

## The New Portobello High School

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### The City of Edinburgh Council

26 April 2012

#### 1 Purpose of report

- 1.1 To provide an update on the project to build the new Portobello High School, advise on the status of the legal challenge and subsequent appeal and seek approval for the proposed next steps.

#### 2 Summary

- 2.1 In December 2006 Council approved Portobello Park as the location for the new Portobello High School and in December 2008 approved the project to replace the school as the first priority within the Wave 3 programme. The funding for the project is in place and planning permission secured.
- 2.2 On 22 September 2011 Council approved the appointment of Balfour Beatty Construction Scottish & Southern Limited (Balfour Beatty) as the principal construction contractor for the new Portobello High School, subject to the approval of the contract being taken to Council at an appropriate future date. A very competitive tender price has been secured.
- 2.3 Since the project was first approved by Council in December 2008 the threat of legal challenge has existed. A Petition for Judicial Review was lodged in the Court of Session and served on the Council on 9 August 2011 on behalf of a local action group, Portobello Park Action Group Association (PPAG), challenging the Council's legal right to use the proposed school site at Portobello Park for the new school. This petition was successfully defended however an appeal against the decision was lodged by PPAG on 27 March 2012. The appeal will be heard on 23 and 24 May 2012 although the actual judgment may not follow for some time thereafter.
- 2.4 This report provides an update on the latest position and the proposed next steps including the appropriation of the land at Portobello Park (as both open space and common good) in accordance with relevant statutory requirements. Council is asked to approve that the contract to build the new Portobello High School should now be progressed on the condition that the existing appeal be first either successfully concluded in favour of the Council or withdrawn.

### **3 Main report**

#### **Background**

- 3.1 On 21 December 2006 Council approved Portobello Park as the location for the new Portobello High School subject to a number of conditions. All of these conditions have been followed up and reported to Council in subsequent reports, concluding with the revised approach to open space compensation which was approved by Council on 11 March 2010.
- 3.2 On 18 December 2008 Council approved the replacement of Portobello High School as the first project in the Wave Three Schools Programme. In February 2009, funding was confirmed in the Council's Capital Investment Programme.
- 3.3 Following approval to proceed, the educational vision was established with the school through the production of a Strategic Educational Brief, the first important stage in the project to inform and guide the physical aspects of the design.
- 3.4 The design was developed and the planning application advanced through an extensive pre-planning consultation and engagement process with the local community and key stakeholders resulting in the Granting of Planning Permission in February 2011.
- 3.5 The procurement process for the contractor started in December 2010 with the required notice in the European Journal. Twenty-two contractors originally expressed an interest in the project of which six were short-listed to the tender stage with tenders being returned on 22 July 2011. A two stage process was followed to evaluate quality and the assessment processes and procedures were carried out in compliance with the Public Contracts (Scotland) Regulations 2006. The Council's Legal Services team provided advice during the selection process to ensure compliance with procurement legislation.
- 3.6 Following detailed analysis of the tender returns, the most economically advantageous tender was considered to be that from Balfour Beatty in the sum of £26,114,107. Balfour Beatty achieved the highest overall score and also the highest individual score for both quality and price. The prevailing market conditions produced an extremely competitive tender value.
- 3.7 Shortly after the completion of the tender evaluation process, a legal challenge was submitted questioning the Council's legal ability to use the proposed school site at Portobello Park. This required a review of project risks and consideration of the most appropriate next steps.
- 3.8 In order to mitigate the risks going forward, Balfour Beatty was formally approached by the Procurement Team to consider extending the tender acceptance period with price, quality and all other contract terms remaining unchanged. This would ensure the very favourable outcome from the procurement process could be preserved whilst allowing time during which it was hoped that the legal challenge could be dealt with before Council committed to the full construction contract.

- 3.9 The resulting confirmation of this extension allowed the procurement process to complete. The contract price, quality and all other contract terms remain unchanged with only the tender acceptance period being extended.
- 3.10 On 22 September 2011 Council approved the recommendation that Balfour Beatty be approved as the preferred contractor and be awarded the contract, with the actual timing of the award of the contract requiring the further approval of Council at an appropriate future date.
- 3.11 Following the Council decision in September 2011, all tendering contractors were informed and the concluding actions in accordance with OJEU regulations completed. The unsuccessful contractors have all been provided with individual feedback and the standstill period has now passed with no challenges having been raised.
- 3.12 At the September 2011 Council meeting reference was made to a dispute involving the Unite Trade Union and an action involving a different company within the Balfour Beatty Group. As requested by Council, the Project Sponsor met with a representative of Unite to discuss the issues of concern and agreed to remain in contact. During the interim period the Balfour Beatty Group company which had been involved in the dispute formally withdrew their action and issued a joint press release with Unite confirming this outcome.
- 3.13 As part of the open space compensatory measures an investment of £150,000 was also identified within the project budget for off-site improvement works within, and for the benefit of, the area. Determination of the most appropriate use of this funding was delegated to the local Neighbourhood Partnership. Services for Communities have undertaken extensive consultation with the local community on this matter and the Portobello and Craigmillar Neighbourhood Partnership recently approved that this funding be directed to improving outdoor play facilities in Magdalene Glen.
- 3.14 The Neighbourhood Partnership gave Services for Communities a mandate to develop the proposals in further consultation with the local community, including the remit to explore further funding opportunities. Applications have been submitted for the current round of Central Scotland Green Network Development Funding which will be concluded by the end of April 2012. The £150,000 funding for this initiative cannot be released until the project to construct the new school on Portobello Park is progressed.

