

WEST DUNBARTONSHIRE COUNCIL

Report by the Executive Director of Corporate Services

Housing, Environment & Economic Development Committee: 8 October 2008

Subject: Ownership, Moorings and Development Issues concerning the River Leven

1. Purpose

- 1.1** The purpose of this report is to update the Committee with regard to the ownership, moorings and development issues concerning the River Leven particularly regarding the external legal advice received from senior Counsel in connection with the boatyard/river title area south of Balloch Bridge.

2. Background

- 2.1** The Royal Charter of 1609 conveyed to the Provost, Baillies and Councillors of the Burgh of Dumbarton and their successors *inter alia*: "ALL and WHOLE the said river of Dumbarton from Balloch to the Castle of the said Burgh with the fishings of salmon and other fishes therein together with the liberty of the same on both sides to the limit of the sea waves". By virtue of the said Royal Charter and the Instrument of Sasine following thereon in 1842 and the Notice of Title recorded in 2004, West Dunbartonshire Council has title to *inter alia* the River Leven.
- 2.2** Notwithstanding the Royal Charter, it appears that during the eighteenth to twentieth centuries, Colquhoun of Luss erroneously believed that the river formed part of the Luss Estates. For example, in an action in 1877 (Colquhoun's Trustees -v- Orr Ewing and Company) Colquhoun of Luss raised an action against dyeing companies who had put down bridge piers in the river to connect two of their factories and the action was raised on the basis that Colquhoun owned the river bed of the Leven. As a result of this it appears that a number of titles to river bed were granted by Colquhoun of Luss, notwithstanding the Council's title. These titles generally granted to the dyeing companies in the eighteenth and nineteenth centuries form the basis for those titles which are now in competition with the Council's title.
- 2.3** Research to date has revealed that there are three main areas of the river where titles compete with the Council. These are :-
- at West Riverside, Balloch owned by Scottish Enterprise with a registered title in the Land Register since 1990 to the mid-point of the river.
 - south of Balloch Bridge there is an area to the mid-point of the river owned by Mr Sweeney who has established permanent pontoon rafts at this location.

- at Vale of Leven Industrial Estate, Renton there are areas of the east bank of the river owed by private companies which have registered titles deriving from disposals by the former Scottish Development Agency (now Scottish Enterprise). It appears that these titles derive from United Turkey Red in the Nineteen Fifties and it is probable that these titles originated in the period when Colquhoun of Luss thought he owned the river.
- 2.4** The Council has considered the moorings, ownership and development issues relating to the River Leven in previous reports to the Community, Safety and Environmental Services Committee dated 2 February and 1 June 2005, 11 January 2006 and the Housing, Environmental and Economic Development Committee of 5 September 2007 and 7 May 2008.
 - 2.5** The Council has corresponded and met with various parties who have been issued with Land Certificates and also met with Scottish Enterprise, National Park Officers and other interested parties with the aim of trying to resolve these issues. An inter departmental working group meets on a regular basis with the same aim. The Council sought answers to various complex legal questions from a Conveyancing Professor and has also referred issues for the opinion of senior Counsel.
 - 2.6** An application to the Keeper to rectify one title has been rejected. The Keeper took the view that the Lands Tribunal or Court of Session would be a more appropriate body to decide this issue.
 - 2.7** Members authorised Officers to obtain Counsel's Opinion with a view to ascertaining the chances of success of an Action of Declarator. Counsel's Opinion was provided dated 28 March 2008 and following receipt of the Opinion a legal Consultation took place between solicitors and senior Counsel in Edinburgh on 12 May 2008 following which further information was provided to Counsel and a Supplementary Opinion of Counsel was issued to the Council's Legal Department dated 1 July 2008.
 - 2.8** It is felt that the release of the information contained in the Counsel's two Opinions may impact on the preparation of any Court proceedings to follow re title in relation to any stretch of the River Leven and hence, the Opinions are not being copied as an annexation to this Report.
 - 2.9** Both Opinions constitute information in respect of which a claim of confidentiality of communication could be maintained in legal proceedings and are therefore considered exempt in terms of Section 36(1) of the Freedom of Information (Scotland) Act 2002.

