

**OUTER
HOUSE,
COURT OF
SESSION**

[2012] CSOH 38

OPINION OF LADY DORRIAN

in the Petition of

PORTOBELLO PARK ACTION GROUP ASSOCIATION

P780/11

For

Judicial Review of a decision of the City of Edinburgh Council communicated by letter dated 11 April 2011 that it intends to appropriate land within Portobello Park for use as a school without obtaining the Court's consent for the proposed change of use of that land within Portobello Park under the Local Government (Scotland) Act 1973

Petitioners: Martin, Q.C.; Drummond Miller

Respondents: S. Wolffe Q.C; Brodies

7 March 2012

Background

[1] The Petitioners are an unincorporated association the objects of which relate to the provision, maintenance or improvement of a public park. The respondents are the City of Edinburgh Council within whose area of responsibility lies Portobello Park. It is agreed that the park is inalienable common good land owned by the respondents and is open-space land. The respondents propose to appropriate part of the park for use of the site for a new school, namely the proposed new Portobello High School (PHS). The petitioners argue that it is unlawful for the respondents to appropriate any part of the park for this purpose; that in any event they cannot do so without the permission of the court; and that their decision to do so was *ultra vires*. They seek declarator and reduction accordingly.

The Decision to appropriate

[2] It is agreed that the park is inalienable common good land. It is also agreed that the respondents have determined that they may lawfully appropriate part of the park for use for a new school. However, when, how and in what circumstances such a determination was made is not the subject of agreement. Briefly stated, council meetings in 2006 and 2008 had referred to the park as a possible site of a new PHS. Planning permission for this was granted in February 2011. Statutory notice of the proposed appropriation was published in October 2011. Between 28th February and 11th April 2011 there was an exchange of correspondence between the petitioners or their agents and the respondents. In short, the petitioners maintained that they had advice that the Council required the authority of the court in terms of section 75 of the Local Government (Scotland) Act 1973 before appropriating any part of the park, and invited the council to agree a joint approach to the court for determination of the matter. They declined to enter into any kind of joint approach, on the basis that authority of the court was not required. This very brief summary of the background, which will require to be examined in due course in much greater detail, is given to explain the dispute between the parties as to the timing and nature of any determination to appropriate part of the park.

[3] In the petition, the petitioners assert that "the respondents" decisions up to and including the decision communicated in the letter of 11th April 2011 and the decision to publish the said notices amount to decisions that it intends to appropriate part of Portobello Park for use as the site of a new high school if and when it is lawful to do so. The petitioners have lodged the present petition in order to establish if and in what circumstances it would be lawful for the respondent to appropriate common good land at Portobello Park."

[4] The respondents aver that the decision to appropriate part of the park was taken in December 2006 and confirmed in December 2008. They aver that the letters in early 2011 do not constitute a relative "decision" susceptible to judicial review, and that the correspondence was initiated by the petitioners in an attempt to avoid the consequences of their otherwise having delayed to do present a challenge.

The Statutory Provisions

[5] The Local Government (Scotland) Act 1973 ("The 1973 Act")

73.- Appropriation of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to the following provisions of this section, a local authority may appropriate for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function.

(2) A local authority may not exercise their power of appropriation under subsection (1) above with respect to any land specified in subsection (3) below except with the consent of the Secretary of State.

(3) The land to which subsection (2) above applies is land which is held for use as allotments.

74.- Disposal of land.

(1) Subject to Part II of the Town and Country Planning (Scotland) Act 1959 and to subsection (2) below, a local authority may dispose of land held by them in any manner they wish.

75.- Disposal, etc., of land forming part of the common good.

(1) The provisions of this Part of this Act with respect to the appropriation or disposal of land belonging to a local authority shall apply in the case of land forming part of the common good of an authority with respect to which land no question arises as to the right of the authority to alienate.

(2) Where a local authority desire to dispose of land forming part of the common good with respect to which land a question arises as to the right of the authority to alienate, they may apply to the Court of Session or the sheriff to authorise them to dispose of the land, and the Court or sheriff may, if they think fit, authorise the authority to dispose of the land subject to such conditions, if any, as they may impose, and the authority shall be entitled to dispose of the land accordingly.

(3) The Court of Session or sheriff acting under subsection (2) above may impose a condition requiring that the local authority shall provide in substitution for the land proposed to be disposed of other land to be used.

