



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 57

P941/18

OPINION OF LORD BOYD OF DUNCANSBY

In the cause

COLIN LIDDELL AND OTHERS

Petitioners

for

Judicial Review

Petitioners: J D Campbell QC; BBM Solicitors
Respondent: J Findlay QC; N McLean (sol adv); Brodies

31 July 2019

[1] This is the petition of the proprietors of Ardencaple House, an 18th century list B house situated at Clachan Seil, Isle of Seil, Argyll and Bute. They seek reduction of a decision by Argyll and Bute Council to grant planning permission for the erection of a single dwelling house and associated development. The decision was taken under delegated powers on 28 June 2018.

Background

[2] Ardencaple House lies approximately 1.5 km north east of the proposed development site. It is agreed that the site occupies a relatively high ridgeline in the Isle of

Seil landscape Area of Panoramic Landscape Quality (APQ). APQ's are of regional importance. The petitioners aver in paragraph 13 as follows:

“[Ardencaple House] occupies a prominent position at the end of an access road, overlooking a valley and wetland to the south and southwest. It is designed and positioned especially to capture the uninterrupted aspect of the panoramic quality of a segment of the Isle of Seil facing southwest towards a ridge, located at a distance of approximately 1.5km from the house. Its immediate curtilage faces south west towards the ridge upon which the proposed development would be built. Its setting, which is more extensive, is the uninterrupted aspect of receding open landscape diminishing in height before rising, in the same aspect, to the ridge or saddle where the proposed development is to be located. The ridge line, viewed from Ardencaple House is entirely uninterrupted by any built development, utility wires, poles, pylons or other vertical structures, other than trees.”

[3] At paragraph 8 the petitioners aver that:

“there will be no backdrop for the proposed development save for the very distant hills. It will therefore stand out as a high profile intrusion on the skyline, clearly visible from Ardencaple House and its curtilage and setting, and therefor upon its setting.”

[4] Other than admitting that Ardencaple House was constructed in the 18th century and is listed there is no admission by the respondent as to the setting of the House or that it was constructed to take advantage of the views. The respondent points out that there is no mention of the views in the listing. It suggests that the ridge line is interrupted by the corner of an agricultural building and a wooden pole. The respondent also avers that the skyline is not affected as the development will be seen against a backdrop of substantial existing land mass at considerably higher location. There is a dispute between the parties as to whether, and if so by how much, the proposed house is higher than surrounding buildings. I do not consider it necessary to resolve that issue.

[5] The majority of the application site, and where the development is proposed, falls within the minor settlement of Clachan Seil. Local Plan Policy LDP DM 1 gives encouragement to small scale developments on appropriate sites subject to compliance with

other policies and statutory guidance. The application was for a small scale development of one house. Accordingly development is in accordance with the plan unless it conflicts with other policies and in particular LDP 9. The petitioners submit that there was a failure to apply LDP 9 fully and completely. That policy requires that developments are to be compatible with their surroundings. Particular attention is to be given to the massing and design details within, amongst other locations Areas of Panoramic Quality and the settings of listed buildings. Within such locations the quality of design will require to be higher than in other less sensitive locations and where appropriate in accordance with the guidance set out in "New Design in Historic Settings" produced by Historic Scotland. (This document appears to have been replaced or updated by "Managing Change in the Historic Environment" (Managing Change) published by Historic Environment Scotland).

[6] An objection to the application was lodged by Baird Lumsden on behalf of Julian Taylor, one of the trustees and petitioners. It makes no mention of Ardencaple House's listed status or the reasons for the listing. However one of the grounds of objection was that the development will have a significant landscape and visual impact and that it will be particularly noticeable from the north-west from Ardencaple House. It points out that the development will be prominent on the ridge line and will be the only manmade feature across an otherwise natural panorama of interlocking ridges against a backdrop of Barr Aille on the mainland. The objections suggests that the application must not be determined until a site visit is made to Ardencaple House by the case officer and this view is understood.

