

WEST DUNBARTONSHIRE COUNCIL

Report by Chief Executive

Housing, Environment and Economic Development Committee 5 September 2007

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

1. Purpose

1.1 To provide the Committee with information and options with regard to the ownership, moorings and development issues concerning the River Leven

2. Background

2.1 The Burgh of Dumbarton was one of the earliest Burghs, dating from 1222 following the grant of a Charter of Erection by Alexander II. A Charter of Confirmation was granted in 1609 on the Petition of the Burgesses because, in preceding years, the River Leven had overflowed and Dumbarton had been inundated. It was necessary to raise embankments to prevent the town being further damaged, and special levies were raised on the Kingdom to have the necessary funds made available.

2.2 The Charter of 1609 conveyed to the Provost, Baillies and Councillors of the Burgh of Dumbarton and their successor *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". On 26 August 1842 Sasine was taken to the subjects described in the Crown Charter of 1609. Therefore, by virtue of the Royal Charter, West Dunbartonshire Council has title to *inter alia* the River Leven.

2.3 However, despite the fact that a proper title was vest in the Council, portions of the River Leven have been included in the Land Certificates granted by the Keeper to adjacent owners.

2.4 Private pontoons have been erected and some local boat owners, accustomed to mooring on the Leven free of charge, have complained to the Council.

2.5 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 and 11 January 2006.

2.6 To try to prevent further encroachments, a Notice of Title has now been registered in the name of West Dunbartonshire Council. This covers both the River and the rights of port and ferry.

- 2.7** The Council has corresponded and met with various parties who have been issued with Land Certificates.
- 2.8** The Council has also met with Scottish Enterprise and National Park Officers and the local MSP with the aim of trying to resolve these issues. An inter-departmental Working Group has been set up which meets on a regular basis with the same aim. The Council has also sought answers to various complex legal questions from a conveyancing professor. However, the problem remains as to how to remedy the current title position.

3. Main Issues

- 3.1** A number of the title holders have been cooperative when asked to rectify their titles. However, other individuals and companies have not agreed to the rectification.
- 3.2** 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.
- 3.3** The Council has now received an Opinion from a Conveyancing Professor regarding its position relating to the River Leven. The Professor's views have been useful, but he was not able to give definitive answers on several points.
- 3.4** It is felt that release of the information contained in the Professor's Opinion may seriously prejudice the Council's chances of success in any Court proceedings and, hence, it is not being copied as an annexation to this Report.
- 3.5** The Professor's Opinion constitutes information in respect of which a claim of confidentiality of communication could be maintained in legal proceedings and is therefore considered exempt in terms of s36(1) of the Freedom of Information (Scotland) Act 2002.
- 3.6** The terms of the Opinion, and also the general correspondence regarding the River Leven over the years, have been considered. The Council would appear now to have the following options available to it with regard to reclaiming or retaining its rights and/or a measure of control over the River, in particular in the area of Balloch Bridge:-

Option 1 - Take no further action.

Option 2 - Promote a Compulsory Purchase Order.

Option 3 - Raise an Action of Declarator.

Option 4 - Appeal the Keeper's decision to the Court of Session/Lands Tribunal

3.7 Option 1 - Take No Further Action

3.7.1 The advantage of taking no further action would be that the Council may avoid incurring the costs of any legal action and minimise its responsibilities regarding the provision and regulation of public moorings and/or ferry.

3.7.2 The disadvantages of taking no further action are likely to be as follows:-

- (i) (a) The private moorings may be extended further. Space for public moorings on the River is then likely to be further limited.
 - (b) In particular, the permanent mooring rafts constructed at Balloch Bridge have elicited a number of complaints.
 - (c) The Council has also received complaints regarding the lack of management of moorings generally, and in particular, in the area of Balloch Bridge.
 - (d) The potential for navigation from the Clyde to Loch Lomond is being considered in conjunction with Scottish Enterprise and British Waterways. This would encourage increased water activities in Balloch and around Dumbarton harbour along with increased development along the riverside. An increase in tourism and visiting craft would be anticipated. Therefore, it would appear to be in the interests of the area to ensure that adequate moorings and unimpeded navigation is available for all.
- (ii) (a) Scottish Enterprise own adjacent land at West Riverside, Balloch. Their title also includes a portion of the River upon which numerous boats are moored on a non-paying basis. Outline agreement was obtained from Scottish Enterprise that they would convey their interest in this part of the River to the Council in exchange for the Council regulating the moorings. It was agreed that regard would be had to the claims of those currently mooring boats there.
 - (b) However, at a meeting with Council Officers in May, Scottish Enterprise seemed to have moved back from that position and were considering selling private secured mooring rights at West Riverside. They were asked to clarify their position and a copy of their response is attached to this Report. (Appendix 1)

- (c) If the Council decided to take no action with regard to the River, then it is possible that Scottish Enterprise would not make any appropriate mooring provision for local boat users or visiting craft. They may simply construct private moorings to be used in conjunction with the adjacent development.
- (iii) (a) Scottish Enterprise officers also indicated that there is a local aspiration for a ferry linking Lomond Shores with Balloch Country Park, possibly being operated by a local cruise boat operator.
- (b) The right of port and ferry (being the provision of a regular ferry service for the benefit of the public) in the River Leven was granted to the Council by virtue of the Royal Charter. It was also granted to the Council's predecessors in terms of the Roads and Bridges (Scotland) Act 1878.
- (c) The right is a privilege which excludes others from competing at the locality. The right, if exercised, entails corresponding obligations e.g. to keep sufficient boats on the ferry route for the use of travellers.
- (d) The right of port and ferry is an ownership right (like salmon fishings) which can be transferred as a separate right distinct from the land of which it forms part.
- (e) Doing nothing may weaken any claim the Council may wish to make to exercise the right of ferry and may also affect its right to port and harbour in the River Leven.

