill. Will PPAG elaborate on its views on the alternative legal approaches to the change in the park’s status that the council considered?

Alison Connelly: I ask Mr Martin to answer that.

Roy Martin: I can address them individually, if the committee wants me to do that. One might call an appeal to the Supreme Court an alternative, but I do not regard it as an option that should have been pursued. I agree that that approach would not have had any prospect of success.

There was a suggestion that, at the stage that the council had reached after 2012, it would decide that the land was not common good land after all. However, that would have been fraught with considerable difficulty for the council, and I would not have advised it. Another possibility was a petition to the nobile officium, which is a petition to the Court of Session asking it to exercise, as it were, a general power. However, I agree that that would not have been likely to succeed, and I would not have advised it.

Assuming that the council wanted to pursue the use of the park, it was left with the options of a bill such as the present one or, alternatively, a public bill to change the law that was the problem. That seems to me, from a legal perspective, to be one of the critical issues, and it has been referred to in the group’s submissions. Its members speak as advocates for their cause whereas I simply take a legal view as best I can.

Section 75(2) of the Local Government (Scotland) Act 1973 undoubtedly prevents the appropriation of inalienable common good land—that is what the Court of Session has found. However, that is to be contrasted with the fact that section 75(2) allows disposal with the consent of either the sheriff or the Court of Session. On the face of it, that seems to be an anomaly because in each case the land would cease to be common good land. Why should the position be different? In paragraph 6.1(f) of his written submission to the committee, Professor Robert Rennie recognises that that is a general issue. If I may say so, the committee has an understandable difficulty with objectors from elsewhere because of that larger issue.

The solution would be a change to section 75, which would involve a general amendment that would apply throughout Scotland. If there was public legislation of that sort, it would allow all the interested parties throughout the country to express a view. It appears to me that the only reason why that has not been done is because of the difficulty in which the council found itself in 2012. I make no comment on that; those are matters for submission by the people who are instructing me. If we leave that out of the account,

I would have thought that, even on the committee's own advice from Professor Rennie and elsewhere, the appropriate way in which to deal with the issue would be through legislation to amend section 75(2).

In that context, it has certainly been said that appropriation is a lesser step than disposal, so why should it be absolutely prohibited when disposal is permitted with the consent of the court? All that I can say from a legal point of view is that I am not sure that that is absolutely the case. Often, disposal comes about because land has ceased to be used for any common good purpose. In other words, it is just lying there wasted, and no doubt it incurs some cost on the part of the local authority that has to maintain it. I was involved in a case that regarded arguments about a town hall that was to be taken out of the common good, which was derelict. That is often why disposal comes about.

Appropriation is different. In a sense, it is driven by the local authority wanting the land for something else. That might be perfectly justifiable. In the case that we are considering, I do not think that there is any doubt that a new high school is a justifiable cause. However, the council does not own common good land in the way that it owns other land. It has trustee duties in effect—although it is not strictly a trustee—and it must look after the land for the community. In a sense, the community owns the land, but the council is the title holder.

Forgive me. This is rather a long answer to your question—I do apologise. It seems to me that to proceed with legislative reform was probably the only option that the council had. Had it not been for time pressure, I would see every good reason for a public bill to amend section 75(2) of the 1973 act.

Alison McInnes: Thank you, Mr Martin. That was helpful.

Stephen Hawkins: From the layman's point of view, I think that, the council having gone down one route and one route only, the time pressure is weighing hard on it. The phrase "last throw of the dice" has been used in relation to the council; I just wish that it would stop gambling with the future of Portobello high school.

From PPAG's point of view, for the issues to be aired and decided in court was what we were looking for all along. As Mr Martin said, there is no way for the court to consider the matter as there is in relation to disposal. We were looking for other ways of progressing the matter, by going to court and getting a clear decision.

I want to make another point. At times, the common good park has been described in quite derogatory terms, but the fact that the council, for whatever reason, has not managed the park well

is no reason for it not to be retained within common good and put to some other use. I think that that has been brought out in case law in the past.

Alison McInnes: Thank you.

Jennifer Peters: There has been a lot of talk about lack of use of the park. At one of the early planning meetings, someone said, "That park's never used. How many people are on it?" The response was, "There are 250 people on it tonight; there is a football tournament on." I subsequently spoke to the father of the coach for Joppa United, who told me that the team had disbanded because it could not afford an alternative playing site. The goalposts came down and the park was dug up for the council's archaeological work, and no one was allowed to use it. The City of Edinburgh Council has turned down requests for races on the park.

Recently, at least 200 people came along to the party on the park event. There is a real desire to use the park. It is unfortunate that the facilities that the council suggests might go on to the replacement park have never been afforded to Portobello park. There is one bench and we are lucky if the grass is cut half a dozen times over the summer, although the grass in other parks in Edinburgh is cut regularly.

The Convener: Before I bring in Alison McInnes again, I say that I am conscious of the time. I ask for concise answers because we have a number of questions and time is marching on. The information that our witnesses have given is important and helpful, but I do ask for short answers.

10:00

Alison McInnes: One of the things that the committee must consider is how effective the consultation process was. Does PPAG think that, in the consultation material and at the public meetings that were arranged as part of the consultation process, there was adequate focus on explaining the alternatives that we have just discussed and the reasons why they were not being taken forward?

Alison Connelly: We provided a written submission containing our views on the consultation. You might want to refer to that for the detail if you want us to keep our answers short, as there is additional information in there.

We were disappointed by the coverage and by the consultation material, which we felt was heavily biased towards promoting the park as the site, as I think Jennifer Peters said. The material clearly stated the view that the park was the preferred site and the alternatives were inferior,

without giving an objective analysis of why that was the case.

A lot of people in the community do not fully understand where the other sites are or are not aware that there are other sites. The message that the council promoted was that the park was the only option. Therefore, people, and especially parents with young children, who are led to believe that their children's education will be endangered if a new school is not delivered on the park, obviously and understandably vote for that. However, if they fully understood the alternatives that are available, they would be in a better position to make an informed decision.

Alison McInnes: What would you have wanted the council to explain thoroughly in the consultation process? Which alternative sites would you have expected it to take forward and detail?

Alison Connelly: In 2006, the council had 15 sites on the list. It discounted most of them, some because they were green space or had had millennium planting. That is ironic, because both factors apply to Portobello park, which was not discounted. Even back in 2006 and in the original feasibility study, there was an inconsistent approach. We felt that the feasibility study was designed to deliver one outcome, which was that Portobello park was the preferred site.

I fast forward to the current position. The council whittled the options down to three—its preferred site, the park; the existing school site; and the alternative site at Baileyfield, which is currently on the market. The fallback of the existing site was considered in 2003, before any of this started, and plans were drawn up for a rebuild on the existing site, which were progressing. There is therefore a demonstrated plan of how a new school could be delivered on the existing site, but it was brushed under the carpet.