### **Legal Challenge**

- 3.15 As previously reported, a Petition for Judicial Review was lodged in the Court and served on the Council on 9 August 2011 on behalf of PPAG challenging the Council's legal right to use the proposed school site at Portobello Park. The petition was heard in the Outer House of the Court of Session over three days in January and February 2012. On 7 March 2012, The Court of Session published the Opinion of Lady Dorrian, finding in the Council's favour <http://www.scotcourts.gov.uk/opinions/2012CSOH38.html>.
- 3.16 Lady Dorrian found that there had been a considerable delay in bringing the petition and the Council's first plea-in-law that the petition from PPAG should be dismissed on grounds of *mora, taciturnity and acquiescence* (delay) was

upheld. In addition to dismissing the petition on these grounds, Lady Dorrian also expressed her obiter views on the *Merits*, concluding that the Council does have the power to appropriate inalienable common good land under the Local Government (Scotland) Act 1973. This judgment therefore supports the position that has been adopted by the Council since December 2008 that no authority was required from the Court in order to appropriate the land.

### **Appeal**

- 3.17 The Rules of Court make provision for an Appeal to be made to the Inner House against an Opinion of the Outer House of the Court of Session. Any appeal had to be submitted by 28 March 2012; this being 21 days from the publication of the original judgment. The solicitors acting for the Council in this matter were advised on 27 March 2012 that a 'Reclaiming Motion' was to be enrolled in Court that afternoon i.e. lodging an appeal against Lady Dorrian's decision.
- 3.18 PPAG have been advised that the Council will use all measures at its disposal to rigorously defend against this appeal.
- 3.19 Court processes can be protracted and, were the prescribed normal timescales to have been followed, it is conceivable that the final judgement would not have been available until late 2012, and perhaps into 2013 depending on complexity and Court availability. However, a motion was submitted by the Council to the Court for urgent disposal of the appeal and this was heard in the Court of Session on 10 April 2012. The Court accepted the necessity for urgency in this matter and, with the consent of Senior Counsel acting for PPAG, agreed that the appeal hearing be held over two days; 23 and 24 May 2012, this being the earliest dates available in the Court diary. The actual judgment will follow thereafter and the timescales for this cannot be predicted with any certainty however as the Court has taken the view that the appeal should be disposed of urgently, it is hoped that a decision will be available within a reasonably short period of time.

### **Recovery of Costs**

- 3.20 It is estimated that the legal costs incurred by the Council to date in defending the petition are in excess of £75,000. In light of the urgency to resolve the matter of the original petition itself, the Court was not asked to consider the matter of costs as that might, in itself, have introduced further delay in arriving at a final decision.
- 3.21 Regarding the question of the potential recovery of expenses the Council has no specific policy on such matters and each case must, therefore, be judged on its own merits. Consideration of this matter was deferred until the judgement was received and the period for appeal had passed as any decision could have been influenced by events during that period.
- 3.22 Expenses in Court proceedings are usually awarded to the successful party, in this case the Council. As it is considered to be in the Council's best interests to seek an order on expenses before the appeal is determined, in order to comply with the time limit set out in the Rules of Court a decision was taken on 29 March 2012 by the Head of Resources, Children and Families in consultation

with myself and the Convenor and Deputy Convenor of the Education, Children and Families Committee, to proceed to recover Council costs from PPAG. As a decision on the matter was required as a matter of urgency and could not await the next scheduled meeting of Council or of the Finance and Resources Committee, the decision was taken under delegated authority following consultation with the Convenor of the Finance and Resources Committee under the provisions of Standing Order 63.

- 3.23 A motion was enrolled with the Court requesting an order on expenses in favour of the Council. PPAG have lodged an opposition to this motion and are asking that it be dealt with on a no expenses due to or by basis i.e. that each party would bear their own costs. The matter will now be remitted to Lady Dorrian and the Court has advised that the earliest point at which the hearing on the motion would be heard is the beginning of May 2012.
- 3.24 The option is available for the Council to request the Court to make an order in respect of caution for the costs of the appeal. This would mean that the appellant would have been required to find security for the costs of the action and to satisfy the Court that such security was in place before they were allowed to proceed with the appeal. This option remains available but has not yet been pursued. However the Council can, and will, at a later date proceed to recover from PPAG the further Council costs in respect of defending the appeal

#### **Appropriation of Open Space at Portobello Park – Statutory Consultation, Town and Country Planning (Scotland) Act 1959**

- 3.25 On 21 December 2006 Council approved Portobello Park as the location for the new Portobello High School subject to a number of conditions. All of these conditions have been followed up and reported to Council in subsequent reports, concluding with the revised approach to open space compensation which was approved by Council on 11 March 2010.
- 3.26 The appropriation of open space is subject to specific requirements that are set out in the Town and Country Planning (Scotland) Act 1959 which requires that before exercising any power of appropriation in relation to land which consists of, or forms part of a common or an open space, an authority shall, for at least two consecutive weeks in a newspaper circulating in their area, publish a notice of the proposed appropriation and shall consider any objections to that appropriation which may be made to them.
- 3.27 This is a discrete statutory requirement with which the Council has to comply and, although it is concerned with land use, it is not intended to replicate the Education Act or Planning Act consultation processes which have previously been undertaken.
- 3.28 The notice of proposed appropriation of a 5.7 Hectare site at Portobello Park, Edinburgh (described as follows: bounded on the south by Milton Road, on the west by Park Avenue, on the east by Hope Lane and on the north by Portobello Golf Course) for use as the site of the new Portobello High School was advertised in a legal notice/press advertisement in the Scotsman on 4 and 11 October 2011. By 26 October 2011 a total of 181 valid representations had been received. All representations were read in full and individual comments

recorded and collated to ensure that all issues raised in objection to the proposed appropriation of the open space were considered. Copies of all full submissions will be made available in the Elected Members lounge for reference.