[6] Town and Country Planning (Scotland) Act 1959 ("The 1959 Act")

24.- Exercise of powers of appropriation.

.....

(2A) Before exercising any power of appropriation in relation to land which consists, or forms part of a common or of an open space (not being land which is held for use as allotments) an authority to whom this Part of this Act applies-

(a) shall, for at least two consecutive weeks in a newspaper circulating in their area, publish a notice of the proposed appropriation; and

(b) shall consider any objections to that appropriation which may be made to them.

History

[7] The respondents maintain that the petitioners are barred from challenging the decision on the grounds of *mora*, taciturnity and acquiescence. In light of that plea, and given the dispute as to the timing and circumstances of any determination to appropriate, it is necessary to set out some of the key dates in the history of the proposed development of the park.

[8] In the course of 2006, options for a site of a new PHS were under consideration. By September 2006 these had been narrowed down to three sites, including Portobello Park. A full Council meeting was held on 21 December 2006 and a deputation from the petitioners was heard. The meeting approved the selection of Portobello Park as a preferred location for a new PHS subject to *inter alia* "(a) confirmation, through the courts if necessary of the land being useable for this purpose;...(c) the identification of local available land for open space provision in compensation". The respondents did not accept the contention that the land constituted part of the common good until a report of January 2008, which recorded that "facts and circumstances indicate that Portobello Park is common good. In accordance with the decision of counsel, the Council will seek authority of the court at the appropriate time when funding has been identified". On the 1 December 2008 the Council issued a press release indicating that they had received advice from senior counsel that the scheme would not constitute a disposal within the meaning of section 75(2) of the Local Government (Scotland) Act 1973 and that the prior authorisation of the court was not required". At a full Council meeting on 18 December 2008 the Council approved, subject to the required additional funding being confirmed, that PHS be progressed as the first school within a group of projects. A deputation by the petitioners to that meeting stated that it was the intention of the petitioners to challenge in court the Council's opinion on their entitlement to appropriate common good land. At a further full Council meeting in March 2010 the respondents considered a motion for approval to a proposed change in the open space compensatory measures associated with the appropriation of the park, following an audit on park usage which suggested that there was limited use of the site by the local community. It was proposed that rather than providing other open space provision in compensation, alternative compensatory measures should be provided. These included provision of two all weather sports pitches for school and community use; community use of the swimming pool and changing facilities; introduction of a network of paths around the park and general landscaping of the area. Those proposals were approved. At that meeting a deputation from the petitioners indicated again that it was their intention to launch a legal challenge "at the appropriate time". Planning permission was granted in February 2011. There was then the exchange of letters to which reference has been made. This petition was raised in July 2011. Notification of proposed appropriation, as required by the 1959 Act, was made in October 2011.

Submissions on *Mora* Respondents

[9] Counsel submitted that in December 2006 a decision was taken in principle to appropriate the park, "subject to confirmation, through the courts if necessary, of the land being useable for this purpose". In December 2008 the respondents decided they did not require to approach the court. The petitioners could have challenged either the decision in 2006 or the one in 2008. Reliance by the petitioners on the correspondence of early 2011 is an attempt to generate a decision and avoid the plea of *mora* which would otherwise be fatal. Implicit in the petitioners' suggestion of a joint approach is the assumption that authority under section 75 is required for appropriation. The *vires* issue was first raised by adjustment in these proceedings. The council had viewed the decision in 2006 as a binding one, hence the application to a meeting in 2010 to remove the condition regarding compensatory provision.

[10] In support of her arguments on *mora* counsel referred to the following cases. *Hanlon v The Traffic Commissioners* 1988 SLT 802; *Devine v McPherson* 2002 SLT 213; *Somerville v Scottish Ministers* 2007 SC

140; *Simpson v Aberdeenshire Council* 2007 SC 366 and *United Co-operative Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists* 2007 SLT 831. From these she drew the proposition that delay was not sufficient to establish the plea, there requires also to be taciturnity and acquiescence. In *Somerville* the opinion of the court noted the following in relation to a plea of *mora*:

"Mora, or delay, is a general term applicable to all undue delay. Taciturnity connotes a failure to speak out in assertion of one's right or claim. Acquiescence is silence or passive assent to what has taken place. For the plea to be sustained, all three elements must be present."

