

**OUTER HOUSE,
COURT OF SESSION**

[2006] CSOH 48

OPINION OF

LORD DRUMMOND YOUNG

in the petitions of

P2035/05

NORTH LANARKSHIRE COUNCIL

P2028/05

Petitioners;

for

Orders under section 75(2) of the Local Government (Scotland) Act 1973 in respect of land at Houldsworth Park, Wishaw and Dunbeth Park, Coatbridge

Petitioner: Thomson, QC, Mrs. S. Wolffe; Simpson & Marwick, WS

7 October 2005

[1] The petitioners have presented two petitions to the Court in which they seek authority to dispose of certain land owned by them. The first petition relates to an area of ground extending to 6.85 acres forming part of Houldsworth Park, Wishaw. The second relates to an area of ground extending to 1.34 hectares forming part of Dunbeth Park, Coatbridge. In both cases the petitioners wish to use the land for the construction of two schools on a shared site with shared facilities. Both areas of ground form part of the petitioners' common good.

[2] The petitioners are the education authority for their area. In the petition it is narrated that that they require land for the construction of new schools and associated facilities, including playing fields. In each case their intention is that two schools should be constructed on a shared site, with shared facilities. The schools are to replace old buildings that are now in poor condition. The sites on which the old schools are constructed are insufficiently large to accommodate a modern school, in particular two schools sharing a site and common facilities. The petitioners aver that the areas of ground mentioned in the two petitions provides suitable sites for the construction of the schools. Those areas currently form part of public parks, which contain football pitches available for use by the public. As an aspect of the construction of the new schools, modern sports pitches will be constructed which will be available to the public when they are not being used by the schools.

[3] The schools are to be constructed and managed by means of public private partnership ("PPP") arrangements. These involve agreements concluded with a contractor and funders in terms of which the contractor constructs and manages the school in return for certain payments made by, ultimately, the petitioners. The agreements are intended to last for approximately 32 years. During the initial phase when the school is constructed, lasting about 12 months, the contractor is given exclusive occupation of the land for the purposes of the construction works; it is averred that that is required for health and safety reasons. Thereafter the project enters what is known as the services phase. During this phase, which last for the

remainder of the term of the agreement, the contractor has non-exclusive rights of access to the site in order to provide the services that it has agreed to provide. These involve the maintenance and servicing of the buildings and physical plant on the site, the provision of janitorial, portage and caretaking services, cleaning and ground maintenance. During this period the building will be used as a school, and the petitioners will be responsible for the provision of education there. The agreements concluded with the contractor expressly stipulate that the rights afforded to the contractor and contractor related parties "shall not confer nor be deemed to confer upon the Contractor or Contractor Related Parties a right of ownership, a lease, a licence or any other interest in the Project Facility other than a right of access, egress and occupancy for the purposes specified". Ownership of the land is to remain with the petitioners throughout. Nor is any of the land subject to the Project Agreement to be burdened by any security right. The rights conferred on the contractor are entirely personal in nature. That remains the position even in the event of default by the petitioners.

[4] The petitions are presented under section 75(2) of the Local Government (Scotland) Act 1973. This is in the following terms:

"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".

For section 75(2) to be applicable, it is necessary that there should be a "disposal" of an item of common good. When the petition called for a first order, counsel for the petitioners submitted that the present case did not involve such a disposal. On that basis the subsection had no application, and he submitted that the Court should accordingly refuse the petition as unnecessary.

[5] Counsel explained that the petitions had been presented because of certain doubts that had arisen out of the decision in *Waddell and Others v Stewartry District Council*, 1977 SLT (Notes) 35. In that case the Lord Ordinary refused a motion for recall of an interdict against the demolition of the town hall in Gatehouse of Fleet. It was accepted by both parties that the town hall formed part of the common good, and was to be regarded as an inalienable part thereof. The critical question that was argued was whether demolition constituted disposal. The Lord Ordinary referred to the rule of the common law that certain items of common good held for the benefit of the community are inalienable without the consent of the court: *Crawford v Magistrates of Paisley*, 1870, 8 M. 693. Section 75 indicated that the same rule continued to apply after the enactment of the Local Government (Scotland) Act 1973. In *Crawford* (at page 696) the Lord President had stated:

"It must be observed that this steeple is not only the public property of the burgh, but it is inalienable property. They could not sell it, and most unquestionably they could just as little pull it down without judicial authority, unless the immediate risk was so imminent as to entitle them, for the safety of the community, to do so".