- 3.29 Included in Appendix 1 is a summary of the various consultation processes which have been carried out to date relating to this project together with the associated outcome. This is followed by a summary of the objections raised during the 1959 Act consultation process and the Council's response.
- 3.30 The issues raised during the 1959 Act consultation process have been either raised, and addressed, during previous consultation processes or are not directly relevant to the appropriation of a common or open space. However, consideration has been given to all of the issues raised and none are considered to present an impediment to the proposed appropriation. There has been no change in circumstances since the determination of the outcome of the educational consultation process and the planning application and nothing additional has emerged in the responses to this consultation exercise to suggest the Council should alter its view on the acceptability of the proposal to appropriate the open space for use as the site of the new Portobello High School. It is therefore recommended that the appropriation of the land at Portobello Park for use as the site of the new Portobello High School is now formally approved by Council.
- 3.31 A copy of this report has been issued to all those who responded during the 1959 Act consultation process.

### **Appropriation of Common Good Land**

- 3.32 In addition to being open space, the land at Portobello Park is also part of the common good for which the requirements governing appropriation are separate.
- 3.33 The appropriation of common good land is provided for in the Local Government (Scotland) Act 1973 and at common law. Since December 2008 the Council has maintained that no authority was required from the Court in order to appropriate the common good land at Portobello Park that is required as the site of the proposed high school. In her judgement, Lady Dorrian also expressed (in obiter) her view that the Council does have the power to appropriate inalienable common good land without requiring prior authority of the Court.
- 3.34 It is now, therefore, recommended that Council approves the appropriation of the land (*as common good land*) at Portobello Park as specified at paragraph 3.28 for use as the site of the new Portobello High School under the powers available in the Local Government (Scotland) Act 1973.

## **The Local Government in Scotland Act 2003 - Power to Advance Well-being**

- 3.35 The exercise of the authority by the Council to appropriate the land at Portobello Park as open space and common good is discussed in paragraphs 3.25 to 3.34 of this Report. The following paragraphs address the discrete and separate authority and power for the appropriation of this land that is available to the Council by s20 of the Local Government in Scotland Act 2003.
- 3.36 S20 of the Local Government in Scotland Act 2003 provides that a local authority has the power to do anything it considers likely to promote or improve the well-being of its area and/or persons within that area. The power may be exercised specifically in relation to any part of the local authority's area, and for the benefit of either all or some of the persons in that area. The well-being power is widely drawn and it is clear from applicable statutory guidance issued by the Scottish Ministers that is intended to be a power of first resort i.e. it is to be relied upon to justify all relevant actions, where there is a well-being aspect. The Council is advised that the well-being power provides authority for the appropriation of the land at Portobello Park for use as the site for the new school whether or not that appropriation is also authorised by the Local Government (Scotland) Act 1973 which the Council considers to be the case.
- 3.37 The well-being power is not, however unqualified. The following considerations are factors material to the exercise of the power:
- The exercise of the power must be likely to promote or improve the well-being of its area, and/or persons within that area;
  - The exercise of the power must be otherwise lawful;
  - The power must be exercised having had due regard to the guidance that has been issued by the Scottish Ministers under s21 of the 2003 Act (published in 2004);
  - In anything it does to advance well-being the Council must have regard to the duty of Best Value in pursuing continuous improvement in the performance of the Council's functions (this is a general duty imposed by s1(1) of the 2003 Act); and
  - The well-being power does not enable the Council to do anything that it is, by virtue of a limiting provision, unable to do. This limitation is imposed by s22(1) of the 2003 Act. A limiting provision is one which is expressed in an enactment and which explicitly prohibits or explicitly prevents the Council from doing anything or that limits its powers in that respect.
- 3.38 The preceding matters are relevant to the issue that is under consideration. Section 22 of the 2003 Act imposes a number of other riders to the exercise of the well-being power; these are:
- The power shall not be exercised in a way that unreasonably duplicates the legislative functions of another body;

- The power does not enable the Council to do anything that may be done under the Local Authorities (Goods and Services) Act 1970; and
- The power does not enable the Council to raise money by levying any form of tax or charge.

These matters are not relevant to the issue under consideration.

- 3.39 *Does the proposed appropriation relate to well-being?* The answer to this is yes. The well-being power is widely drawn. Paragraph 1.6 of The Scottish Ministers Guidance specifically refers to social factors such as looking after the needs of children and young people; access to leisure opportunities and access to education. Improving these things can reasonably be considered as relating to the well being of persons within the Council's area; in this case the children within the defined catchment area of Portobello High School, those children outwith the catchment area who may wish to attend the school through a placing request and those within the wider community who will benefit from the facilities provided at the new school and the improvements to the Park. The improvements to the Park and facilities provided as a consequence of the project (which are further exemplified in paragraph 3.11 of Appendix 1) can also reasonably be said to be an improvement to the Council's area.
- 3.40 It would be fair to say that not all persons within the Council area agree that the construction of the school on this site will serve these ends but the Council has, in previous decisions on this matter, already given very careful consideration to the arguments made out in favour of and against the appropriation of the site and has concluded that the benefits very much outweigh the arguments made out against the appropriation of the site. It is not possible to deliver the benefits that will flow from the construction of the new school if the site is not appropriated. The appropriation of the site is therefore related to well-being.
- 3.41 *Is the exercise of the power otherwise lawful?* The answer is yes. The Council is advised that the exercise of the power is in accordance with the law more generally. Parties with an interest in the appropriation of the site have been consulted and their views taken into account, and the Council has complied with relevant statutory requirements (such as those laid down by the Town and Country Planning (Scotland) Act 1959).
- 3.42 *Is the power being exercised having had due regard to the guidance that has been issued by the Scottish Ministers under s22 of the 2003 Act (published in 2004)?* The answer is yes. Members are advised that the proposed appropriation has been considered with reference to the content of the Guidance. The appropriation will secure improved educational and leisure facilities and will help meet the educational needs of children and young persons. The appropriation will also enable the Council deliver a significant element of the Wave 3 School Replacement Programme, the delivery of which is included in the Edinburgh Partnership Single Outcome Agreement 2009-12 and which supports National Outcome 4 - 'Our young people are successful learners, confident individuals, effective contributors and responsible citizens'.
- 3.43 The decision to progress with the new Portobello High School pre-dated the announcement of the Scottish Government Scotland's Schools for the Future Programme. Unlike the new James Gillespies and Boroughmuir High Schools