The message in the most recent consultation was that the existing site on its own is too small and that the school could be delivered on that site only if the neighbouring primary school was relocated. It is hard to understand how the council came to that decision, which has never been fully explained. I almost think that it was added as an extra reason for not choosing the existing site.

The existing site is 2.9 hectares and the neighbouring primary school has 0.6 hectares. The combined site is therefore 3.5 hectares. However, it has been demonstrated that it would be feasible to deliver a new school on the 2.9 hectares site. As Jennifer Peters said, James Gillespie's high school is being rebuilt on its existing site, which is about 2 hectares. The City of Edinburgh Council has proved that it can do that elsewhere in the city. We think that the option

should have been more fully analysed and discussed, instead of the council deciding that it was not very good so it would not spend too much time thinking about it.

The Baileyfield site was put up for sale and the closing date was 10 months ago, in December 2012. The council made a bid for the site, but we still do not know the outcome. I think that the issue was discussed at the committee's meeting two weeks ago.

Alison McInnes: In oral evidence to the committee, the council said that, during the consultation process, for all the different alternatives sites, it

"sought to provide at a high level the respective pros and cons".—[*Official Report, City of Edinburgh Council (Portobello Park) Bill Committee*, 11 September 2013; c 33.]

Do you dispute that?

Alison Connelly: Yes. We also dispute the accuracy and objectivity of the information that was given about the pros and cons.

The Convener: Thank you. We move on to questions from my colleague Fiona McLeod.

Fiona McLeod (Strathkelvin and Bearsden) (SNP): Continuing on the consultation process, I want to ask about the mechanics of the process. In your objection, you refer to the "late/non-delivery of leaflets", but the council told us in evidence that respondents should generally have had two opportunities to be informed about the consultation process through leaflet drops and that the level and timing of the submissions suggested that the message had got out.

Is PPAG aware of any particular group of people who did not eventually receive any information and therefore did not have the opportunity to respond? Does PPAG feel that the council could have done more to ensure that there was 100 per cent coverage earlier in the process? If so, what measures could the council have taken?

Stephen Hawkins: Other measures could have been taken. For instance, the council used an untried and untested delivery company. Only after we discovered that people were not receiving leaflets did the council accept that its chosen method had failed. The leaflets were delivered after Christmas to some of the most affected areas, but that was after the first meeting. The council bases its assertion that its communication was effective on the fact that it received a high level of response fairly quickly. However, many schools have special events in the lead-up to Christmas, and it seems that the information was successfully disseminated through the schools but not to the wider area of Portobello and certainly not to the wider area of Edinburgh.

Fiona McLeod: You have reiterated the problems that you saw with the distribution. Can you think of any other measures that the council could have used?

Stephen Hawkins: The council used electronic methods of communication, which probably cut out quite a few people in the older age bracket in Portobello. However, the issue is not necessarily the methods that were used but how and when they were employed.

Fiona McLeod: In your submission, you say that the public meetings were “hostile”. Will you expand on why you think that? What could the council have done to prevent what you characterise as “hostile” public meetings?

Alison Connelly: In the community, it is difficult to avoid the hostility that has become part of the whole debate. If you hold a public meeting, it is inevitable that there will be strong feelings on both sides, so I am not sure that the council could have done much to prevent the public meetings from being quite hostile.

However, as the committee will hear when it takes evidence from Portobello for a new school later today, it has worked closely with the council—in collaboration, if you like—to deliver the school on the park. We feel that PFANS has often been the vehicle to drum up support in the community. It has invited or encouraged people to come to meetings by saying, “You must come”, “You must bring your children” and “You must demonstrate how important it is that these children have a new school.” A sort of anxiety was generated.

Given the feelings that now exist in the community, I am not sure that the council could have done much to avoid the meetings being hostile. That would have been the outcome regardless of what might have been done to avoid it.

The Convener: We move on to questions from my colleague James Dornan.

James Dornan (Glasgow Cathcart) (SNP): Good morning. In paragraphs 4.28 and 4.29 of your written evidence, you argue:

“Apart from two meetings at the Milton Court sheltered housing complex ... no attempt has been made to engage with those directly affected by the Bill, the residents bordering the park.”

Will you explain why you think that additional meetings for those residents were necessary, in view of the other meetings and the general consultation process?

Alison Connelly: Sorry, but will you repeat the first bit of your question?

James Dornan: Certainly. In your written submission, at paragraphs 4.28 and 4.29, you argue:

“Apart from two meetings at the Milton Court sheltered housing complex ... no attempt has been made to engage with those directly affected by the Bill”.

Will you explain why you think that additional meetings for those residents were necessary, in view of the other meetings and the general consultation process?

Alison Connelly: I think that we made that comment because the council described its consultation process as including a lot of ancillary meetings in libraries and with community groups. We were unaware of any of those meetings locally. To balance things out, we pointed out that we would have liked something that tried to draw in local people who were perhaps not online and who had not received leaflets through their letterboxes. There was no mechanism for them to know what was going on.

Stephen Hawkins: The people who will be most affected, we might expect, are those who live in close proximity to the park, who will perhaps use it more than others in Portobello do. They are the ones who did not receive the leaflets until five weeks into the consultation and after the first public meeting. Under the guidance, the promoter of the bill is supposed to take into account and consult closely those who are most affected. We are saying that there were general meetings, but the people around the park did not even receive their leaflets until after Christmas in what was a very short consultation period.

James Dornan: Thank you. That brings me to my next point. The council justified its general approach by saying:

“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”.

Will you expand on why you believe that a city-wide consultation process was necessary? In particular, what would have been the likely costs of such a process? Would there have been a risk that people with less interest in the process would have had a deciding say?

Stephen Hawkins: One issue is that this is Edinburgh’s common good land. The way in which the council has approached the process has—and will have—a bearing on how it approaches other issues in the city. The land was bought for the behoof of the people of Portobello and of Edinburgh.

Our particular issue with the way in which the targeted consultation took place is that, rather than focusing on Portobello park, the area for the

targeted distribution was more or less coterminous with the school catchment area. There are a couple of areas that do not exactly match up—one being an industrial estate and the other a large area of green belt land—but the consultation pretty much took place within the school catchment area, so it was neither just for Portobello nor for the whole of Edinburgh.

James Dornan: If you are saying that the whole of Edinburgh should have been consulted, how does that fit with your argument that local residents should have been consulted in more depth?

Stephen Hawkins: That comes from your own guidance. We are saying that the park is Portobello's, and your guidance says that local residents should be taken into account more closely.

James Dornan: All your earlier comments suggest that the focus should have been on local residents, but occasionally you say that the consultation should have been wider.

10:15

Stephen Hawkins: No. I disagree with that. I will try to clarify. The consultation was for the people of Portobello and the people of Edinburgh. What we are saying is that the Scottish Parliament guidance for promoters of private bills states that particular attention should be paid to those who are most affected. You heard from Jennifer Peters about some people who might have been closely affected—the footballers—but they had already been kicked off the site. The other group of people are those around the park. That comes from the guidance.