3. Main Issues

- 3.1** Following the consultation with senior Counsel in May, Counsel was requested by Legal Services to consider the likelihood for the Council of success in any application to the Lands Tribunal or Court of Session on the basis of current Case Law and the documentary information produced.
- 3.2** Written advice received from senior Counsel in July 2008 indicated that the prospects of success for the Council were considered to be low in view of the considerable legal difficulties the Council would face in mounting a legal challenge against a title which has been registered in the Land Register of Scotland in 1998 without exclusion of indemnity on the face of the Land Certificate. Although Mr Sweeney's title was registered in 1998 his title is not a new one and is based on prior title deeds which go back as far as 1922. Mr Sweeney's predecessors paid market value for the ground that they acquired and accordingly it is a title which competes with the Council's title.
- 3.3** To be successful in any Court proceedings the Council would have to:-
- (i) demonstrate that the Council is the proprietor in possession in relation to the bed of the river. It may be difficult for the Council to provide sufficient evidence of actual physical possession. As previously reported, the Council has carried out certain works in respect of the river eg removing sunken boats and carrying out some flood prevention/riverbank strengthening works; however, regular maintenance works such as dredging of the river ceased some decades ago. Identifying positive acts by this Council evidencing their possession of the river has been problematic and such evidence would be essential in connection with the proving of possession in any Court action.
 - (ii) In the event of the Court deciding that the registered land owner (as opposed to the Council) was the proprietor in possession of at least the part of the riverbed where the pontoons at Balloch Bridge are situated and possibly the whole one half of the riverbed adjacent to the boatyard, the Keeper of the Registers could only rectify the Register in favour of the Council if it is proved in the Court proceedings that the inaccuracy was "caused wholly or substantially by the fraud or carelessness" of the proprietor in possession in terms of the Land Registration (Scotland) Act 1979 (Section 9(3)(a)(iii)) leading to a Court Order on the Keeper to rectify the registered title.

- 3.4** To show that any current registered proprietor was guilty of “carelessness” would require fairly compelling evidence to show that at or immediately before the date of the first registration of the title the current proprietor had been well aware that the Council had a prior title and had asserted its own rights to the riverbed in the particular area concerned. Any evidence provided in relation to moorings managed by the Council (or on their behalf) would require to relate to the specific area of title being challenged. It would be difficult for the Council to prove the current owner’s state of knowledge of the title position at or around the time of the first registration of the boatyard title in June 1998 and it could potentially be a difficult exercise to obtain witness statements from anyone with specific knowledge on the subject in the period 1998 who would also have to be agreeable to providing formal evidence on behalf of the Council at a subsequent Court of Session Hearing in Edinburgh. It should also be noted that the current proprietor’s title goes back to at least 1922, making it difficult to prove evidence of carelessness or fraud when the present proprietor recorded his title.
- 3.5** Senior Counsel’s opinion has not been obtained regarding the Scottish Enterprise Balloch and Renton competing titles. However, as these have been registered in the Land Register following on older titles, it would also be difficult to challenge these competing title on the basis that they were obtained by fraud or carelessness of the party registering the Land Register title.
- 3.6** The further legal advice that the Council has obtained has confirmed that the River Leven is a public navigable river and that the rights of the public to navigate in the river and to land on public land or on private land with the agreement or acquiescence of the land owner will prevail over a registered title owner of part of the riverbed. The exception to these rights occurs where the owner of part of the river erects mooring pontoons or marinas. In these cases the owner may control their use by refusing permission to moor or by charging for moorings. The pontoons or marinas must not prevent navigation in the river itself and no one can interfere with navigation on the river by the public. Further, Counsel is of the view that there is no right to draw boats onto privately owned land and no reason to conclude that the public had any rights to keep their boats permanently moored to the bank.
- 3.7** The Council has rights of port and ferry in the river which rights derive from the Crown however, the question of where these rights may be exercised depends upon the Council owning the land on which the landward part (port) is to be established and there being public access to the port from the landward side.
- 3.8** Ownership of the river does not give as many rights as might be first thought. Owners cannot interfere with the public right of navigation. The right of ownership of the river is only of practical use to:-
- put in moorings, where the owner also owns the bank and can access the moorings. Moorings cannot interfere with navigation.