which will both benefit from funding under this national Programme, the new Portobello High School is being fully funded by the Council. However, the delivery of the new school is very much in accordance with the principles and objectives of the national Programme to ensure that more children are being taught in good quality accommodation across Scotland in well designed, innovative, modern buildings which can provide children the best possible chance for learning and, along with the improvements to the teaching framework through Curriculum for Excellence, enable teachers to deliver the best learning and teaching. This accords with the approach that is recommended in paragraph 2.7 of the Guidance which supports the exercise of the power in the pursuit of national priorities.

- 3.44 *Is the power being exercised with regard to the Duty of Best Value in pursuing continuous improvement?* The answer is yes. For this purpose, Best Value is defined in the guidance as making arrangements to secure continuous improvement in performance. The appropriation will enable the significant improvement of the educational and leisure facilities provided by the Council within the Portobello area. Additionally, exercising the power at this juncture would also enable the Council to let the contract to Balfour Beatty the financial benefits of which are referred to elsewhere in this Report and will also deliver excellent value for money.
- 3.45 *Is the power unavailable to the Council in consequence of a limiting provision?* The Council is advised that the answer is that there is no limiting provision that would limit or prohibit the exercise of the well-being in connection with the proposals under consideration.
- 3.46 In addition to meeting the tests identified above, the Council in exercising the well-being power is under a more general duty to act reasonably. The Council is able to demonstrate that it has acted reasonably in arriving at its decision that the site ought to be appropriated in that it has approached site selection in a manner that has involved a number of consultative processes, it has taken proper account of, and has carefully weighed up, the views of interested parties and has reached its decision having taken account of material considerations including the common good status of the site.
- 3.47 Taking the above factors into consideration it is now, therefore, recommended that Council approves the appropriation of the land (*as open space and common good land*) at Portobello Park as specified at paragraph 3.28 for use as the site of the new Portobello High School under the powers available within s20 of the Local Government in Scotland Act 2003.

### **Project Delivery Timescales**

- 3.48 The terms of the construction contract have been maintained including the length of the actual construction programme itself. Whilst the original timescale and programme would have facilitated the occupation of the new school in August 2013 this was predicated on a decision having been taken in September 2011 as had originally been intended.
- 3.49 The start on site for the main construction programme has already been delayed by at least six months as a result of the original legal challenge. In the event that the contract was awarded on 26 April 2012 this would result in a

contract period ending in January 2014 which would technically not allow the new school to be occupied prior to the commencement of the January 2014 term. However, it might still be possible to achieve a January 2014 opening as the acceleration of time involved is not significant. This would require discussion and agreement with the contractor if appointed.

- 3.50 In the event that the contract was awarded after 26 April 2012 it would be practically impossible to achieve an opening in January 2014 and the next logical opportunity would be during the 2014 Easter break if an award was made by the middle of July 2012 at the latest. Beyond this date the earliest date would be an opening for the beginning of the 2014/15 school term. The Council would continue to work towards achieving the earliest date possible for the project delivery whilst aligning this with school curriculum requirements and the necessity to avoid disruption to pupil learning.
- 3.51 The tender acceptance period expiry date is obviously critical as, if no contract is entered into with Balfour Beatty, an entirely new procurement exercise will require to be undertaken, in itself at further cost to the Council but also including the real risk of an increased contract sum reflecting the recovery of the construction market. This would also prolong the financial burden on the Council of maintaining the existing school. However, of equal if not greater importance, this would also further prolong the necessity for the pupils and staff of Portobello High School to remain in sub-standard accommodation in a building that is not fit for purpose and would deny access to state of the art new facilities which would benefit the wider community.
- 3.52 A new full procurement process would require a timescale, and therefore entail a delay, of up to nine months to which would require to be added the additional time to see the appeal to a successful conclusion as the procurement process could not be started until the appeal was concluded. An early appeal hearing has been secured however the further delay to the project could still be significant, being dependent on how long it takes to conclude the appeal process.

### **Consequences of proceeding**

- 3.53 This is a critical point for the project. Arrangements are in place to let a very competitive contract to Balfour Beatty which would, if signed in April 2012, see construction starting on site in early June 2012 and achieve the earliest possible opening date for the new school. The recommendations contained in this report are intended to minimise further delays to the programme and to minimise additional cost, and are made in the light of appropriate legal and technical advice.
- 3.54 The Council has successfully defended the petition brought by PPAG. However, PPAG have persisted in continuing their action and have lodged an appeal. The timetable set by the Court required PPAG to lodge grounds of appeal by 17 April 2012 and these were submitted on 16 April 2012. No new information or arguments appear to have been included beyond that covered during the earlier Court hearing.