[7] This invitation to visit Ardencaple House was repeated by email. The case officer Fiona Scott discussed this with her superior and it was decided that it was unnecessary to visit the House before determining the application.

Grounds of review

[8] There are two grounds of review. First the petitioners submit that the respondent failed in its duty under section 25 of the Town and Country (Scotland) Act 1997 which states that in making determinations under the Planning Acts the determination should be in accordance with the development plan unless material considerations determine otherwise.

[9] The second ground is an alleged failure by the respondent to consider the desirability of preserving a listed building and its setting, contrary to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, (the Act) section 59(2) which states that in the exercise of its powers the planning authority shall have regard to the desirability of preserving features of special architectural or historic interest and, in particular, listed buildings.

The legal background

[10] There is no legal definition of setting. As Sullivan LJ noted in *R (The Friends of Hethel Ltd) v South Norfolk District Council* [2011] 1 WLR 1216 (at paragraph 32) it is very much a matter of planning judgement for the local planning authority. In *R (Williams) v Powys County Council* [2018] 1 WLR 439 Lindblom LJ listed some of the factors that might be significant:

“Typically, I think, they will include the nature, scale and siting of the development proposed, its proximity and likely visual relationship to the listed building, the architectural and historic characteristics of the listed building itself, local topography, and the presence of other features—both natural and man-made—in the surrounding landscape or townscape.” (paragraph 53)

He continued:

“Clearly, however, if a proposed development is to affect the setting of a listed building there must be a distinct visual relationship of some kind between the two—a visual relationship which is more than remote or ephemeral, and which in some

way bears on one's experience of the listed building in its surrounding landscape or townscape. This will often require the site of the proposed development and the listed building to be reasonably close to each other, but that will not be so in every case. Physical proximity is not always essential." (paragraph 56)

[11] In *Managing Change*, setting is described as the way the surroundings of a historic asset or place contribute to how it is understood, appreciated and experienced. The setting can incorporate a range of factors which include views to, from and across or beyond the historic asset or place and views from within an asset outwards over key elements in the surrounding landscape such as the view from a principal room of a house or from a roof terrace.

[12] *Managing Change* identifies three stages in assessing the impact of a development in the setting of an historic asset. Stage 1 is to identify the historic assets that might be affected by the proposed development. The initial approach should include all the potentially affected historic assets and places including those relatively distant from the proposal. Stage 2 is to define and analyse the setting and stage 3 is to evaluate the potential impact of the proposed changes on the setting.

[13] In *Simson v Aberdeenshire Council* 2007 SC 366 the petitioner was the owner of an A-listed house known as the "Gallery". He sought a judicial review of the decision to grant planning permission to a windfarm development over 5 miles away from the Gallery. An environmental statement was submitted along with the application. Although the study area took in the Gallery there was no mention of it or its setting. Historic Scotland responded during the consultation period that in respect of the historic landscape and listed buildings they were content to agree with the findings of the environmental statement. Before permission was granted the planning committee gave objectors, including the petitioner, the opportunity to address the committee. The report from planning officers did

not include any mention of the Gallery or its setting. The petitioner argued that the Council had failed to carry out an assessment as required under the Act. The Extra Division (Lord Abernethy and Lord Eassie; dissenting Lord Mackay of Drumadoon) held that it was for the planning authority to determine how much information is required for it to determine the application. In so holding Lord Abernethy (at paragraph 23) agreed with Sullivan J in *R v Rochdale Metropolitan Council* [2001] Env LR 22 (wrongly cited in *Simson* as 406). It is worth quoting Sullivan J; it is not controversial but is sometimes forgotten.

“It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority's judgment in that matter in all but the most extreme cases.” (paragraph 108).

