MEMORANDUM
CHIEF EXECUTIVE'S OFFICE

To:	**HUGH FRASER, ECS, HQ** **RON MACKENZIE, ECS, HQ**
From:	**HEAD OF LEGAL & DEMOCRATIC SERVICES**
Date:	**27 AUGUST 2010**
Our ref:	**L/EDC 0: LH/JG**
Your ref:	
Please ask for:	**LESLEY HOWIE, EXT 2107**

BIGNOLD PARK, WICK

I refer to our meeting earlier this week and as discussed would confirm that the advice received from Professor Rennie on the title to Bignold Park, Wick is as follows:-

- The park was conveyed to the Provost, Magistrates and Councillors of the Royal Burgh of Wick by Deed of Gift granted by Arthur Bignold and recorded on 4 May 1903. Title to the park is now vested in the Council as statutory successors. The narrative of the Deed of Gift clearly states that Arthur Bignold acquired the ground with a view to it being utilised as a public park and recreation ground for the inhabitants of Wick and Pulteneytown. The conveyance is to the Provost, Magistrates and Councillors for the use and enjoyment of the inhabitants of the Burgh of Wick. Professor Rennie advises that it is clear from the words used in the Deed of Gift that the subjects were conveyed to be part of the common good of the Burgh and its use from 1903 onwards is consistent with this.

- He is of the view that following earlier court decisions because of its use as a public park it is part of the inalienable common good.

- The combined effect of Section 73 and Section 75 of the Local Government (Scotland) Act 1973 is that the Council can appropriate common good land for the purpose of any other function provided no question arises as to the right of the Council to alienate that land ie if it is alienable common good land it can be appropriated for educational purposes without any requirement to petition a court for authority to do so. If, however, a question does arise as to the ability of the Council to alienate, the

Council cannot appropriate the land for the purpose of another function and there is no right to petition the court because the only thing the court can actually do is authorise a disposal.

- Unfortunately, because of its use as a public park, Bignold Park is considered to be inalienable common good land and so it cannot be appropriate for an educational purpose. Further, there is no method to obtain court consent for this as a petition under Section 75 would be incompetent. The only possible counter argument would be if it can be shown that new land is being provided by the Council as a replacement park in which case Bignold Park, although originally part of the inalienable common good, would then form part of the alienable common good and could be appropriated for educational purposes.

- Having considered the case law Professor Rennie concludes that an alternative park would have to be available immediately Bignold Park ceases to be available failing which any objection to the Council's use of Bignold Park for educational purposes would be likely to succeed.

- Although the intention is that the existing playing fields etc at the current Wick High School would be available as an alternative park, these facilities would require to be used exclusively for the existing school at least during term time whilst the new school was being constructed at Bignold Park. There would, therefore, be a period of 18 months to 2 years when neither Bignold Park nor the alternative park would be available. Professor Rennie's opinion confirms that a commitment to make the land at the existing school available once that school had closed would not be sufficient defence to any court challenge to the Council's actions. He confirms that unless an alternative park is available immediately a challenge is likely to be successful.

- His opinion also confirms that any action against the Council is likely to be in the form of an interdict or a judicial review of a decision by the Council to opt for the Bignold Park site. Such a challenge could happen right up to and indeed into the construction phase.

- I understand from our meeting that there is a significant risk that members of the community would mount a challenge to any decision by the Council to proceed with the Bignold Park option. Professor Rennie is clear in his view that such a challenge would be likely to succeed if no alternative park can be made available immediately when Bignold Park ceases to be available. I understand that in practice this is not a possibility. Professor Rennie's view is based on the terms of the relevant legislation and existing case law and I have no reason to question his opinion.

I hope that the above is of assistance but please get back to me if anything further is required.