3.55 If the contract is not let to Balfour Beatty the consequences in terms of time delay, continued inconvenience and financial cost could all be very significant as outlined earlier in this paper.

3.56 Consideration has therefore been given to, and legal advice sought regarding, the consequences and implications of the various options available to the Council at this time.

#### **4 Financial Implications**

4.1 This project is included in the Council's Capital Investment Programme. The contract value is within the budget allocated to the project and would realise considerable savings as a result of the most economically advantageous tender already secured.

4.2 The present outcome would, allowing for an appropriate level of contingency to be retained, provide the opportunity for savings of at least £5m to be reallocated to the delivery of other Wave 3 school projects. The next priority school within the Wave 3 replacement programme is actually another local school, St John's RC Primary, the replacement of which is also entirely dependent on the project to build the new Portobello High School going ahead.

4.3 If a contract is not awarded to Balfour Beatty, the delay would be considerable and an entirely new procurement exercise will require to be undertaken at further cost to the Council including the real risk of an increase in the contract sum as the construction market is already strengthening with costs increasing. This would also prolong the financial burden on the Council of maintaining the existing school and an assessment would require to be undertaken of any further essential repair works which would be necessary to facilitate the extension in the required remaining life of the building. The additional costs associated with these different risks have not been quantified but could be very significant.

4.4 The costs to date of successfully defending the legal challenge are estimated to be in excess of £75,000 and the Council will incur additional legal costs in defending the recently lodged appeal. However, with a view to mitigating the cost to the Council of defending its position, a decision has been taken to pursue PPAG for the recovery of costs.

#### **5 Equalities Impact**

5.1 The implications have been taken into consideration during the project development and procurement stages.

#### **6 Environmental Impact**

6.1 Environmental impact assessments were submitted as an integral part of the Planning Application and have been considered within this process and approved.

## **7 Conclusions**

- 7.1 In December 2006 Council approved Portobello Park as the location for the new Portobello High School and in December 2008 approved the project to replace the school as the first priority within the Wave 3 programme. The funding for the project is in place, planning permission secured and a preferred contractor identified and approved at a very competitive tender price.
- 7.2 Since the project was first approved by Council in December 2008 the threat of legal challenge has existed. A Petition for Judicial Review was raised on 9 August 2011. On 7 March 2012, the Court published the Opinion of Lady Dorrian, finding in the Council's favour. However an appeal against the decision was lodged by PPAG on 27 March 2012. The appeal will be heard on 23 and 24 May 2012 although the actual judgment may not be available for some time thereafter.
- 7.3 Council is asked to approve that the contract to build the new Portobello High School should now be progressed on the condition that the existing appeal be first either successfully concluded in favour of the Council or withdrawn.

## **8 Recommendations**

- 8.1 It is recommended that the Council:
- a) notes the contents of this report and the latest position relating to the progress of the project and the associated legal challenge;
  - b) notes the outcome of, and approves the responses to, the consultation exercise required by the Town and Country Planning (Scotland) Act 1959 as set out in this paper;
  - c) approves the appropriation of the land (*as common good land*) at Portobello Park as specified at paragraph 3.28 for use as the site of the new Portobello High School and associated community facilities under the powers available within the Local Government (Scotland) Act 1973;
  - d) approves the appropriation of the land (*as open space and common good land*) at Portobello Park as specified at paragraph 3.28 for use as the site of the new Portobello High School and associated community facilities under the powers available within s20 of the Local Government in Scotland Act 2003;
  - e) approves the acceptance of the tender from Balfour Beatty Construction Scottish & Southern Limited of £26,114,107 and that a contract be entered into with them as the principal construction contractor to deliver the new Portobello High School on the condition that the existing appeal be first either successfully concluded in favour of the Council or withdrawn in each case to the satisfaction of the Chief Executive in consultation with the Director of Children and Families and Director of Corporate Governance;

- f) delegates the authority to make the decision referred to in recommendation 8 e) above to the Chief Executive in consultation with the Director of Children and Families and Director of Corporate Governance; and
- g) agrees to receive a further report for information at the earliest opportunity following any decision having been taken in accordance with recommendation 8 f) above.

**Gillian Tee**  
Director of Children and Families

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Appendices	Town and Country Planning (Scotland) Act 1959 - Appropriation consultation process and outcomes
Contact/tel/Email	Billy MacIntyre Tel. No. 469-3366 e-mail: <a href="mailto:billy.macintyre@edinburgh.gov.uk">billy.macintyre@edinburgh.gov.uk</a>
Wards affected	14 Craigentiny/Duddingston; 17 Portobello/Craigmillar
Single Outcome Agreement	Supports National Outcome 4 – ‘Our young people are successful learners, confident individuals, effective contributors and responsible citizens’.
Background Papers	<ul style="list-style-type: none"> <li>• The New Portobello High School, Council Report, 22 September 2011</li> <li>• Update on Major Projects, Education, Children and Families Committee</li> <li>• 21 June 2011</li> <li>• Capital Investment Programme, Council report, 10 February 2011</li> <li>• Portobello High School, Council report, 11 March 2010</li> <li>• Wave 3 Schools, Council report, 12 March 2009</li> <li>• Wave 3 Schools, Council report, 18 December 2008</li> <li>• Wave 3 Business Case Report, Council report, 16 June 2008</li> <li>• Consultations on Site Options for the Replacement of Portobello High School Council report, 21 December 2006</li> </ul>

