

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) ACT 2014

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by Brodies LLP on behalf of the promoter, the City of Edinburgh Council (the “Council”), in order to assist the reader of the City of Edinburgh Council (Portobello Park) Act 2014 (the “Act”). They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND TO THE BILL

3. The purpose of the Act is to change the legal status of the land at Portobello Park, Edinburgh (the “Park”) to allow the Council to use the Park as the site of a new Portobello High School. In the absence of legislation the Council would be unable to do so, because the Park is inalienable common good land.
4. The Council approved the Park as the preferred location for a new Portobello High School on 21 December 2006 following a statutory consultation, and approved the project to build the new school on the Park on 18 December 2008. Planning permission was granted on 24 February 2011 and renewed on 4 December 2013.
5. The Council proposed to appropriate the Park to be used as the site of the new school. This would change the function for which the Park was held and the use to which it was put, though title to the Park would remain in the Council’s name. The change would include moving responsibility for the Park from the Council’s Services for Communities Department to its Children and Families Department. This proposal was challenged in the Court of Session, and in September 2012 the Inner House of the Court of Session decided that the Council could not appropriate the Park due to its status as inalienable common good land.
6. The Park forms part of an area of land disposed to the Council’s predecessors, the Lord Provost, Magistrates and Council of the City of Edinburgh, by Sir James Miller in 1898. The disposition provided that the land disposed, which also included what is now Portobello Golf Course, was to be “used exclusively as a public park and recreation ground for behoof of the community”. The disposition also contained a condition against building on the Park, other than buildings consistent with the use of the land as a public park or recreation ground. These conditions, together with the historical background to the Council’s acquisition of the Park and the public’s subsequent use of it, mean that the land has inalienable common good status.
7. Section 73(1) of the Local Government (Scotland) Act 1973 (the “1973 Act”) confers on local authorities a power to “appropriate for the purpose of any functions, whether

statutory or otherwise, land vested in them for the purpose of any other such function”. Section 75(1) of the Act allows local authorities to use section 73(1) to appropriate “land forming part of the common good of an authority with respect to which no question arises as to the right of the authority to alienate”.

8. The Inner House decided that this power did not extend to inalienable common good land. The 1973 Act also makes no provision for the courts to permit the appropriation of such land, though they can give authorities permission to dispose of it under section 75(2) of the 1973 Act.
9. The Act alters the status of the Park so that, for the purposes of Part VI of the 1973 Act (which includes sections 73 and 75), it is deemed to be “land forming part of the common good” of the Council “with respect to which no question arises as to the right of the authority to alienate”. The Act therefore allows the Council to rely on section 73(1) of the 1973 Act to appropriate the Park.
10. However, the Act is limited so that the Park may only be appropriated for the purposes of its functions as an education authority, and does not change the Park’s common good status. The inalienable status of the neighbouring land (which forms Portobello Golf Course) remains unchanged, and the Act does not affect any other land. The Act does not itself authorise the construction of a new school, which remains subject to statutory planning control.

COMMENTARY ON SECTIONS

Section 1

11. Subsection (1) provides that the Park is deemed to be alienable common good land for the purposes of Part VI of the 1973 Act. This enables the Council to rely on section 73(1) of that Act, read with section 75(1), to appropriate the Park for functions other than the recreation purposes for which the Park was vested in the Council.
12. Subsection (2) limits subsection (1) so that the Park may only be appropriated for the purposes of the Council’s education authority functions. The Park otherwise remains inalienable, and so the Council may not appropriate it under section 73(1) of the 1973 Act for any other purpose. Section 17 of the Education (Scotland) Act 1980 confers on the Council a duty to provide for its area sufficient accommodation in public schools, and a power to provide, alter, improve, enlarge, equip and maintain schools for that purpose.

Section 2

13. In its September 2012 decision, the Inner House questioned whether the terms of the 1898 disposition might have given rise to a title condition preventing a change in the use of the Park, separate from the restrictions placed on the Council by the 1973 Act. Subsection (1) confirms that nothing in the disposition prevents the Council from relying on Part VI of the 1973 Act in respect of the Park.
14. Subsection (2) confirms that the Council may continue to use the land for the provision of recreational, sporting, cultural and social facilities and activities. This includes using any school facilities constructed on the land for those purposes. These are the purposes for which the land was originally dedicated, and will continue to be given effect insofar as the construction and operation of any school constructed on the land allows.