Standing by in silence can be treated as acquiescence (*Hanlon*) so the importance of promptly taking action for judicial review of administrative decisions has been repeatedly stressed (*Devine*). Delay which is not justified by any practical considerations may constitute acquiescence. A party cannot simply rely on a "climate of opposition" if there are steps that can and should have been taken to challenge a decision

[11] Circumstances suggestive of a detriment to good administration is a factor to consider in inferring acquiescence. In *Simson*, a decision to delegate authority to grant full planning permission had been taken in June 2004 with planning permission subsequently being granted in July 2005, the earlier date being when the challenge should have been made. In *United Co-operative Ltd* it was noted that an objector might in practice hold up implementation of, or reliance on, a decision by continually threatening action without actually taking proceedings. However, objections have to be translated into action at some point, and if that point does not come soon enough, the plea will succeed. She drew attention to the treatment by the Lord Ordinary in *United Co-operative Ltd* of the different constituent parts of the plea, noting the observations that:

"Taciturnity simply connotes a failure to speak out in assertion of a right or claim when a reasonable person in that position would be expected to speak out."

and that:

"Acquiescence simply means assent to what has taken place. The enquiry is not a subjective one, to be answered by looking into the mind of the petitioner. The test is objective. Acquiescence requires to be inferred from the petitioners' inaction and silence. The question is how the matter would have appeared to a reasonable person observing the petitioners' conduct, knowing of all the circumstances of which the petitioners knew or ought to have known when acting in the way they did."

[12] Counsel submitted that all the elements of the plea had been established. It was manifestly unreasonable to delay from December 2008 to July 2011, particularly in light of the assertion in 2008 that grounds for challenge already existed. Even a delay from March to July 2011 could be seen as unreasonable. The issue was not complex, there was no need to take further advice, it was a single narrow issue and the petitioners were well organised from at least 2008.

Petitioners

[13] Counsel for the petitioners submitted that from the outset the issue has been whether the council have power to appropriate the land. The petition is not simply a challenge to advice received, but seeks declarator about the validity of the council's proposal.

[14] The decision in December 2006 was clearly a decision conditional on removal of any doubt about the land being useable for the purpose; and also on developing a funding strategy, submitting a case to the Executive, and exploring possible delivery mechanisms. There has to be unqualified appropriation for the *mora* argument to succeed. That was not achieved even at the December 2008 meeting, when there was still a funding gap. The 2010 report shows that the appropriateness of proceeding and the issue of suitable compensatory measures was still alive at that stage. The question is not whether there might have been an earlier challenge but whether the petitioners are now barred from challenge, notwithstanding the fact that a decision actually to appropriate has not yet been taken. The cases referred to by the respondents all concern a single, implementable decision, not a conditional decision such as this.

[15] Counsel referred to the case of *R (Burkett) v Hammersmith and Fulham London Borough Council and another* [2002] 1 WLR 1593, in which the facts were similar to those in *Simson*. The Court of Appeal had, as in *Simson*, agreed that the earlier date was the *punctum temporis*. The House of Lords held that failure to challenge the earlier decision to delegate authority to grant permission did not prevent a challenge being made against the actual grant of permission. Counsel referred to the speech of Lord Slynn of Hadley that:

"It seems clear to me that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time i.e. from the date when the planning permission is granted...even if the grounds relied on are broadly the same as those which ... would have been relied on to challenge the resolution."

He also referred to the speech of Lord Steyn, in which were enumerated a number of policy considerations to be considered, in particular the need for simplicity and certainty rather than complexity and uncertainty. These militated in favour of selection of the later date as the appropriate one for the running of time.

"An applicant is at risk of having to pay substantial costs which may, for example, result in the loss of his home. These considerations reinforce the view that it is unreasonable to require an applicant to apply for judicial review when the resolution may never take effect. They further reinforce the view that it is unfair to subject a judicial review applicant to the uncertainty of a retrospective decision by a judge as to the date of the triggering of the time limit under the rules of court."

[16] By analogy, here there is a conditional decision and it is not until the conditionality is resolved that time runs. *Simson* could be distinguished since the factual background was very different and the raising of the petition was the first notification of any challenge. In *Bova v Highland Council*, Lord Pentland, 19th August 2011, the circumstances were as in *Simson*, but the approach of the court was strongly influenced by the decision in *Burkett*, which had not been referred to in *Simson*.