## **APPENDIX 1**

### **Town and Country Planning (Scotland) Act 1959**

#### **Appropriation consultation process and outcomes**

##### **1 Process**

- 1.1 This consultation process was carried out under the terms of the Town and Country Planning (Scotland) Act 1959 (the 1959 Act) in connection with the proposal to appropriate open space forming part of Portobello Park for use as the site of the proposed new Portobello High School (The 1959 Act Consultation).
- 1.2 The notice of proposed appropriation of a 5.7 Hectare site at Portobello Park, Edinburgh, bounded on the south by Milton Road, on the west by Park Avenue, on the east by Hope Lane and on the north by Portobello Golf Course for the new Portobello High School was advertised in a legal notice/press advertisement in the Scotsman on 4 and 11 October 2011.
- 1.3 Responses were invited by 26 October 2011 by when a total of 182 representations had been received and acknowledged. One representation was rejected as the submission was not verified by the named addressee.
- 1.4 All representations were read in full and individual comments were recorded and collated to ensure that all of the issues raised in objection to the proposed appropriation of the open space were considered.
- 1.5 The 1959 Act Consultation is required because the land that the Council intends to appropriate is a common or an open space. The 1959 Act is concerned with land use, specifically any proposal that will result in the loss of open space.
- 1.6 The 1959 Act Consultation is not concerned with the nature of the Council's title or the name of the account in which the open space is held by the Council. For that reason, while a number of objections have been made on the basis that Portobello Park is common good; those objections are not relevant to the 1959 Act Consultation.
- 1.7 In so far as objectors have raised the issue of common good along with other issues, the other issues have been taken into account in the recommendation with regard to the appropriation of the open space.

##### **2 Consultations Undertaken**

- 2.1 In considering site options for the replacement of Portobello High School the Council has carried out a number of statutory consultations. In particular the Council has previously carried out extensive consultations under the Education (Scotland) Act 1980 (the Education Act) and the Town and Country Planning (Scotland) Act, 1997 (the Planning Act).

- 2.2 The Council has also carried out an open space audit and has adopted an Open Space Strategy which is relevant to the proposal to appropriate open space forming part of Portobello Park. The Open Space Strategy has been referred to by the Council in its consideration of the issues raised during the course of the 1959 Act Consultation.
- 2.3 The 1959 Act Consultation is a discrete statutory requirement with which the Council has to comply and is not intended to replicate the Education Act or Planning Act consultation processes. However, a number of the issues raised during those earlier consultations have also been raised in the context of the 1959 Act Consultation and have therefore been considered of new in reaching the recommendation on the proposed appropriation of the open space.
- 2.4 Outlined below is a summary of the consultations carried out to date and the outcome of those processes followed by a summary of the objections raised to the 1959 Act Consultation and the Council's responses.

### **Education Act**

- 2.5 Consultation on site options for the replacement Portobello High School was required under the Education Act. The consultation ran from the start of September 2006 until 30 October 2006 and was open to the public. To aid the consultation process, meetings were held with affected parents on 3 and 4 October 2006 and a public meeting held on 11 October 2006. Nearly 800 people attended the three meetings and 440 responses were recorded as part of the consultation.
- 2.6 The Council proposed three specific options for the replacement of Portobello High School and considered alternative site options proposed by the community as part of the consultation. The responses to the consultation were considered by Council on 21 December 2006 when the selection of Portobello Park as the preferred location for the new Portobello High School was approved.

### **Planning Act**

- 2.7 As the construction of the new school in Portobello Park will constitute development, an application for planning permission to develop the land is required under the Planning Act.
- 2.8 An application for planning permission was registered by the Council in respect of the proposal to locate the new Portobello High School within Portobello Park in September 2010 (the Application). Due to the fact that the proposal was a major application it required to be consulted upon before it could be considered by the Planning Authority.
- 2.9 The pre-application consultation process took place between May and September 2010 and included road shows, on street consultation, two public meetings and information events. Consultation was carried out with specific organisations which included parent organisations, community councils and local residents and site neighbours. As a result of this pre-application consultation process the original proposals were developed and amended.

- 2.10 The Application in its final form was further consulted upon with relevant stakeholders and statutory consultees, amongst others SNH, SEPA and the Scottish Executive, as part of the planning process and ultimately considered at a hearing held by the Council's Development Management Sub Committee of the Planning Committee on the 23 February 2011; a copy of the paper can be accessed through the following link  
[http://www.edinburgh.gov.uk/download/meetings/id/31565/item\\_3-portobello\\_park\\_and\\_golf\\_course\\_20\\_stanley\\_street\\_edinburgh](http://www.edinburgh.gov.uk/download/meetings/id/31565/item_3-portobello_park_and_golf_course_20_stanley_street_edinburgh).
- 2.11 Amongst other things, the issue of loss of open space and benefits to the community of the new high school were raised at this hearing and considered by the Sub Committee in arriving at its decision to grant the Application.

### **Open Space Strategy**

- 2.12 The Council's Open Space Strategy was approved in September 2010. The aim of the strategy is to ensure that the Council takes a co-ordinated approach to meeting Edinburgh's open space needs. It was widely consulted upon prior to its approval and was considered as part of the planning application process for the proposed new school in Portobello Park. It was considered that the Application did not conflict with the aims of the Council's Open Space Strategy.