Additional Note

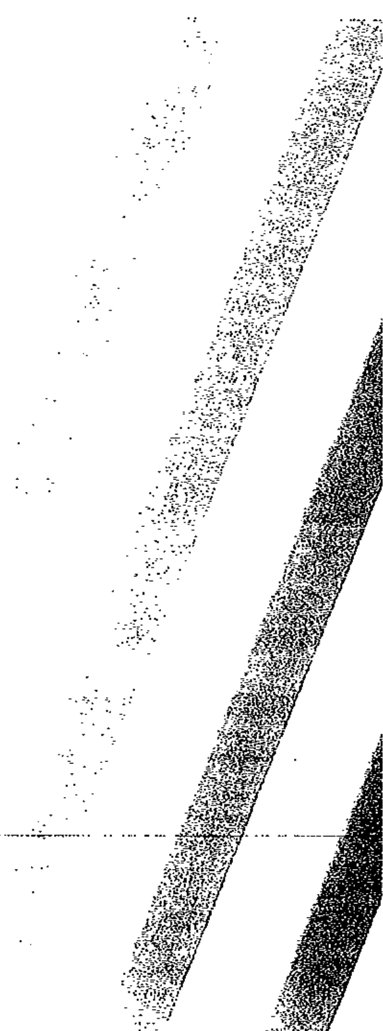
by

Professor Robert Rennie

The Highland Council

relative to

Bignold Park, Wick



Additional Note

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1.0 Introduction

I refer to:-

(a) My Opinion dated 15th July 2010.

(b) Further questions raised in email of 1st August 2010.

1.1 It has been suggested that if Bignold Park was used as the site for the new Wick Community High School the existing High School site and its playing fields could ultimately be turned into a replacement park for use of the general public. The difficulty is that there would be a period of time (possibly up to two years) when there was no park available to the public commensurate with the size and facilities currently afforded at Bignold Park. The reason for this is that the existing playing fields at the existing high school would still require to be used by the school during the construction of the new school at least during the day.

1.2 Two questions arise:-

(a) Whether such a gap would mean that Bignold Park could not be appropriated unless the same facilities were being afforded immediately to the general public.

(b) What sort of challenge would be likely given there is no question of a disposal as such.

2.0 Further Opinion

As I noted in my original Opinion inalienable common good land can become alienable if other land is provided by the local authority for the same purpose. This matter was canvassed in two cases [1]. In the *Marks and Spencer*'s case the *Magistrates of the Royal Burgh of Kirkcaldy* raised an action again *Marks & Spencer* concluding for decree ordaining them to implement articles of roup and sale. *Marks and Spencer* defended on the ground that the subjects disponed were not alienable being part of the common good and accordingly the Burgh's title was not marketable. Effectively the Council were selling the old municipal buildings having temporarily moved into other buildings such as the Police buildings pending completion of new Council buildings. The argument of the Council was that although the existing Burgh buildings were originally ***extra commercium***, as changes must be kept in view such buildings might return ***inter commercium*** if the Magistrates acquired other premises of their own – that is if they substituted one inalienable property for another. The basis for this argument was the opinion of Lord Pitmilly in *Phin v Magistrates of Auchtermuchty* [2]. He said:-

"*The Burgh could not sell these subjects voluntarily except in the case of their having provided new ones for the use of the Burgh, when they might dispose of the old buildings no longer used as a jail, etc.*"

Lord Jamieson held that the old municipal buildings had become alienable and that *Marks & Spencer* therefore had to proceed with the purchase.

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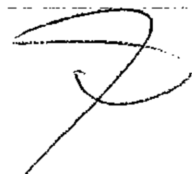
[1] *Magistrates of Kirkcaldy v Marks & Spencer Limited 1937 S.L.T. 574; Cockenzie and Port Seton Community Council v East Lothian District Council 1997 SLT 81*

[2] *(1827) 5S 690*

2.1 A similar view was taken in the *Cockenzie and Port Seton Community Council case*. The *Community Council* brought an action for judicial review of a District Council's decision to demolish a hall and swimming pool with a view to thereafter disposing of the site. A new community centre for the area opened in 1994 and in 1995 the District Council took the decision to demolish. Accordingly there was an overlap of provision so far as the particular facility was concerned. The court held that the question was whether or not the property was or was not inalienable. The court went on to hold that since all the public functions to which the subjects had been devoted had, since 1994 at the latest, been carried on elsewhere and were not said to have been performed improperly any inalienable quality which might previously have been possessed by the subjects did not attach to them at the time of the decision to demolish. The petition for judicial review was dismissed.

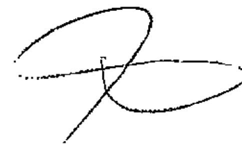
2.2 The problem which I identify with a so-called switch of sites is the time lapse of eighteen months to two years. In the *Marks & Spencer*'s case the Council were using other buildings to carry out the functions which would have been carried out on the site sold to *Marks & Spencer*. In the *Cockenzie and Port Seton* case the new leisure facilities which superseded those carried on in the old premises were already open to the public at the time the decision was taken to demolish the old premises. In the case of Bignold Park it would be a building site for the whole of the construction period. The existing school site and playing fields would be used by the school exclusively at least during term time and for mornings and afternoons although they could be available to the public in the evenings. It is stating the obvious to say that in late autumn and winter it is dark from about 4.30 p.m. I do not think that that would be sufficient to justify the proposition that the



old school site would be made available as a park from the time Bignold Park was appropriated for educational purposes.