[17] If the question is whether a reasonable person would have concluded that the petitioners had decided not to challenge the decision, surely the answer is "no"?

Submissions on the merits

Petitioners

[18] The primary submission for the petitioners was that the respondents are not entitled to appropriate the land, with a subsidiary submission that *esto* they are entitled to do so, they can only do so with the authority of the court. The petitioners proposed that the issue might be resolved by a summary trial or special case and continually raised the question of entitlement with the Council. The following matters were not in dispute.

(1) Local authorities are statutory bodies constituted by the 1973 Act and exercising powers only within the applicable statutory provisions.

(2) The provisions relating to land transactions in Part VI of the 1973 Act provide a statutory code regarding land which may be held by a local authority.

(3) The park is inalienable common good land held by the Council. It is public open space and managed by the council as such.

(4) The use of land at the park for a new school by the Council would involve "appropriation" of the land and not a "disposal".

[19] The appropriation of land from one function to another is regulated by statute. It is not simply an action which an authority is free to take because it already holds title to the land in question. The powers contained in sections 73 and 74 of the 1973 Act would allow the Council to appropriate the land held by them at the park, or dispose of that land, unless their entitlement to do so is otherwise qualified. Section 75(1) acts

directly as such a qualification, applying sections 73(1) and 74(1) only to common good land that is alienable. These provisions do not apply to common good land which is inalienable.

[20] The effect of section 75 is to provide a comprehensive scheme in relation to common good land. The general powers of a local authority to deal with land are applied to alienable common good land and a specific power is provided in respect only of disposal of inalienable common good land. The combined effect is an absolute prohibition on the appropriation of common good land which is inalienable. This is consistent with the equivalent provisions in the Local Government (Scotland) Act 1947 which was the statutory predecessor of the 1973 Act. Section 171 of the 1947 Act allowed appropriation, letting, selling, feuing or encamping of alienable common good land. Under other provisions a Council could sell or feu inalienable common good formerly used as a Town Hall, with the consent of and subject to such conditions imposed by the Secretary of State, but otherwise they could only dispose of such property subject to the court's authorisation.

[21] Appropriation is a formal act which can be carried out only under prescribed circumstances and certain notification requirements, provided for in the 1959 Act. The right to appropriate may not even yet be available to the respondents so that rather than being late it is arguable that the petition is premature. Planning permission was only granted on 23 February 2011 and until that stage the council could not build on the site. The decision of the council in September 2011 to appoint contractors was taken in the full awareness that a legal challenge had been mounted in the form of this petition.

[22] Counsel then referred to the following authorities: *North Lanarkshire Council, Petitioners* 2006 SLT 398; *Waddell v Stewartry District Council* 1977 SLT (Notes) 35; *Sanderson v Lees* (1859) 12 M 24; *Grahame v Magistrates of Kirkcaldy* (1881) 6R 1066; *Murray v Magistrates of Forfar* (1893) 20R 1908; *Crawford v The Magistrates of Paisley* (1870) 8 R 693; *East Lothian District Council v The National Coal Board* 1982 SLT 460; *Cockenzie etc v East Lothian Council* 1997 SLT 81; *Paterson v Magistrates of St. Andrews* (1881) 6R 833 and *The Magistrates of Kirkcaldy v Marks & Spencer* 1937 SLT 574.

[23] In *North Lanarkshire Council* a local authority sought authorisation of the court to dispose of common good land for the development of two schools. Lord Drummond Young refused the petition as unnecessary since the petitioners were not intending a "disposal of land" within the meaning of section 75(1.) In doing so he followed the unreported decision in *South Lanarkshire Council, Petitioners*, 11 August 2004 in which the Inner House had refused as unnecessary (issuing no opinion) a section 75(2) application in similar circumstances. In *North Lanarkshire Council* the court concluded that "disposal" required an Act whereby the local community were deprived of the benefit of the land. This was "not easy to reconcile" with the earlier case of *Waddell* a case of interdict against the demolition of a town hall, where the court concluded that "alienation" would include "any action which effectively deprives the community of something which, by custom or dedication by direct grant, they are entitled to have" and that a council which is not entitled to "dispose" of property by sale would not be entitled to destroy the property other than in circumstances of imminent danger to the public.