James Dornan: Thank you. Will you expand on how you define the appropriate residential area for the distribution of consultation documents?

Stephen Hawkins: The consultation was Edinburgh-wide because the park was dedicated to the people of Edinburgh, so I suggest that the area should have been Edinburgh.

James Dornan: I note that there has been a fair submission from the council on the survey format and results. When I say "fair", I mean sizeable rather than anything else. Does PPAG wish to provide any further information on its concerns about the survey process in the light of the council's clarification of its approach? Would you like me to read out that clarification?

Alison Connelly: If you could read it out, that would be helpful.

James Dornan: In oral evidence, the council expanded on a number of points on the survey format and results. It said:

"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..."

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...

We also undertook a process of validation back to the electoral roll... Of the 9,958 individuals who responded, 7,700 appeared on the electoral roll... 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 area, and 75.9 per cent of them were in support, which is broadly consistent with the figure in the overall population."—[*Official Report, City of Edinburgh Council (Portobello Park) Bill Committee*, 11 September 2013; c 29-30.]

Further to that, do you wish to provide any more information on your concerns about the survey process?

Alison Connelly: We had some concerns about the lack of independence in managing the consultation. We asked at the outset that the council employ somebody independent and external to run the whole thing. Probably for financial and other reasons, it chose not to do that, so we were a little concerned about the verification processes that were used to check the responses.

However, our overarching concern is that the design of the consultation in the first place invalidated the responses. The responses were only as good as the questions that were asked and the people they were put to, and we felt that the design was compromised from the outset in as much as a consultation should not be about a yes or no. It should be about discussing the principles, but that was not the case here. People were standing in supermarket foyers getting yes or no ticks from customers as they left the supermarket. They were asked, "Do you want a new school? If so, tick yes." A lot of the responses were generated in that way.

The form asked, "Do you want the school on Portobello park?" and then "What do you want on the replacement park?" A replacement park was used as an incentive or almost a bribe to

encourage people to say, “We’re getting another park. They’re replacing the green space, so it doesn’t matter.” Again, we felt that that was inappropriate because, as we have mentioned elsewhere, a replacement park is not part of the bill. It is not guaranteed and it has no security in the future. They are talking about spending money on a replacement park that has never been spent on Portobello park in the first place. The replacement park is adjacent to another park; it would have been nice if we had been able to visit that on the site visit on Friday.

There were a lot of issues with the information in the form that we felt rendered it ineffective as a consultation document. The meaning of the number of responses is therefore diminished. Numbers have been bandied about, such as the assertion that 76 per cent of the community supports the school on the park. However, that is 76 per cent of the people from the local area who responded to the consultation—not everybody responded.

Jennifer Peters mentioned that 2 per cent of the whole Edinburgh population responded. I am sure that the percentage could be broken down to show what percentage of the local community responded, but it was certainly not 76 per cent. The numbers are misleading, and you know what they say about statistics.

James Dornan: Thank you for that very full response to a very full question.

The Convener: Alison Connelly, you spoke about the green space and your view that it is not part of the bill as the council is suggesting. In evidence to us, the council advised that the replacement green space on the existing school site would have Fields in Trust status, which is understood to mean that there would be a legal agreement with the National Playing Fields Association, which dedicates the areas concerned to public use, recreation and similar uses.

What is your view on that agreement?

Alison Connelly: We would welcome any additional green space, and we want green space to be preserved. However, the existing school site—as the council itself has recognised—is not in the correct location to provide a replacement for Portobello park. It is adjacent to an existing park and it is a fair distance from the existing Portobello park.

A parent who has a 10-year-old child would not want them going as far as that to a park. People who have mobility issues and want a short walk would have a long walk to get to the park first. We do not feel that the site is in the right location to replace Portobello park.

We would obviously see the Fields in Trust status as a good thing, but, again, that could be taken away. Portobello park has common good status and it is under threat. We do not think that Fields in Trust status would provide robust enough protection to avoid any future use if a case was made for economic or other benefits from developing the site.

The Convener: Mr Martin, do you have a view on how that stands legally?

Roy Martin: I am afraid, madam, that I am not familiar with the Fields in Trust principle. I can imagine an agreement between a local authority and a third party—in this case, sportscotland or whoever it might be—that would, in good faith, dedicate the land to a particular purpose for a particular length of time.

However, such an arrangement would not exist within any formal legal context, statutory or otherwise. It would not, for example, be the equivalent of inalienable common good status or some other form of land burdened by a title condition, which is a much more difficult situation now, given the change in the legislation.

All I would say is that it would be a private agreement between two parties that, while it would no doubt be made in good faith, might—as Alison Connelly has indicated—have unpredictable consequences. With respect, I would want to know more about the details of that status if it was to be a significant factor in your consideration.

Alison McInnes: I will turn to the use of the park, which both of you touched on in your opening statement and in your responses to earlier questions. The council asserts that the park is not well used, and is used mainly for walking and dog walking. However, that assertion rests on an audit that was carried out in 2009 over a 10-day period.

Can PPAG give us some more information on the uses to which the park has been put in recent years, and on the reasons why you believe that the council’s audit was not fit for purpose?

Stephen Hawkins: We challenged the council’s audit of the use of the park at the time, and we have challenged it since.

I cannot understand some of the phrases that are used in the audit. For instance, it says that the football pitches were used only in August and September, and yet bookings taken by Edinburgh Leisure say that from September 2010 to May 2011, teams from the Scottish Youth Football Association east region used the park 24 times. Two other teams, in the fair play league, used it fortnightly. There was training there every Tuesday evening and there was a training light on the pavilion. Social events were also held on the

park. The football teams had an annual day on which people came along and celebrated the teams. Various other events took place on the park, including running.

The use of the park was not compared with the use of other parks in Edinburgh. There is a snapshot of the use of Portobello park, but how does that compare with the Meadows, Leith links or Inverleith park on the same days? I am not suggesting that any of those parks should be built on. I am saying that there is no control: the use of Portobello park is not compared with the use of any other park in Edinburgh or in Scotland.

Jennifer Peters: There are no facilities on the park. There is one bench and the grass is rarely cut. People are not encouraged to use the park. If a swing park was put on it or if there were picnic tables or more benches, we would see use go up. If you removed all the facilities from any park in Edinburgh and allowed the grass to grow, use would inevitably dip. It is simply not acceptable for the council, which is responsible for maintaining the park, to say that it is in a poor state and that no one uses it. It is in that position because of City of Edinburgh Council.

Alison McInnes: Ms Peters, you mentioned something called party on the park. Was that a regular community event?

Jennifer Peters: No. It is something that we would like to be a regular community event. There have been a few events on the park but that one was quite recent. It was not even a nice sunny day, but about 200 people turned up to the event—an event in Leith on that day was cancelled due to the poor weather. Clearly, there is an appetite for park events.