- install jetties. Again the owner has to own the bank where the jetty is installed as otherwise there would be no access.
- install bridge piers providing these do not interfere with navigation.

In respect of development issues, Scottish Enterprise has applied for planning permission to regulate the moorings at West Riverside, Balloch. Scottish Enterprise are planning to adopt a more positive managed control of the boats in their stretch of the river and have advised Council Officers that they intend to meet with all the boat clubs to discuss formalisation of their occupation of mooring in the area concerned.

4. Options

4.1 The Council still owns the vast bulk of the River Leven and is still able to install moorings provided that access can be obtained thereto. Accordingly, court action would not enable the Council to do any more than it can at present. Previous complaints to the Council relating to moorings have come from local boat owners who previously used mooring at little cost. There is nothing to prevent the Council installing pontoons or moorings on areas of the Leven owned by the Council outwith the areas of title which have been registered to others. However, the costs and benefits of this would need to be closely evaluated. Options the Council might wish to consider include:-

- remitting to the Estates Section of HEEDS to investigate the commercial viability of installing moorings or pontoons on Council owned areas of the River Leven to which there is public access from the banks.
- remit to officers to discuss with Scottish Enterprise and the Park Authority the options for their installing moorings in Council or Scottish Enterprise owned ground.
- to remit to officers to identify areas of Council owned river where private owners could be allowed to install moorings which would not interfere with navigation.

5. Personnel Issues

This report does not have any direct personnel implications but there will be a requirement for additional personnel resources if the Council decided to take a more active role in dealing with issues affecting the river such as regulating moorings or dredging.

6. Financial Implications

Depending on the course of action decided upon considerable costs may be incurred for example as a result of any court action in the Court of Session or Lands Tribunal. There would also be financial implications if the Council assumed a more active role in dealing with management/regulation of moorings or dredging.

7. Risk Analysis

If the Council embarks on Court proceedings there is a likelihood that such proceedings are not successful. Counsel has indicated in his Second Opinion that the chances of success in a court action are "so low that it is not sensible to proceed". Should the Council be unsuccessful the legal costs of the successful party would also have to be met.

8. Conclusions

- 8.1** The Council has obtained expert opinions in connection with a complex title issue and requires Members views on the way forward.
- 8.2** Whatever decision is taken regarding potential Court action in this case, the Council can continue to monitor the position regarding future land registrations of the river insofar as and when it is advised of same by the Registers of Scotland and take appropriate legal action to defend the Council's interests in the river where there appears to be at least a reasonable prospect of success. Due to the complexity of title challenges it is envisaged that external legal opinion involving Counsel could again be required in this connection.

9. Recommendations

- 9.1 It is recommended that the Committee:**
- (i) Note the position with regard to the title situation and the advice obtained from Counsel as far as contained within this report.**
 - (ii) Acknowledge that based on this advice court action would achieve little and as a consequence approve that no further legal action is taken at this time.**
 - (iii) Request that issues regarding moorings as detailed in Section 4 are pursued and that a further report(s) on these matters is brought to a future meeting of the Committee.**

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Appendices: None

Background Papers: Reports to the Community Safety and Environmental Services Committee dated 2 February 2005, 1 June 2005 and 11 January 2006.

Reports to the Housing, Environmental and Economic Development Committee dated 5 September 2007 and 7 May 2008.

Counsel's Opinions dated 28 March 2008 and 1 July 2008.

Wards Affected: Lomond, Leven and Dumbarton.