[24] The argument that a local authority could not appropriate inalienable common good land was consistent with earlier authorities. In *Sanderson v Lees* the court interdicted a proposed feuing; in *Grahame* interdict was granted upon the basis that magistrates were not entitled to appropriate for town stables land which had been vested in them for public enjoyment; in *Murray* magistrates were not entitled to alienate a moor which had been subject to immemorial use for recreation. In *East Lothian District Council* there was a detailed consideration of the position of common good land, but again in the context of disposal.

[25] Although originally advancing the argument that in the event of his primary submission being incorrect, the council would nevertheless only be entitled to appropriate the park once authorisation of the Court had been given, counsel recognised that such a position could not be maintained and took that argument no further.

[26] The council had averred that they were entitled in any event to appropriate the land in exercise of the power provided by section 20 of the Local Government in Scotland Act 2003 to promote the wellbeing of their area, but did not assert that any decision had been made under that section. In any event, for the purposes of section 22 of that Act, section 75 of the 1973 Act constituted a limiting provision preventing the exercise of the power contained in section 20.

Respondents

[27] Appropriation is a power distinct from that of disposal. Even if there was in the pre-1973 case law a restriction on appropriation in respect of inalienable common good land (which is denied) it is doubtful that there was an absolute prohibition. Inalienability is not an immutable status. In *Wilson v Inverclyde Council* 2003 SC 36, Lord Drummond Young noted that inalienability can be qualified in three ways:

(1) by act of parliament; (2) because some items of inalienable property may be replaced (for example municipal chambers), and (3) because of the overriding principle that the law will not sanction the wasteful use of property. The prohibition on alienation must be read subject to that overriding principle. *Magistrates of Kirkcaldy v Marks & Spencer* and *Cockenzie* were examples of the second qualification. In *Glasgow Corporation v Flint* 1966 SC 108 Lord Wheatley observed that the common good is "by its nature *sui generis*, has special characteristics and cannot readily be equiperated to other types of funds in different spheres." It was not to be equiperated with a trust nor were common good purposes to be interpreted with anything like the rigour of trust purposes. The enjoyment by the public of an inalienable common good property is not the same as a private law right which maybe vindicated at the first suggestion of even a modest interference.

[28] A wide discretion was given to a Council in the administration of its common good. The power of appropriation is analagous to that power of administration which is vested in the Council for the purpose of managing the common good and is distinct from disposal which is clearly destructive of the common good. Councils require to consider the changing nature of recreation and the requirements of the community. If, incidental to the building of a new school, there are advantages to the recreational possibilities for the community then it may be arguable that that is within the powers of administration of the burgh.

[29] The suggestion by the petitioners in their *esto* case that "disposal" might be stretched to cover "appropriation" and thus bring the matter within the terms of section 75(2) has no support from any authority. The disposal cases can readily be distinguished since they constitute alienation of what is inalienable, or its equivalent, destruction. *Sanderson*, *Crawford* and *Waddel* are all examples of this. The proposition that a local authority has no power to appropriate inalienable common good land is too stark a proposition to be sustained. If the position at common law is properly to be looked at as one of discretion that goes a long way to explain why there are no cases to vouch that absolute proposition.

[30] In *Paterson* it seems (p835) that the proposal for the road constituted an appropriation and the challenge was defeated. That case does not support the proposition for the petitioners. An appropriation would be impermissible at common law if it substantially interfered with the use for any necessary purpose, for example, for golf. If the whole of the park were to be appropriated the recreation rights would be defeated and that might be an example of an impermissible appropriation equivalent to a disposal. The measures taken will constitute material improvements in the range and quality of the facilities on the remaining part of the park. The council have not proceeded from a picture of ignorance. They carried out an audit which showed that the use of the park is effectively casual play, use of football parks and dog walking and none of these activities will be frustrated or substantially interfered with. Cyclists and wheelchair users will be able to use parts of it. It will be more efficient and there will be a broader variety of uses. A gym, dance studios and a 25 metre pool will be available for use by the public. £150,000 is to be set aside for local investment in compensatory measures. This is indicative of what would have been a permissible appropriation at common law.