Alison McInnes: Finally, the council clarified, for the avoidance of doubt, that the goalposts issue and the archaeological dig happened in 2011 and not 2009, so they did not inform the audit. Does that in any way change your view?

Jennifer Peters: No. The park has been neglected for some time and the grass is seldom cut. There are no benches or facilities.

James Dornan: You argue in your written evidence that the council's plan to build a school in the park is part of a larger plan to redevelop the surrounding area, including the golf course. You also mentioned that earlier. You also argue that the siting of the school will lead to pupils crossing the golf course, thus damaging it, and that the golf course will close. However, the council has indicated that it has granted the golf course to the north Fields in Trust status. It has also explained that there is no likelihood of pupils crossing the golf course as there is no school entrance on the north side. What impact do the council's comments in its oral evidence have on the

argument that the council wishes to develop a larger area than only the park?

Alison Connelly: Our concern comes from the way in which the matter has been handled over the years. The council has changed its mind a number of times about a number of important aspects of the plan, which has made us a little bit anxious—and perhaps cynical—about the underlying motives. The initial decision was to develop the whole area and to provide replacement space but, as we have explained, there has been no consistency in the process and things keep changing. We believe that the future of the golf course will be compromised by being located next to a high school.

10:30

The Convener: As members have no further questions, would any of the witnesses like to add anything that they might not have been asked about?

Roy Martin: I wonder, madam, whether I might be permitted to say one thing? On the issue of whether the council has maintained the park and what part that might play in its use and the record of its use in the survey, all that I would say—this is to confirm what Mr Hawkins said earlier—is that there is clear legal authority that where land is common good land, the authority has a duty. It was said of a Victorian case on common good land that

“the magistrates were bound to see that it was kept in such order as to be suitable for these purposes. If it has been allowed to become unfit for these uses that only shews that to that extent the duty of the magistrates has been neglected.”

The fact is that it is part of the status of common good land that the authority has a duty to look after it for the benefit of the community. I make no comment about the survey or whatever it may be, but the fact is that if this committee felt that there had been a degree of neglect here, that neglect might be said to be a breach of the council's duty. I should say that the passage I quoted is referred to in paragraph 26 of Lady Paton's opinion in the Court of Session case last year. The quotation is from 1879.

Alison Connelly: The open space survey specifically referred to the fact that the park was neglected and that there was a lack of maintenance.

Stephen Hawkins: I have a final comment about green space. During the planning process, the council admitted that the loss of the park would have a bad effect on its green space standards, given its size and that it is a city park. That militates against the argument that the existing school site will be replaced by green space.

People often wish to redraw boundaries to compare the amount of green space that will be lost. For example, taking only Portobello, 25 per cent of the green space will be lost, but that figure might be less if we took a wider catchment area. If Arthur's seat is taken in, the figure is even less. It is about where the boundary is drawn.

We have said consistently, looking at Portobello, that green space is under increasing pressure. Already the council is looking at putting 1,200 more houses in the green belt between Edinburgh and Musselburgh. All around us, we are losing green space both in the green belt and in urban areas. Where and how we use land is very important. We must preserve green space and recognise that it has health benefits and that the size of the green space has an effect on that.

The Convener: I thank you all for your time this morning, which the committee members appreciate.

I suspend the meeting briefly in order to change over witnesses.

10:33

Meeting suspended.

10:37

On resuming—

The Convener: I begin our second evidence session by asking the witnesses to introduce themselves.

Sean Watters (Portobello for a New School): I have lived in Portobello for nine years. I have a daughter who has just started secondary 1 at Portobello high school and another in primary 6 at Towerbank primary school. I have been involved with Portobello for a new school for seven and a half years, and I have been the nominal chair for about the past five years.

Tom Ballantine (Portobello High School Parent Council): Good morning. I am the chair of Portobello high school parent council. I have lived in Portobello for 19 years and I have been involved with PFANS pretty much since it started. I am the parent of two children at Portobello high school.

I am really here to tell you about the building as it is now. Portobello is a good school, but it is so in spite of the building, which is at the end of its ability to function to a tolerable level. It is on a site that is too small, and it has inadequate facilities for sport and other activities. Portobello high school is a fantastic institution in a building that is in a pretty terrible state and on a bad site.

I joined PFANS because I saw a wonderful opportunity to have a state-of-the-art school in green space at the heart of the community, with sports and other facilities for 1,400 young people and the wider community. The facilities would be available every school day to the school's pupils. I would be very happy to answer any questions that you have about what the school might offer our community.

Rosemary Moffat (Portobello for a New School): Hello. I live two minutes' walk from Portobello park and I have no school-age children. I became involved in the issue only 18 months ago due to the successful PPAG appeal—I became involved because I was angry at the outcome of the appeal. I know that the park lies empty 99 per cent of the time and is used only by dog walkers.

We canvassed the local communities—the Christians and the Magdalenes, which are the communities from which I come—and I am happy to answer any questions about how they were canvassed. I am also happy to answer questions about the responses from the local communities that border the park. It is important that their views be put at the meeting.

The Convener: Thank you very much.

Mr Watters, do you have an opening statement? If so, it would be great if you could keep it to 10 minutes.

Sean Watters: Thank you, convener. I thank the committee for inviting us. We very much appreciate the opportunity to speak to you about the issue. We do not wish to encroach on time for questions, so I will be brief.

The core issue—the underlying reason why we are here—is Portobello high school. It is a great school in a deficient building on an inadequate site. The need for a new school is not in question; everyone agrees that it is urgently needed and long overdue. There is also no doubt about local feeling. The huge response to the private bill consultation demonstrated that the local community is overwhelmingly in favour of the school being built on Portobello park, which is by far the best possible site.

We are in the unusual situation of having gone through an exhaustive process—going back almost eight years—of public consultations, statutory educational consultations, prioritisation exercises, pre-planning consultations and planning processes to have a great new school fully designed, consented and tendered, with the contractor ready to start building, but the school unable to be built. That appears to be down to a peculiar and, presumably, unintended quirk of the current law. It is possible to sell inalienable common good land to dispose of it but there is no

legal mechanism to change its use, regardless of the merits, public benefit or public support.

We are here because we want the school that our young people need to be built where the community wants it. The proposal offers the best outcome all round. We would get a great new school on a site that is large enough to accommodate all the necessary facilities. We would turn an underused space into a valued community asset. We would get two freely accessible, all-weather pitches that would sustain far more use than the grass pitches that were there before.

Yes, we would lose some green space, but improved paths would make the remaining park and golf course more accessible. People would still be able to exercise and enjoy the trees, wildlife and views. We would also get a new park on the existing site, which would keep the loss of open space to a minimum.

By relocating the school, we would also free up space for St John's primary school to expand. It is also on a grossly undersized site and in need of replacement.