In *Waddell*, after quoting that passage, the Lord Ordinary continued:

"I have accordingly come to the view that in this context what constitutes alienation must be liberally construed and would include any action which effectively deprives the community of something which, by custom or dedication by direct grant, they are entitled to have. If an authority cannot deprive the community of the use of property which is inalienable by disposing of it in the ordinary commercial sense of the term, or by making a gift of it, it would only be in accordance with the underlying principle that they could not deprive the community of its use by destroying it, except in the highly special circumstance of imminent danger to the public".

It followed that a wide construction fell to be placed on the words "dispose of", and anything that deprived the community of the use of the building by destroying it, except in the case of imminent danger, constituted a prohibited disposal. The Lord Ordinary did, however, reserve the question as to whether the words "dispose of" as used in section 75 of the 1973 Act fell to be similarly construed.

[6] The statements of the law in *Waddell* require some qualification, in that it has been held that a local authority may decide to replace property that forms part of the common good with other property that is suitable for discharging the same function; in that event it may dispose of the original property which has been made redundant: *Magistrates of Kirkcaldy v Marks & Spencer Ltd.*, 1937 SLT 574; *Cockenzie & Port Seton Community Council v East Lothian District Council*, 1997 SLT 81. Since *Waddell* was decided, it has been held that the granting of a 99 year lease of a strip of land immediately adjacent to an area of land forming part of the common good was a "disposal" for the purposes of section 75(2): *East Lothian District Council v National Coal Board*, 1982 SLT 460.

[7] In *South Lanarkshire Council*, 11 August 2004, unreported, a petition was presented under section 75(2) in relation to land forming part of the common good of the petitioning council. The land in question was in use as a public park and playing fields, and the petitioners wanted to make use of it for the construction of a new school and sports facility. The school and sports facility were to be constructed under PPP arrangements. Those differed from the PPP arrangements proposed in the present cases in that they involved a 30 year lease of the school by the petitioning council to the private-sector contractor with a lease-back to the council for the same period. During the period of the lease and lease-back the contractor was obliged to maintain the school buildings. The facts thus bear some similarity to the present cases. The Court ordered a report into the facts and circumstances of the petition. When this was obtained, the Inner House refused the prayer of the petition as unnecessary. The interlocutor narrates that this was done "in respect that it was accepted by counsel for the petitioners that the arrangement proposed did not involve a 'disposal' of land for the purposes of section 75(2) of the Local Government (Scotland) Act 1973". It seems clear that the Court was itself satisfied that the arrangements did not involve a "disposal" for the purposes of section 75(2), because that was the only basis on which it could have refused the petition as unnecessary. That is an indication that, in at least one other case, the Court has taken the view that PPP arrangements of the sort under consideration in the present case did not amount to a "disposal" for the purposes of section 75(2). Indeed, the present cases are *a fortiori* of *South Lanarkshire Council* in that no lease is involved; instead, the PPP contractor is merely given rights of occupancy, and those are non-exclusive rights except during the period of construction, when obviously special considerations apply.

[8] Although no opinions were issued, the decision in *South Lanarkshire Council* indicates that, for a transaction to amount to a "disposal" of land for the purposes of section 75(2), there must be an act whereby the local community are deprived of the benefit of the land in question. It seems to be implicit in the decision that the use of land held for the purposes of the public park to construct a school and playing fields does not involve any "disposal" for the purposes of the subsection. In view of that decision, which is obviously binding on me, I consider that there is no "disposal" in the present cases. It follows that section 75(2) has no application. In these circumstances I refused the prayers of the petitions as unnecessary.