[31] During the latter part of the submissions noted above, Counsel had referred to a plan 7/38 of process which appeared to suggest that a small part only of the park was to be appropriated. At a further hearing it was revealed that this plan had shown not only the area of the park but the area of the golf course. Further copy plans were produced (7/43 and 7/44) showing the actual site of the park and of the proposed development. From that it was clear that the area of park remaining, not given over to either school or playing pitches, was considerably limited. The plans show three areas: the area of the school; an area referred to as "public accessible area" and an area referred to as "area of park remaining". The "public access areas" includes the two sports pitches. These are to be all-weather pitches not suitable for dog-walking purposes. The area of park remaining includes an area at the Northern boundary of the park. This is a very small area compared to the size of the park at present.

[32] Part VI of the 1973 Act provides a code of powers exercisable by local authorities by way of acquisition, appropriation and disposal of land. The general powers of appropriation and disposal may be exercised even in relation to common good land, except to the extent that section 75(2) of the 1973 Act qualifies the exercise of such powers. The general power in section 73 is not subject to any further control, other than for allotments and subject to the mechanical requirements of the 1959 Act. So long as the appropriation is for the purpose of any function of the council, which obviously includes education, they may lawfully do so in the exercise of the power conferred upon them by section 73(1).

[33] Counsel then advanced the respondents' *esto* argument based on the 2003 Act. She accepted that the council had not specifically addressed the 2003 Act as part of the decision-making process. However, the original argument which the respondents were facing was that consent under s75(2) was required: now it is that there is no power at all. That is not the case, because there is power available under the 2003 Act should the council choose to exercise it. In the present case the court could give *obiter* guidance regarding the provisions of the 2003 Act which might clarify the powers available under that Act.

Reply for petitioners

[34] Counsel accepted that the 1973 Act did not prohibit appropriation. The prohibition arose from the obligations on the council in respect of their ownership of land vested in them for the benefit of the community. In the absence of a power which overrides that responsibility they cannot appropriate such land or treat it as their own. Management and appropriation do not shade into one another: the one implies the land will be retained and managed for the common good; the other does not. *Paterson* was a case about management of the common good land. The road could be reconciled with the use of the land for golf and so was allowed. What they would not be allowed to do is to apply the land entirely to another use or to a use which causes substantial interference with the use to which the land has been accustomed to be put. The general power of appropriation contained in the 1973 Act does not contain power to override the obligation to maintain the land for the community. It turns the argument on its head to argue that there is no prohibition: what must be identified is a power to act. Counsel accepted that in the *North* and *South Lanarkshire* cases the court must have proceeded on the basis that an appropriation would go ahead. The consequence is that the cases were rightly decided but led to an incompetent act, overlooked by the court in each case. The present argument was not advanced in either case.

Discussion and decision

[35] Dealing first of all with the nature of the challenge, the respondents sought to argue that the petitioners' root and branch challenge - that there is simply no power to appropriate common good land - was a relatively recent development, and that hitherto the argument had simply been the *esto* one advanced in the correspondence in early 2011, namely that any appropriation required the authority of the court. However, although the nature of the challenge has fluctuated slightly from time to time, it seems clear from the documents lodged by the petitioners that an element of the challenge from the outset has been that the council simply have no power to appropriate land such as this. See, for example the submissions of the deputation of September 2006 (6/7 of process) and the press release of December 2008 (6/19 of process). Accordingly, I am prepared to proceed on the basis that the challenge has all along been a fundamental one.