The land would continue to be common good but used for education. The common good exists for the benefit of the community. Having the school in the park is in the best interests of our community, and the private bill is the means to achieve that.

I am happy to take any questions.

The Convener: Thank you very much. I would like to get some background about PFANS. How long has it been established and what is its membership? Specifically, what proportion of the membership is made up of parents of pupils at the existing school?

Sean Watters: The first tentative suggestions about building the school in the park were floated at the end of 2005. They really came into public consciousness in early 2006. Although the details were sketchy, an organisation against the proposals was established quickly. We formed at that time to say, "Hang on—we want to hear more. This is sketchy and tentative but the school is important and we need to know more."

We have always been a fairly loose organisation. Numbers come and go. We have a Facebook page with 2,500 likes. We have an email distribution list of a couple of hundred. I think that 1,800 people have now signed the letter that we submitted to the committee.

We do not have membership details, but the range of people is wide. There are people who have no kids and there are people who would see some benefit. My kids go to the school. Lots of people whose kids went through the school and

are now grown up got involved because they know how poor the school is. It is a broad mix of local people.

The Convener: You do not know the make-up of the membership at the moment. Is there a way of getting that information? Would you be able to gather that?

10:45

Sean Watters: No. We are not as formal as that. When we originally started out, our aim was to articulate the views of people who were in favour of the new school and the new school in the park, and for a lot of the process it has not been clear where the balance of opinion is. The planning process got 681 responses, which is not bad for a planning process. There were 300 against and 381 in favour. However, in the context of the wider community, those are not huge numbers. The reality is that people are aware of the issues in the background but they do not get involved. The consultation changed the situation. The consultation received a huge response, and that is the evidence that we represent a sizeable proportion of the community. Most people in the community are in favour of the school in the park.

Tom Ballantine: It is a very loose organisation in which people do more or less depending on the time available to them, their commitments and the other things that are going on in their lives. It is so fluid that it would be difficult to give you an exact idea of what the membership consists of. The number of Facebook likes probably gives a good idea of how broad the direct support is, but different people within that grouping will come forward at different times and do different things.

The Convener: Okay. Thank you.

Alison McInnes: Good morning. There have been suggestions that the delay in building the new school is largely due to the council's mismanagement of the issue. Do you agree with that view? Do you think that the council could have taken steps to ensure that a new school was built sooner?

Sean Watters: It is clearly not an ideal situation to be in. With hindsight, in 2008, when the common good issue was raised, perhaps the council could have done something different. To be fair, though, the park was bought in 1898 and the first time that anyone suggested that it was common good land was in 2006. For 108 years, no one thought that it was common good land and it was not on the common good register. When that claim was first made, it took a while for the council to investigate it as part of a wider look at common good land in the city, following which it concluded that it probably was common good land.

In 2008, we moved towards a prioritisation process. Five schools were identified that needed to be replaced—the wave 3 schools. At that time, we lobbied the council to resolve whether the issue was a problem because we were worried that we might be marked down on the prioritisation exercise because of the uncertainty. The council went to two QCs for opinions, and the opinion that it got back was that it did not need permission or to go to court and that it could build the school in the park. I presume that that opinion was given in the light of the North Lanarkshire and South Lanarkshire cases. Ultimately, it transpired that that opinion was wrong, but I do not think that it was unreasonable for the council, having taken advice, to follow that advice. It is an unfortunate situation to be in, but I think that the council has acted in good faith all along.

Tom Ballantine: There was a successful outer house decision for the council on the basis of delay from the people opposing the school in the park, and the council was to be allowed to build. It is clear that there was quite a lot of difficulty around the technical legal issue. As Sean Watters has said, if someone gets legal advice telling them that it is okay for them to do something, it is understandable that they will act on the best advice available to them.

Alison McInnes: You have spoken about your view that the new school is, itself, a common good. What is your view of the argument that the loss of green space and its benefits to the community is not acceptable because there are possible alternative sites for the school?

Sean Watters: There are other possible sites for the school, but they are inferior for a variety of reasons. The exercise in 2006 identified sites that were not in council ownership, that were too small, that were badly located and that it would be too expensive to develop. That is still largely true of the alternatives, although sites have been looked at again and again. The park is not the only possible site, but it is the best site by far. There are serious deficiencies with the alternatives.

On the loss of green space, local people know Portobello park and how it is used. The football pitches were pretty poor. I played on them once but we abandoned the game and went elsewhere because the pitches were that bad. They were not great pitches and were not hugely used. The park is used mainly for walking and dog walking.

As far as amenity and the functions that the park serves are concerned, the new school will provide two floodlit all-weather pitches that will take far more use than the grass pitches ever could. That amenity will be preserved. The new pitches will be freely accessible to local people, who will be able to book them for free, so the football angle is covered.

When it comes to walking, exercise and dog walking, it is true that there will be a reduced amount of green space, but paths can be put in down the sides of the golf course along the tree belts. The present arrangement is informal—there is no proper path and access is not great. Paths can be put down both sides of the golf course, and there will be the area at the top around the school, as well as the trees and the views, so there will still be amenity.

If we set the alternatives against the benefits of having the school on this site, the case is pretty clear cut to me, and I think that the majority of the local community agree.

Tom Ballantine: In effect, what will be lost is an area about half the size of a football pitch and what will be gained is a fantastic school in a green space. The school will be next to a golf course. The children are important. They need to be educated in the best possible place for them. That is what will be gained.

I thought that it was interesting that a PPAG representative said that it was “feasible” to build the school elsewhere. We are not denying that it is feasible to build the school elsewhere; we are saying that the best option by far is the site at Portobello park. That is why the community has rallied round so strongly to say that that is the option that it wants to go with.

Alison McInnes: Thank you.

We heard from PPAG that it believed that the issue should be dealt with as part of a public bill. Is PFANS in favour of the option of pursuing the private bill process?

Sean Watters: The issue has been raised in other evidence. Andrew Ferguson referred to the proposed community empowerment and renewal bill, the original consultation on which raised issues to do with common good and its governance. However, it is hugely uncertain whether that will be taken forward, what the timescale will be and what will happen. I think that common good law will have to be looked at, given the opinions that have been submitted. Andrew Ferguson has described the current situation as “somewhat illogical”, Gerry Moynihan QC has described it as “odd” and Professor Rennie has described it as “bizarre”, so it is clear that there is an underlying problem.

We do not see it as some sacred principle of law that common good land cannot be appropriated. We are talking about a quirk. If common good land can be disposed of if there is a justifiable public benefit—we are not talking about an unfettered right to do something—it seems incredible that it cannot be appropriated if the case has sufficient merit.

We have a proposal for a school that has been fully designed and fully consented, and which the community wants. It could be built in 20 months. That is sitting there. The idea that we will wait for three or four years for common good in general to be addressed, when it is uncertain that the issue will be resolved, strikes me as bizarre.