Section 3

15. The Council’s intention in drafting the Act was to limit the power of appropriation so that the Park could only be appropriated for the Council’s education functions, and to ensure that the Park’s legal status was otherwise unchanged. Section 3 is intended to safeguard the future use of the land and to ensure the protection given by its inalienable

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Act 2014 (asp 15) which received Royal Assent on 1 August 2014*

common good status would continue to apply in circumstances where it was no longer to be used for an educational purpose.

16. Subsection (2) reapplies the previous legal and title restrictions if, after appropriation, one of two trigger events takes place. Those two trigger events are set out in subsection (1) and are:
 - a) the expiry of an “opportunity period” (defined in section 3(3)) of 10 years from the date of appropriation without the Park having been used during that period for the purposes of the Council’s education authority functions; or
 - b) the Park, having been used for educational purposes, ceasing to be so used.
17. “Previous legal and title restrictions” is defined in subsection (3) to mean the law and terms of the disposition as would have applied to the Park immediately before the occurrence of one of the trigger events, on the assumption that the appropriation had never occurred in the first place.
18. The effect of these provisions would be to ‘reset’ the Park’s legal status and put it back in the position it would have been in the day before the relevant trigger event had it never been appropriated. Any changes in the law applying generally to common good land, and which were made after the Park’s appropriation, would therefore apply to the Park.

Section 4

19. Portobello Park is defined to exclude that part of the land disposed in 1898 that currently forms Portobello Golf Course.

PARLIAMENTARY HISTORY

20. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which the Committee Reports and other papers relating to the Act were published, and the references to those Reports and other papers.

<i>Proceedings and Reports</i>	<i>Reference</i>
Introduction	
25 April 2013	SP Bill 29 – Session 4 (2013)
Preliminary Stage	
<i>(a) City of Edinburgh Council (Portobello Park) Bill Committee</i>	
1 st Meeting, 19 June 2013	1 st Meeting, 19 June 2013
2 nd Meeting, 11 September 2013	2 nd Meeting, 11 September 2013
3 rd Meeting, 25 September 2013	(Meeting in private)
4 th Meeting, 9 October 2013	4 th Meeting, 9 October 2013
5 th Meeting, 13 November 2013	(Meeting in private)
6 th Meeting, 27 November 2013	(Meeting in private)
The City of Edinburgh Council (Portobello Park) Bill Preliminary Stage Report, published 4 December 2013	1 st Report, 2013 (Session 4), The City of Edinburgh Council (Portobello Park) Bill Committee
<i>(b) Consideration by the Parliament</i>	
Preliminary Stage Debate, 9 January 2014	Cols 26369-26391

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<i>Proceedings and Reports</i>	<i>Reference</i>
Consideration Stage	
<i>City of Edinburgh Council (Portobello Park) Bill Committee</i>	
<i>(a) Phase 1</i>	
1 st Meeting, 16 January 2014	1 st Meeting, 16 January 2014
2 nd Meeting, 26 February 2014	(Meeting in private)
3 rd Meeting, 12 March 2014	3 rd Meeting, 12 March 2014
4 th Meeting, 26 March 2014	4 th Meeting, 26 March 2014
5 th Meeting, 23 April 2014	5 th Meeting, 23 April 2014
6 th Meeting, 7 May 2014	6 th Meeting, 7 May 2014
7 th Meeting, 21 May 2014	(Meeting in private)
The City of Edinburgh Council (Portobello Park) Bill Consideration Stage Report, published 22 May 2014	1 st Report, 2014 (Session 4), The City of Edinburgh Council (Portobello Park) Bill Committee
<i>(b) Phase 2</i>	
8 th Meeting, 12 June 2014	8 th Meeting, 12 June 2014
Final Stage	
<i>Consideration by the Parliament</i>	
Final Stage Debate, 26 June 2014	Cols 32916-32941
Royal Assent	
1 August 2014	City of Edinburgh Council (Portobello Park) Act 2014 (asp 15)