[36] One of the main difficulties in this case lies in identifying when the determination to appropriate was made. This is not a case in which one can point easily to an identifiable, stand alone and effective decision that the council intend to appropriate the land. To that extent it is quite different from the situations in *Hanlon*, *Devine* and *United Co-op*. Moreover, it is of necessity (since no decision to appropriate has yet actually been taken) the decision that the council intend to appropriate the park which is challenged. The petitioners are therefore also in a different position from the situations in *Simson*, *Burkett* or *Bova*, in all of which the decision in principle had been followed by a decision in execution. In 2006 the council were denying that the park formed part of the common good. That would not, of course, prevent them from making a decision to appropriate the land, used as a park, for another purpose, namely education. It seems clear in fact that in December 2006 they did make a conditional decision to appropriate part of the park for the school, subject to confirmation through the courts if necessary that the land could be used for such a purpose, subject to provisions regarding provision of open space land in compensation and on condition that there would be no housing built on the park or adjacent golf course. I do not think there can be any basis for criticising the petitioners for failing to take action at that time, when there was still a real likelihood that the council themselves would apply to the court for authority. In January 2008, the council accepted that the land was part of the common good but were still contemplating an approach to the court in due course. However, during 2008 the position changed and it was clear by the meeting of December 2008 that no approach to the court would be made. This had been made clear in a press release of 1st December 2008. By the meeting of December 2008 it was therefore clear that the council had made a decision in principle to appropriate the park in the knowledge that it formed part of the common good. This decision was still conditional on the identification and provision of alternative open space land. On behalf of the petitioners it was argued that this might never come to pass; and of course it did not, because in 2010 the decision was made instead to provide enhanced recreational facilities. The condition that no housing be built on the park or golf course had been resolved by at least 12th March 2009 (7/9 of process, p 12). Other resolutions made at the 2006 meeting, such as, for example, developing a funding strategy, were not conditions attached to the decision to appropriate but simply delegated decisions about the way in which the school project might be progressed. Nothing at the 2008 meeting actually affected the appropriation decision, since resolution regarding the common good issue had already been achieved to the council's satisfaction. The fact that the decision to progress PHS as the first wave three project was "subject to additional funding" being in place, had no effect on the decision to appropriate. It would no doubt dictate when actual building of the school might progress but it was not a condition attached to any decision in principle to appropriate. At the very latest, therefore, by March 2010 the council had determined that they may lawfully appropriate the site and had unconditionally decided that they would do so. The fact that planning permission would be required before they could actually develop the park does not mean that a decision as to appropriation had not been made. A number of obstacles might lie in the path of ultimate development but these would not mean that the council had not taken a decision that they would appropriate the park, or that any such decision remained conditional. The decision which is challenged was made at the latest by March 2010 and it would have been open to the petitioners to challenge the decision at that date. Had they done so, not only would the grounds be the same (as was the case in e.g. *Simson*) but it would be the same decision which would have been challenged.

[37] There has therefore been a considerable delay in bringing this petition. There is clearly a tension between the requirement to act "promptly" in mounting by judicial review a challenge to an administrative decision and the requirements of Scots law that a plea of *mora* cannot proceed on the basis of delay alone. In this case that delay has been considerable, and although the petitioners have, up to March 2010 been maintaining that they intended to present a legal challenge they did not do so until July 2011. As far as I can see from the time-line (6/4 of process) and documentation lodged on behalf of the petitioners, they did not take steps to instruct solicitors for that purpose until August 2010. Thereafter they consulted with senior counsel and took his advice. However, on the issue of the oft-repeated threat to mount a legal challenge, there seems to have been a deafening silence until they initiated the correspondence in February 2011 (apart from asking, in the course of the planning process, whether the council had contingency plans "in the event of a challenge being mounted").

[38] In assessing the impact of silence during this period of delay, I take into account that one must allow a reasonable period for mobilisation, instruction of solicitors and counsel and obtaining funding. On the latter point, of course, the petitioners had been opposing appropriation of the park, and threatening action since 2006, so the fund raising issue has to be set in that context. Otherwise, the issue is not one on which they required to gather evidence, it is purely a question of law on which they already had the advice upon which they subsequently chose to act.

[39] It is not enough for the petitioners to rely on a "climate of opposition". They had repeatedly threatened action. When the council finally resolved the issue of compensatory provision in the way they did in March 2010, that was the time for the petitioners to translate their words into action. They did not do so, and in my opinion the gap between March 2010 and July 2011 is indicative of taciturnity and acquiescence. A reasonable person knowing all that the petitioners knew, and observing their conduct, would have been entitled to conclude that they had, albeit reluctantly, acquiesced. Accordingly I find the plea of *mora* to have been established. I will uphold the first plea-in-law for the respondents and dismiss the petition

Merits

[40] Strictly speaking, it is not necessary for me to deal with this, given the view I have reached as to the preliminary plea. However, it is right in the circumstances that I should express my view on the matter. I have reached the conclusion that the local authority does have power to appropriate inalienable common good land. Section 73 of the 1973 Act gives a local authority the widest powers to appropriate for the purpose of any function land vested in them for the purpose of any other function. The only restriction on appropriation is that a local authority may not appropriate land held for allotments without the consent of the Secretary of State. Section 24 of the 1959 Act requires a local authority to give public notification of any proposed appropriation and to consider objections made as a result but does not restrict the general power of appropriation. An equally wide general power of disposal is given under section 74, subject to a requirement to obtain the best price. Section 75 of the 1973 Act does two things. By subsection (1) it makes it clear that the provisions regarding appropriation or disposal of land apply to common good land where there is no question arising as to the right to alienate. Where such a question arises, under subsection (2) the power of disposal is limited, in that a local authority may only dispose of such land with the authority of, and subject to any conditions imposed by, the court. The power to appropriate such land remains unfettered.