Alison McInnes: In its memorandum, that was one of the alternative approaches that the council said that it considered. There were other alternatives that it could have pursued. Do you think that an adequate focus was placed on giving an explanation of why the council was not taking forward those alternatives during the consultation—at the public meetings and in the consultation material?

Sean Watters: Generally, yes. As soon as the appeal came in, we put pressure on the council—we asked it what it could do and whether there were any other options. We looked at the situation, too. We took advice from people in our group who had legal backgrounds. It quickly became fairly apparent that a private bill was pretty much the only option, as the others were just not realistic or practical.

A huge amount of information was put out as part of the consultation material. People were aware of the issues and were informed. There was a huge level of engagement with local people—the response to the consultation was astonishing, for what is a local issue. That demonstrates that people were engaged. There was plenty of information out there.

Alison McInnes: Thank you.

Tom Ballantine: I am not sure which aspects of the consultation you are talking about, but you must remember that the issue goes back to 2006. There was an education look at the available sites, for instance. All the sites were gone through, and a tremendous amount of research was done on what the best possible site for a school would be and how different sites would work. That process of investigation went on in different ways right up until the last consultation on the question of the private bill. People in the community have therefore been very engaged with the issue really since way back in 2006.

Alison McInnes: I understand that many people in the community have been very engaged with the matter from the start, but our focus has to be on the formal consultation that relates to the private bill. Do you think that the council relied heavily on what had gone before, or do you think that the consultation for the private bill properly explained all the alternative situations?

Sean Watters: In a word, yes.

Tom Ballantine: I would like to expand on that. People were asked whether they would agree to the school being built on the particular site and whether they would agree to a change in the use of the park. In the leaflet that was sent out to them, people were given the opportunity to look at information that went back over alternative sites. There was a website that people could look at, as well. The critical question for the people of the community was whether they believed that it would be better to change the use of the park to be the location of the new school or to leave it as a park. They voted overwhelmingly for the proposal, because they understood the benefit that it would give the community.

Alison McInnes: Thank you.

Fiona McLeod: Good morning. I want to home in on the mechanics of the consultation process. PPAG told us that it has concerns about the notification process. I want to gather your experiences of the notification process in the local area. Were any difficulties experienced in certain residential areas regarding the consultation process? I also want to pick up on something that Rosemary Moffat said about your own consultation. It would be interesting to hear why you felt the need to do that.

Sean Watters: I will pass that question to Rosemary Moffat, as she was quite heavily involved in the consultation.

It is documented that there was a problem with the initial delivery of leaflets. I did not get the first leaflet. It is also true that a huge amount was going on. There were leaflets in libraries and stories in the *Evening News* and on Scottish Television. There was a lot of publicity in general. The council did its thing to engage people and get responses, and we did the same alongside it. The Portobello park action group also did that. We went from door to door, set up stalls and went to supermarkets, and PPAG knocked on doors, handed out leaflets and went to supermarkets as well. The idea that local residents were unaware of the consultation is not remotely credible. From what we can tell, glossy colour leaflets that encouraged people to support the build it on Baileyfield campaign went out to thousands of households. There was an active campaign to get people to engage in the consultation against the private bill. There was a huge amount of publicity and information out there, and people were informed by various parties, including us, PPAG and the council, about what was going on, and they put their own views on that.

Rosemary Moffat will talk about the consultation itself.

Rosemary Moffat: Basically, we found what Sean Watters has described. We concentrated

purely on the two housing schemes that border Portobello park. The people in those schemes are most affected by the private bill. We canvassed them and found that the majority of the people knew exactly what was going on, as the saga had gone on for many years. There were also umpteen newspaper reports that gave information on the private bill and told people about the public meetings. When we went round the doors, residents told us that we were an hour behind PPAG. It got to the stage at which people asked us, "Are you for or against the school?" because there was a bit of confusion as a result of both groups going round at the same time. However, we never bumped into each other. Residents were happy to speak with us and give us their views on the matter. They informed us that PPAG was canvassing in the area and that they were asked to sign a petition along with the response form.

11:00

Most people already knew about the consultation from, for example, newspaper articles. We carried spare leaflets for any households that had not received them, but we found that the majority of people knew about it.

We also ran a call-back diary; if we did not get an answer at a particular door, we took a note of the address and called back later. We wanted to reach the hard-to-reach groups and make contact with and get the views of elderly residents, households with no internet access and so on. We wanted to cover every area so we went into every street and knocked on every door to ensure that we spoke to the vast majority of the community.

Tom Ballantine: I have lived in Portobello for 19 years and have never known any other issue to bring so many people to public meetings, community council meetings and school meetings. The community was very engaged with the issue and knew what was going on.

Fiona McLeod: Under the private bill process, the committee has to satisfy itself that the promoter undertook a consultation process that was open, accessible and so on. Mr Watters, you said that you did not receive the consultation leaflet from the council—

Sean Watters: Not the first leaflet.

Fiona McLeod: So you got the leaflet in the second drop.

Sean Watters: Yes.

Fiona McLeod: And as a local resident you were satisfied that you were clearly informed about the consultation process by the council in an adequate timeframe.

Sean Watters: Yes.

Fiona McLeod: Ms Moffat, you said that you took leaflets with you so that when folk said that they had not received anything you could give them one. Were those the council's leaflets?

Rosemary Moffat: Yes. When the consultation started on 3 December, we were aware that paperwork was being posted to all the households. However, we wanted to get a move on, so we went to the library and picked up some of the information and forms to ensure that the consultation process could begin as soon as possible. We knew that the Christmas break was coming up, and we were keen to get started.

I live in that area and certainly got my leaflet prior to Christmas; I know that my neighbours and friends got their leaflets prior to Christmas; and I know of people in the Christians who got a leaflet prior to Christmas and another after Christmas. The whole area—by which I mean the two schemes bordering the park—was leafleted before and after Christmas. The odd address might not have received a leaflet but we covered every door and did not hear anyone complaining about not getting a leaflet.

The initial hiccup might have arisen because we started as soon as the consultation opened and, at that stage, the stuff was still in the post. That might also have been the problem with some of the PPAG households. PPAG was campaigning at the same time as us, which was roughly two days after the consultation started, but we were going round with the consultation leaflets and response papers that we had collected from the library.

Fiona McLeod: The public meetings have been characterised as hostile; indeed, the PPAG representatives reiterated that in their evidence this morning and said that they did not think that the council could have done anything to lessen that hostility because of the heightened nature of everyone's participation. Could the council have done anything to create a more positive atmosphere at the meetings?

Sean Watters: I think that I would characterise the public meetings as robust rather than hostile. There have been many meetings over the years, but the difference with the meetings at the town hall and certainly at Meadowbank was that it was pretty clear that the public who turned up were overwhelmingly in favour of the school in the park. Both PPAG and PFANS were present; PPAG had less support in the room, but I am not convinced that that translated into hostility.