## **3 Issues Raised by Objectors and Council Responses**

- 3.1 **Issue 1:** *The permission of the court is needed in order to change the designation of open green space to anything other than its original intended use.*
- 3.2 **Response 1:** The statutory requirements for the appropriation of open space are contained within the Town and Country Planning (Scotland) Act 1959. The Act does not impose an obligation on the Council to obtain the permission of the court in respect of the appropriation of open space. Objectors may be referring to the process for the *disposal* of common good land which specifically requires court consent and is different to the process for the *appropriation* of open space. However, the Council is confident that it does not require the permission of the court for the appropriation of open space or the appropriation of common good land; the latter having been confirmed in the recent judgement by Lady Dorrian.
- 3.3 **Issue 2:** *The proposal will have a detrimental impact on the Golf Course.*
- 3.4 **Response 2:** The Golf Course land is not included in the open space that is to be appropriated. The Golf Course is managed by Edinburgh Leisure with whom the Council is working to ensure that work carried out for the new school will cause minimal disruption for golfers. It is proposed that that public access around the golf course will be improved by pathway improvements funded through the project as agreed by the Council at its meeting of 11 March 2010.
- 3.5 **Issue 3:** *The appropriation will result in the loss of a free and easily accessible community asset which provides significant health and social benefits. In contrast the new school facilities will be limited. If the land is transferred to the Children and Families Department, it would deprive the Common Good Fund of a valuable capital asset without compensation.*

- 3.6 **Response 3:** While the appropriation will result in a reduction in the overall area of open space, the quality and accessibility of the remaining open space will be improved. The loss of some open space was an issue that was given careful consideration during the planning application process at the conclusion of which the Council, as planning authority, concluded that the loss of the open space was acceptable with reference to the Development Plan and the Council's Open Space Strategy.
- 3.7 On 11 March 2010 the Council considered and approved a report which set out the strategy in relation to the various compensatory measures considered necessary and appropriate in respect of the project to deliver a new Portobello High School on Portobello Park.
- 3.8 An audit of the usage of Portobello Park was undertaken to inform the re-provisioning of adequate facilities which might be lost. The audit was undertaken by Ironside Farrar with the assessment having been carried out in 2009 over a four-week period between June and early July of that year. A copy of the final audit report is included at Appendix 2 to the March 2010 Council report; the conclusions were as follows:
- While used for training and matches during the season (August-May), the sports pitches are only used for a limited period during the summer months, through bookings made by Edinburgh Leisure to community football teams. The pitch quality is poor and lack of lighting limits the length of time that the pitches can be used during the football season.
  - Apart from the pitches, the site offers very little opportunity for other activities apart from walking. The primary use of the park for sport has resulted in the site comprising of wide open spaces. The park does not provide the smaller, more intimate spaces that are normally used for other activities e.g. passive recreation, sitting and relaxing, picnics and informal play.
  - The mature boundary trees and woodland provides an attractive wooded setting to the surrounding residential areas, but is largely unmaintained and requires thinning and management (Services for Communities subsequently identified that action was in progress to remove a number of trees which have Dutch Elm disease). Other problems included anti-social behaviour, including littering, which contributed to the poor quality of the park.
  - Apart from use by footballers and dog walkers, there was limited use of the site by the local community. The quality of the entrances, path surfacing and routing was poor, which would limit the use of the site by other potential park users. Both the Edinburgh Open Space Audit and this assessment concluded that the park usage is relatively low by the local community, due to the limited recreational opportunities, the overall quality of the landscape, pitch condition, poor maintenance condition and poor public accessibility.
- 3.9 The (then) draft Open Space Strategy for the City of Edinburgh recognised that the quality of space was as important as the quantity of open space and included, within its actions, creating or improving access to existing spaces and changing from one type of open space to another. The strategy recognised that, in a few cases, actions would be delivered through built development on open space. Those actions would result in less space overall, but higher

quality open spaces which better meet the standards and needs identified in the strategy.

- 3.10 The Portobello area was recognised to be well provided for in terms of the quantity of open space although Portobello Park was assessed as being only fair quality. The opportunity was therefore taken to focus on improving the quality of Portobello Park rather than providing alternative open space therefore being fully aligned with the Open Space Strategy.
- 3.11 One of the key objectives for the project has been to ensure that the existing uses of the park, mainly as a walking venue, should not only be preserved but improved wherever possible. This, in turn, would improve the quality of the existing provision in the area. The final proposals for which planning permission was approved include a number of measures to achieve these objectives, including the improvement of the quality of Portobello Park set against the deficiencies identified in the Park Usage Audit. These measures can be summarised as follows:
1. Two 3G all-weather pitches will be provided. These will not only meet curricular requirements with surfaces allowing a range of sports including football, and remove almost all off-site transport for pupils but also provide pitches for the use of the wider community throughout the year outwith curriculum time, including the option to extend hours by sensitive lighting proposals. There will also be a cat-flap access system to enable local children to use the pitches free when not otherwise in use.
  2. The new layout as shown on the planning landscape plan retains a broad publicly accessible perimeter along the South and East edges without impacting on the existing mature tree belt woodland and including a number of opportunities for informal recreation and a significant open grass play area at the South East corner.
  3. The mature boundary trees to the West, South and East edges of the park are maintained except for the necessary provision of entrances. This largely retains the look and feel of the park to the adjacent residential areas.
  4. The main entrances to the park, from East and West, will be opened up and improved in order to link into the new network of paths within the park boundary and extending along the West and East perimeter of the Golf Course. The improved path networks will provide greater access for those with pushchairs, disabilities and mobility issues as well as for the existing dog walkers and cyclists.
  5. The introduction of a cycle path along the Eastern edge will also provide a previously missing link for the Sustrans Cycle network across Edinburgh.
  6. The school itself will bring further recreational opportunities in the form of gym halls, dance studios, fitness facilities and a 25m swimming pool, all of which will be available to the community outwith curriculum commitments.