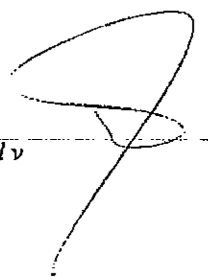
2.3 The question arose obliquely in another case [3]. 12.48 acres in the centre of Dumbarton had been used for public recreation since time immemorial. There was a Sports Centre and a Children's playground on the ground. Authority had already been given by the Court of Session to Dumbarton District Council to grant a lease for 99 years for a public indoor bowling stadium. That project however did not get off the ground. In 1995 the District Council entered into missives with the Secretary of State for Scotland in respect of the provision of a site for the erection of a new Sheriff Courthouse on the same area as had been earmarked for the bowling stadium project. Effectively this would have been a replacement for the existing court building in Dumbarton town which was no longer fit for purpose. The Council petitioned the court for authority to dispose of that part of the land to the Secretary of State for the purposes of the new courthouse. The Court of Session appointed a Reporter who found that all parties agreed on one thing and that was that the courthouse should stay in Dumbarton. However despite the fact that Scottish Court Service's preference was for the common good site other parties within the town did not agree that this was an appropriate site. Lord Maclean in the Outer House held that it was not enough for the Council to rely on the Secretary of State's preference. He listed various factors which ought to be taken into account in the balancing exercise. He held that the Council should have satisfied themselves that Scottish Courts Service's preference was based on grounds which were sufficient to outweigh any presumption in favour of retaining common good land. The objectors represented themselves as party litigants arguing that the area in question was part of the only

[3] *Western Dunbartonshire Council v Harvie 1997 SLT 979; 1998 SC 789*



public park in Dumbarton town centre. It was, they said, a "green lung" for the centre of the town. Lord Maclean held that the public open space used freely for recreational purposes was a vital amenity for all inhabitants of towns and cities. He found against the Council and refused the petition. The Council appealed but the Inner House was reluctant to interfere with the Lord Ordinary's decision. It was not, they said, for the court to make investigations into the benefits or disbenefits of any proposal. The fact that using the common good land for a courthouse might be said to be for the overall benefit of the community as a whole was not enough [4]. The *Motherwell District Council* case is similar to the present in as much as it relates to an existing public park which had become "virtually derelict". The District Council proposed to dispose 1.9 acres of it to Strathclyde Regional Council for a replacement primary school with the playing surface at the school being available for public use outwith school hours. Another acre was proposed to be leased under a 125 year lease to developers of a retail food store. This one acre part of the park was for a car park. The local community council opposed an application for alienation. The objectors argued that Motherwell District Council should have explored the possibility of marketing land for some type of development with a view to bringing in maximum money. Lord Kirkwood disagreed. He held that the local authority were entitled to prioritise limited funding. These cases indicate the delicate balance involved.

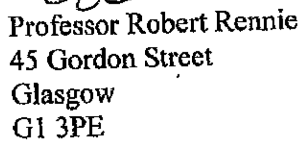
2.4 While each case will be taken on its own merits my view is that an objection to the use of Bignold Park would be likely to succeed unless alternative park land can be made available immediately.



[4] *See also Motherwell District Council Petitioners 1988 JWD 15-666; Kirkcaldy District Council v Burntisland Community Council 1993 SLT 753*

2.5 In so far as any action is concerned it is likely to be in the form of an interdict although it could also be in the form of a judicial review of a decision by the Council to opt for the Bignold Park site for the school. I do not unfortunately see any reason why a member of the public would not be in a position to challenge matters right up to an indeed into the construction phase. I do not see how personal bar would actually operate in relation to something as public as this. I doubt if it can be said that the "community" or "public" are personally barred as a body. That of course is not the same as saying that a court would be prepared to grant an interim interdict once construction was substantially underway. An interim interdict is of course granted or refused on the basis of the balance of convenience not on the basis of what the law may or may not turn out to be at the end of the day.

The Opinion of



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4th August 2010