The view that there is a lot of division, discord and hostility in the community is exaggerated. Regardless of where people sit on the issue, the community is not that divided. I have friends and acquaintances who I like and respect who are against the school on the park, although I should

say that far more of my friends are in favour of it. It is not that big a problem.

The issue has been going on for eight years, and a core of a few dozen people around PPAG and PFANS have been arguing and winding each other up in the letters pages of the *Edinburgh Evening News* for eight years now. It is fair to say that there is a little bit of friction between that couple of dozen people, but that is not a characterisation of the wider community. It is not divided and there is not that much discord. People disagree about it, but we are talking about a school. It is not the issue that it is made out to be.

Tom Ballantine: I was at both public meetings and, in my view, the critical point is that they were extremely well managed. As far as I am aware, all questions were taken; there were a lot of questions from people who were against the school being built on the park, and they were all answered. I thought that the officials who answered the questions conducted themselves in a very civil and patient way and I saw no difficulty in that respect.

If you are going to have a public meeting about an issue that people disagree on, you are going to have some fairly robust discussions but, as far as I am concerned, that is really as far as it went. I thought that the person who chaired the meeting managed to do it in a very balanced way and that the officials answered very fairly.

James Dornan: What are your views on the claim that, if the school is built on the park, the compensatory green space proposed by the council will be only a third of the area of Portobello park?

Sean Watters: It is a matter of playing with figures. The area of Portobello park, excluding the golf course—originally, the whole space was the park—is roughly 6.4 hectares. The school campus and car park will take up 2.8 hectares or about 40 per cent of the park and the two accessible all-weather pitches something like 1.4 or 1.6 hectares or about 25 per cent. As a result, 35 per cent of Portobello park will in effect remain public space.

The trees will still be there, there will be a sort of civic square in front of the school and there is a particular area of grass that is about 0.6 hectares. You will lose 2.8 hectares with the school but the proposed park on the existing Portobello high school site will be 2.2 hectares so there will be a net loss of 0.4 or 0.6 hectares. That is not a huge amount.

Of course, as far as accessibility and use are concerned, the proposed park is in a different location, close to Figgate park. How will that affect communities around the park who are most likely to use it as it is? Portobello park is not hugely used by the community. People use other places

such as Bingham park and kids tend to play in Brunstane primary school grounds, because that is the recognised safe play area.

In terms of amenity, these proposals are a huge improvement. They will improve the area and make it more useful for the community; there will be not only pitches and new paths but a new park on the existing site with an expanded St John's primary school. As for what form the park takes, I hope that that will be informed by the community, who I hope will be asked what kind of space they need.

Overall, the loss of some green space is always going to be regrettable, but there are huge benefits to these proposals and having the school on that location. I am fully in favour of the school going on the park.

Tom Ballantine: It might be helpful to comment on the usage issue, as the community feels quite strongly about it. That area is generally recognised as not being very well used. When the issue first arose, back in 2006, I took the trouble to go and speak to the leisure manager who managed the parks, and I still have the email from her about the level of usage of the football fields. She said that there were effectively 180 games throughout the year, over a 36-week season.

James Dornan: Can you clarify the length of the season?

Tom Ballantine: The season was from August to April, and that was in 2006.

To compare, if you imagine those two pitches being used by a school with 1,400 pupils every school day, and being available to the community during the evenings and at weekends, it is not unrealistic to say that each pitch would be used five times a day, so that is 10 times a day for both pitches. Within 20 days, the community would have used the area more than it is currently used in a whole year for football.

In terms of amenity and usage, there is no doubt in my mind that the clear benefit comes from the school being there with the pitches available to the school and to the community.

James Dornan: What is your view on the plan to establish the new green space at the site of the existing school?

Sean Watters: I am very much in favour of the park on the existing site and of the fact that it allows St John's to expand. The St John's site is 0.6 hectares and it should be 1.4 hectares, so it is overcrowded. That was considered before and discounted because of its proximity to Figgate park, which is the largest park in the local area—more than double the size of Portobello park.

It depends what form the park takes, as there are different types of parks. For it to be a real asset for the community, it would have to be different from Figgate park, because there is no point in recreating the same kind of park. It is a sizeable park and it has Fields in Trust status, so I think that that proposal can only bring benefit.

James Dornan: Mr Ballantine, do you have a view?

Tom Ballantine: I am sorry. I did not catch the question.

James Dornan: I was asking for your view on the plan to establish a new green space at the site of the existing school. As Mr Watters has just said, it is in close proximity to Figgate park.

Tom Ballantine: I do not have a strong view. I just know from going past there that the current park, as it is, is not well used, so I have no reason to believe that any new park would be any less well used.

James Dornan: I turn to the criticisms that the school community appears to have had a disproportionate opportunity to promote the case for a positive response to the council's consultation—at a pre-Christmas event and in parent forum consultations, for example. Do you have any comments on that?

Sean Watters: I have been on the Towerbank primary school parent council and we put out information leaflets and notices to people, not encouraging them to respond in any particular way but informing them about the consultation.

On two occasions towards the end of the consultation period, three of us from the school council set up a stall in Towerbank playground, where we had the official council leaflets, the official green postcards that the council produced and official consultation responses. That was simply an opportunity for people to respond however they wished, and we did not seek to influence what people did.

At the same time, we were letting people know that the consultation was going on. We publicised it, and they could respond as they wished. We were going round doors and PPAG representatives were doing the same—all chapping on doors, going to supermarkets and giving out leaflets. Both groups were promoting the consultation as heavily as possible.

There were 10,000 responses to the consultation, which is far more than the school community of Portobello high school and the cluster primaries. The wards are broken down by intermediate geographies in the council report, and if you look at Portobello and Joppa you will see that 22 per cent of the entire population responded. That might not be a great turnout in a

general election, but in a consultation it is extraordinary. Most consultations get a few hundred responses, so that figure represents a huge wealth of response across the community.

Tom Ballantine: My only gloss on that would be to say that there was probably a disproportionate desire on the part of the school community to communicate on the issue, but that is understandable because it is the young people of Portobello who will be affected. It is fair to say that the school community would want to get involved, but you would expect that in any consultation.

The Convener: Mr Ballantine, you spoke about the usage of the park in your previous answers, but I am more interested in the apparent neglect of the park, which you mentioned earlier and which has been raised in evidence. Do you agree that there has been neglect of the park? If so, where has that neglect come from? Is it neglect by the council, or by others?

11:15

Tom Ballantine: In the past, there were two football pitches in the park. The council was preparing for a change of use in the area to build the school, and so an archaeological dig took place. I am talking slightly off the top of my head—I would just be giving you anecdotes, as I do not know what the park looks like at present.

I reiterate that the situation in 2006 was interesting because there were two football pitches at that time, and there was no reason why things should have changed dramatically since then. The park was not used very much at that time.

Sean Watters: Can I just—

The Convener: I will come to you, Mr Watters, but I would like Mr Ballantine to clarify his point.