7. Finally, the commitment to an investment of £150,000 in further compensatory measures to be decided by the local people through the Joint Neighbourhood Partnership goes some way to enabling further enhancements outwith the boundary of the site, to where it is considered most beneficial by the local community.
- 3.12 Overall the March 2010 report concluded that the school project would not only retain and improve those elements previously identified as needing improvement, but would also add a diversity and range of uses for the community which were not previously available.
- 3.13 It is expected that these improvements will see a marked increase in the number of people using the pitches for organised matches as well as casual games. Runners, joggers and walkers will all benefit from improved pathways and routes in and around the park and the changes and improvements will provide opportunities for local people to become more active.
- 3.14 **Issue 4:** *The Council has let the Park deteriorate.*
- 3.15 **Response 4:** The Park continues to be maintained by Services for Communities. The Council does, however, acknowledge that there has been some disruption within the Park. As a condition of the planning permission for the new school the Council was required to undertake preliminary archaeological works. These works were undertaken in late summer 2011 in order to avoid the football season and to ensure that local residents had the fullest use of the park area during the summer months. Although the area where the works were carried out has been made safe it is considered uneconomic to reinstate the playing surface whilst the Council is considering building works.
- 3.16 **Issue 5:** *The Park is not a suitable location for the new school/there are other more appropriate sites for the new school. Factors raised include loss of habitat, impact on protected views, environmental impacts, road traffic congestion, loss of millennium planting, preferential use of brownfield sites.*
- 3.17 **Response 5:** All of these issues were carefully considered during the course of the earlier consultations undertaken by the Council under the Education Act and the Planning Act. In the course of the planning application process the Council took account of Scottish Planning Policy (the Scottish Government's planning policy document), Development Plan policy and the Council's Open Space Strategy. The planning application for the new school was accompanied by a number of documents that addressed issues that are now being raised by objectors including;
- An environmental impact assessment;
  - A design and access statement;
  - A transport statement;
  - A noise impact assessment; and
  - A tree survey.

- 3.18 The application was also the subject of consultation with a wide range of consultees. The outcome of the consultation exercise influenced a review and amendment of the proposals.
- 3.19 **Issue 6:** *The proposal is contrary to Development Plan Policy.*
- 3.20 **Response 6:** The Council acknowledges that the proposal is contrary to the Development Plan as it will result in the loss of the open space however there are other material considerations that have been taken into account which outweigh the development plan land use allocation. These include the benefits to the local community and the upgrading of the pitches on site. These matters were explored during the planning application process and are more fully discussed in the report of 23 February 2011 to the Development Management Sub-Committee referred to above.
- 3.21 **Issue 7:** *Green space may not be appropriated for any use without the specific consent of the Scottish Ministers and if no consent has been sought this is a breach of local planning policy.*
- 3.22 **Response 7:** There is no legal requirement for the Council to obtain the consent of the Scottish Ministers for the appropriation of open space. The Council may decide to approve proposals under the Planning Act that are contrary to Development Plan policy where there are material considerations that outweigh the development plan land use allocation. The statutory authority for this is set out in the Planning Act.
- 3.23 **Issue 8:** *The Council ought to reconsider locating the new school on Bingham Park as Lismore Primary has now closed.*
- 3.24 **Response 8:** The Bingham Park Area sites were considered as part of the 2008 Education Consultation and were discounted as they were very small, are poorly located in relation to the catchment area and access was difficult given the narrow streets leading there, creating potential traffic issues. For these reasons this site was discounted most recently as part of a re-examination of potential sites as part of the planning process. Part of the former Lismore Primary School site has been identified for another Council use and the construction of a replacement Seaview Respite Centre is scheduled to start within the next few months. It is worth noting that Bingham Park is also designated as being open space.
- 3.25 **Issue 9:** *Those adversely affected by the proposal cannot be compensated for the likely increase in traffic noise, congestion and light pollution, visual impact and loss of open aspect resulting in loss of amenity and possible adverse effect on health and the reduction in property values.*
- 3.26 **Response 9:** The Council acknowledges that there is no statutory compensation framework for proposals of this kind (the construction of a school) however the impact of the proposal was considered in detail during the planning application process. Whilst it was concluded that the proposal would alter the intrinsic residential character of the area, the proposals have been designed in order to minimise or negate any detrimental impact on residential amenity. Other issues including noise, air quality, access and parking, and

lighting were also addressed during the planning application process to the satisfaction of the Council as planning authority.

- 3.27 **Issue 10:** *Proceeding with the appropriation whilst the outcome of current court proceedings remains outstanding may bring accusations of maladministration.*
- 3.28 **Response 10:** The purpose of the 1959 Act Consultation is to consider a proposal that will result in the loss of open space. The consultation process must be completed before the open space can be appropriated and, as the Council wishes to continue to make progress with the Portobello High School project, it is necessary that the consultation exercise is completed at this time.
- 3.29 The Council is aware that Portobello Park is inalienable common good land. However, the Council has taken legal advice, including seeking joint Counsels' opinion that confirms the Council may appropriate property that is common good without the necessity of first seeking the permission of the Court. A number of parties disagree with the legal advice received by the Council and challenged whether the Council has the right to appropriate inalienable common good. A Petition for Judicial Review regarding this matter was raised on 9 August 2011. On 7 March 2012, the Court published the Opinion of Lady Dorrian, finding in the Council's favour.
- 3.30 The Council has taken, and continues to take legal advice, and remains satisfied that it is acting within its legal authority.