[41] Such an interpretation is entirely consistent with both the case of *North Lanarkshire Council, petitioners* and that of *South Lanarkshire Council, petitioners*. I accept, of course, that those cases were concerned with disposal and the question of whether section 75(2) applied. However, the effect of the decision that neither of those cases involved a "disposal" was that they inevitably involved an "appropriation" of inalienable common good land. It could be nothing else, as counsel for the petitioners recognised. The decisions were based not on a conclusion that the land was alienable but that no disposal was required. The underlying assumption must have been that the council could appropriate the land in question. I cannot accept that either Lord Drummond Young or the Inner House (the Lord President, Lord Eassie and Lady Smith) would not have appreciated the consequence of their decision in the context of the legislation which they were construing.

[42] The cases to which I was referred fundamentally related to questions of disposal; or at least to whether the property had the character of inalienability and hence could be disposed of. Cases in the former category would include *Crawford*; *Waddell* and *East Lothian District Council*. Cases in the latter category would include *Sanderson v Lees*: "The question is whether there can be by usage such a dedication of property...as will exclude that property from being sold by the magistrates, or attached for the debts of the burgh", *per* Lord Deas, pp 31/32; *Grahame v Magistrates of Kirkcaldy*: "I find it impossible to hold that the magistrates as town council could sell to the magistrates as police commissioners property which they could not sell to anyone else"; *Cockenzie; Magistrates of Kirkcaldy v Marks & Spencer*; *Magistrates of Kirkcaldy v Burntisland*; and *Wilson*. The only case which dealt with what might reasonably be considered "appropriation" rather than "disposal" was *Paterson*. Even there, a primary concern was to make it clear that

the council's powers did not extend to alienating any part of the *solum*. "Encroachment" was allowed, at least to the extent that it did not interfere with immemorial usage.

[43] Despite the observations in these cases, it seems, from the report of the Local Government and Public Health (Scotland) Committee of 1943, that there was some uncertainty as to the position regarding disposal of inalienable common good property. As I have noted, the majority of the cases to which I was referred suggest that it was impossible at common law to dispose of inalienable common good property, other perhaps than municipal buildings which were redundant or had been replaced. However, a degree of "encroachment" or appropriation appears to have been possible, certainly where consistent with historic usage. The effect of legislation has been to render possible that which was impossible, or at least highly doubtful, namely the disposal of the inalienable, and to impose no limit on the disposal which can be authorised by the court. Removing a more restricted limitation, namely that appropriation was only possible with continued usage, would not be inconsistent with that approach. Had I been with the petitioners on the issue of *mora*, I would nevertheless have refused the petition on the merits.

[44] I notice that in both the *Lanarkshire* cases the areas under consideration involved appropriation of only part of the land in question. The same position arises in the present case. Although the area available for dog-walking will be more limited than hitherto, the opportunities for recreation remain substantial, and in some ways will be increased. This factor does not seem to have featured as part of the reasoning in either of the *Lanarkshire* cases, nor does it do so in the present case. I can see that circumstances might arise where a council sought to appropriate the whole of a park in circumstances in which no aspect of its original use for the purposes of recreation remained. It might be argued, as counsel for the petitioner suggested, that, consistent with the "destruction" cases such as *Crawford* and *Waddell*, this amounted to a "disposal", but the point was not explored before me in detail. Such an interpretation might not accord either with the wide terms of the statute or with the notion of "disposal" discussed in *North Lanarkshire Council* which suggests that "disposal" requires an act whereby the local community were deprived of the land in question, but that the use of parkland for construction of a school and playing fields did not have such an effect. The partial nature of the appropriation was not highlighted.

[45] I need not deal with the petitioners' *esto* argument which was rightly departed from as untenable. Nor need I deal with the respondents' *esto* case. I would not in any event have done so. It is clear that the respondents did not proceed under the 2003 Act and I would not have ventured into discussion of an issue which was, at this stage, of academic interest rather than the focus of a dispute.