Mr Ballantine, did you say that you do not know what the park looks like now?

Tom Ballantine: Well, I go past the park—one question would be whether or not the grass is cut, and I think that it is.

The Convener: That is fine—I did not catch what you said.

Tom Ballantine: I could not tell you much more—for instance, whether the football posts are up or anything like that.

The Convener: Okay—that is fine.

Sean Watters: I can put that in context. Once the council had planning permission and the project was tendered, it was moving further towards building on the park. At that point, there was an archaeological dig, which tore up the football pitches and other parts.

Ever since then, the council has been hoping to start building on the park as soon as possible. It was hoping to win the case in the outer house in the Court of Session, which it did; then it was hoping that there would not be an appeal; and then there was an appeal, and it was waiting for that process to finish. During the whole time it has been waiting to build on the park, so maintenance of the park was not a huge priority because the council was planning to start building on it.

That situation changed more recently, because the process was becoming more protracted, and the council carried out some remedial works. The park was always usable—I have walked across it many a time in the past few years as a shortcut—but it has never been that widely used, and the football pitches were always poor.

I should clarify that the usage survey that was produced in the summer—which aimed to survey casual use—estimated the level of use that the pitches could sustain. It did not include actual figures, but it said that the pitches, because they were poor, could sustain only three games a week. That is far greater than the actual use.

As Tom Ballantine said, Edinburgh Leisure confirmed that there were approximately 180 lets per year. There are—or were—actually four pitches: two full-size pitches and two seven-a-side pitches. If four pitches are being used three times a week over a season that is 40 weeks long, that is pushing 500 possible lets. The actual usage was 180, so even then the pitches were used far less than they could have been, because they were not very good. That is the reality of what the park was like.

Rosemary Moffat: As I have already said, I live minutes from the park, so I see on a daily basis what goes on there. The local community—those in the Christians and Magdalenes at least—do not have a problem with the park, for the simple reason that neither of the housing schemes use it.

There is an abundance of green space in both areas. Residents of the Magdalenes in particular have the grounds of Brunstane primary school for their children to use on one side of the scheme. Behind the scheme, there is the Magdalene glen, and to the opposite side of the school there is Jewel park. Over the road, there is Portobello park.

Even the people in the Christians have Joppa park to the side of their scheme, and the safe play area at Brunstane primary school, which is just over the road from them. They would have the new sports pitches on Portobello park if the school was to go there, and they also have a big grassy area that runs along the length of the whole scheme right at the back of their houses. You

would not know about it unless you lived in the scheme.

There is a lot of green space and playing areas surrounding the Christians and Magdalenes, so any problem with the park not being maintained is not a problem unless you have a dog, because no one else is paying attention to it. The park has lain empty for the majority of the time—I see it day in, day out, and I have done for years and years. Even before the dig, the park was never well used. There were a few football games now and again, and the occasional bit of training.

I grew up with two brothers who complained constantly about Portobello park, for the simple reason that it was on a slope. The minute they tried to pass the ball to each other, it went somewhere else—I remember the number of fights that were caused because the ball did not go where it was supposed to go.

It is not like other parks that are loved; it is not a loved park and it never has been.

Tom Ballantine: Incidentally, when I play, the ball does not go where I want it to go, for different reasons.

Just to give the committee some context, at present Portobello high school has to bus pupils off-site for their physical education provision. For every hour, they get about 20 to 25 minutes of PE, because they have to get on the bus, travel, get out of the bus and all the rest of it, so they lose all their PE time.

There is one five-a-side pitch at the school at present. When you, as a committee, are thinking about the issue, you should understand that the new school is a huge opportunity for our community to look at improving health and tackling obesity, and to offer better access to sport for all those thousands of young people and for the community.

The Convener: Thank you. I see that members have no further questions. Do the witnesses wish to add anything further, or mention any element that they have not been asked about so far?

Rosemary Moffat: I remember hearing comments from people who live in the area surrounding the park when we were doing the canvassing and talking to people on the doorstep. People felt that the park was a wasted area, and they wanted a better use for common good land. Quite a few people said, “What better common good can you get than the common good of a school that the local community wants?”

Other comments were fed back to us. A few elderly residents wanted the community’s children, rather than the dog walkers, to have the use of the park. Many residents were happy with the school

proposal, and there is a high level of support from the areas immediately bordering the park.

People in those areas are hoping to get the sports pitches on the park, because that will get the youths off the street and into the park on evenings and weekends. A lot of the elderly residents were quite happy that they were going to have a swimming pool on their doorstep, so that they could go to the school on evenings and weekends and access the swimming pool. At present, they cannot get a bus directly to Portobello—they need to take two buses or walk—so they are over the moon at the thought of getting a school swimming pool on their doorstep.

There was a minority who objected to the private bill. Their reasons were that there would be more litter on the street and noisy children passing their doors. There would be children attending the local shops at lunchtime, and the school could cause traffic congestion.

There was only one person among all the people who I spoke to in the two housing schemes who mentioned the loss of green space. It was never mentioned by any other household, and we covered approximately 900 people in the Magdalenes and 200-odd in the Christians.

That is what the green space means to those two housing estates. They do not use it, and it is not a loss to them. Not having what they could have would be a loss to them.

Sean Watters: I have been involved with this issue for seven-and-a-half years. It has been debated and discussed to death. I counted 107 articles on the subject in the Edinburgh *Evening News* since January 2006, and that is not counting the multiple letters.

People have been informed and engaged, and they understand the issues. The majority of people see the project as a huge opportunity. We need a new school, as the existing school is dreadful. It is a great school in an awful building on an inadequate site, which has always been inadequate right from the time that the school was built. It is a nine-storey tower block.

The scheme is a great opportunity to have a great school, set in parkland next to the golf course with all-weather sport pitches, and we get a new park. It is also the quickest possible route to having a new school, and by far the cheapest. You are looking at £5.9 million to £6.7 million more for the alternatives that have been identified—that is the cost of a new primary school.

There are a huge number of positives behind the scheme, and that is why the community is broadly in favour. If we can get the bill through and get the school built, I would be delighted.

Tom Ballantine: I do not think that I can add anything to that, beyond emphasising that it is a fantastic opportunity. When we spoke to people about the new school before coming along today, we wanted to communicate the positives with regard to the opportunity for facilities in the school, such as a gym hall, dance areas and music and drama facilities. All those things will be going on in the school, and outside there will be the sports facilities.

It is important for the Scottish Parliament and our community to show that we value our young people and their education. It is a question not just of going for the most feasible option for the new school but of going for the best option—and this is the best option.

The Convener: Thank you very much for your time this morning. That concludes the public session.

11:26

Meeting continued in private until 11:53.

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e-format first available
ISBN 978-1-78351-868-5

Revised e-format available
ISBN 978-1-78351-893-7

Printed in Scotland by APS Group Scotland