3.8 Option 2 - Compulsory Purchase Order

3.8.1 The Council could consider purchasing, by way of compulsory measures, those areas of the River Leven which have been acquired by individuals and companies by virtue of the Land Registration system. However, this is likely to be lengthy and costly in that several owners have indicated that they have no intention of giving up their interest in the River voluntarily. If the Compulsory Purchase Order was appealed, such procedure would involve the Council in significant expense in terms of time, legal costs and compensation payments.

3.9 Option 3 - Raising an Action of Declarator

3.9.1 The Council could seek a Court determination with regard to the extent of its various rights in the River Leven by raising an Action of Declarator.

3.9.2 (i) The advantages of raising this Action are that it would have the advantage of determining the Council's rights with some degree of certainty.

- (ii) Further, if the Court granted Declarator as sought, then the Council's negotiating position would be strengthened and further litigation may not be necessary. Obtaining the Declarator sought would however provide a solid foundation for further Court action against those whose titles encroach on the River.
- (iii) The Action of Declarator may establish the local community's Common Good rights in respect of the River which could assist the Council in proving possession of the River (see paragraph 3.10 below).

3.9.3 The disadvantage of raising this Action is the cost involved. Any Court action is subject to challenge, may involve significant expense and has no certainty of a successful outcome.

3.9.4 It would, therefore, be prudent to obtain Counsel's Opinion on the likelihood of success prior to raising Court Action.

3.10 Option 4 - Appealing the Keeper's Decision to the Lands Tribunal/ Court of Session

- (i) The Professor's view was that it may be difficult for the Council to provide sufficient evidence of possession of the River.
- (ii) The Council has carried out certain works in respect of the River (e.g. removing sunken boats and carrying out some flood prevention/riverbank strengthening works). However, regular maintenance works such as the dredging of the River ceased some decades ago and the Council is no longer actively involved in regulating moorings. Identifying positive acts by this Council evidencing their possession of the River Leven has been problematic. Such evidence would be necessary in order to succeed in any Appeal.
- (iii) It would appear that, historically, the River has been viewed as a liability rather than an asset and, in the past, there has been some reluctance to become involved with River Leven issues. This is probably because of the potential costs involved. However, for the purpose of obtaining evidence of possession, a more active involvement would have been helpful.

4. Personnel Issues

4.1 If the Council assumed a more active role in dealing with issues affecting the River, and took on responsibilities such as regulating moorings or dredging operations, then additional personnel may be required.

5. Financial Implications

5.1 If the Council embarks on Court action to clarify its rights in the River Leven considerable costs may be incurred.

- 5.2 While obtaining Counsel's Opinion as mentioned at paragraph 3.9.4 also involves expense, this would at least give an indication of whether such Court action is likely to be successful.
- 5.3 If the Council assumed a more active role in dealing with issues affecting the River Leven, and took on responsibilities such as regulating moorings or dredging operations, then there would also be cost implications.

6. Risk Analysis

- 6.1 Should the Council embark on Court or Compulsory Purchase proceedings there is always the risk that such proceedings are not successful. This would involve the Council in significant costs. Obtaining Counsel's Opinion would mean that the level of risk involved in raising a Court Action is easier to assess.
- 6.2 However, if the Council takes no action, then there is the risk that local boat owners will have difficulty obtaining moorings at reasonable cost, and that the lack of regulation of the moorings may affect safety and have an adverse impact on tourism.

7. Conclusions

- 7.1 Given the uncertainty of success in any litigation proceedings, the significant costs involved and the lack of active involvement in matters dealing with the River Leven over a period of many years, the obvious recommendation is to take no further action.
- 7.2 However the River Leven is a significant community asset with great potential and, both geographically and historically, a defining feature of West Dunbartonshire.
- 7.3 Accordingly, it would seem that obtaining Counsel's Opinion would be the appropriate way forward at this stage.

8. Recommendations

- 8.1 The Committee is asked to note the position with regard to the title situation.
- 8.2 The Committee is asked to authorise officers to obtain Counsel's Opinion as regards the chances of success of an Action of Declarator and thereafter revert to Committee with a further Report detailing further options and the anticipated costs involved.

.....
David McMillan
Chief Executive
Date: 27 August 2007

Person to Contact: Susan Milne, Solicitor, Legal and Administrative Services
Telephone: 01389 737823
E-mail: susan.milne@west-dunbarton.gov.uk

Appendix: Letter from Scottish Enterprise of 19 July 2007.

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

Conveyancing Opinion.

Wards Affected: Lomond, Leven and Dumbarton.