[14] Reverting to *Simson*, Lord Eassie noted that the duty under section 59(2) of paying special regard to the desirability of preserving the building or its setting arose only if the proposed development would affect its setting. He noted that counsel for the petitioner (who also appeared for the petitioners in this case) accepted that whether that gateway criterion was met was a matter of planning judgement (paragraph 37).

[15] I draw from this brief review the following considerations. First there is no special or legal definition of “setting”. Rather it should be given its natural meaning. Secondly in its application in any particular case there are a number of factors which may be considered. These include matters which are inherent in the property itself such as its architectural design and its historical significance. But it may also include external features such as its place in the landscape and its relationship to other features whether natural or manmade. Thirdly in considering the effect of a proposed development on the setting of a listed building there needs to be some distinct visual relationship between the two. As Lindblom LJ put it in *Williams* such a relationship needs to be more than remote or

ephemeral and bear on one's experience of the listed building in its surrounding landscape. Fourthly although the visual relationship will normally be taken from a point external to both the development and the listed building it may also be a relationship which is appreciated from the listed building as in a view from the building which encompasses the proposed development. Again however the relationship must be more than remote or ephemeral and bear on one's experience of the listed building in its landscape. On this last point however some care is required. As counsel for the petitioners pointed out, as a matter of planning law nobody is entitled to a view. Accordingly the fact that the development might be seen from the listed building is not in itself material. Something more is required; there must be some relationship between the view from the building and its setting. In determining the materiality of that relationship regard should be had to the reasons for its listing. Fifthly the decision on whether the duty under section 59(2) is engaged is a planning judgement for the planning authority. It is for the planning authority to determine whether it has sufficient information to determine an application, subject to the review by the court where it steps outside its statutory obligations.

The respondent's decision

[16] This was a delegated decision. There is a report of handling dated 27 June 2018. It was compiled by Fiona Scott and reviewed by Tim Williams. The report deals with the objection by Baird Lumsden. So far as views from Ardencaple House is concerned it notes that it is accepted that the development occupies a relatively high point in the landscape; it is at the same level as existing development to the east and that when viewed from the north west will be seen

“in context against the rising hills to the south (this should read north) which will provide a suitable backdrop against which the proposed dwelling house will be appropriate within its local and wider landscape and in accordance with the existing settlement plan”.

Nowhere in the report is there any mention of the listing of Ardencaple House or its setting.

[17] The respondents have lodged two affidavits from Fiona Scott. The second merely corrects a minor error. Ms Scott is a planning officer having been in their employment since 1991. She has been in the Oban, Lorne and the Isles planning team since 2009. She explains that there are many listed buildings within this area and that she is familiar with the statutory provisions and guidance in Managing Change. She said that she first became aware of the proposed development in 2014 when she responded to a request for pre-application advice. She undertook a desktop assessment. She was aware of the listing Ardencaple House and its location in relation to the proposed development site. She did not identify Ardencaple House as a likely restraint on the proposed development due to its distance from the site. However “having the Duty in contemplation” (presumably the general duty in respect of listed buildings under section 59 of the Listed Buildings Act 1997) reserved judgement until she had visited the site which she subsequently did.

[18] On the site visit Ms Scott identified that Ardencaple House was visible looking out from the proposed development site at a considerable distance. She also assessed the proposed development site from a point adjacent to the agricultural building located next to the access road to Ardencaple House, looking backwards towards the site. This is a point approximately half way between Ardencaple House and the site. She continues that from this viewpoint she was satisfied that in her professional opinion,

“having regard to

1. The distance between the proposed development and Ardencaple House of approximately 1.5km;

2. The character of the landscape and landform between the proposed development site and Ardencaple House; and
3. The topography

That development upon the site of the type encouraged within the settlement zone as defined in the local development plan would not affect Ardencaple House or its setting, and that the presence of Ardencaple House would not be a restraint to that type of development. I determined, having undertaken as (sic) assessment on site, that the Duty would be engaged but that the type of development encouraged within the settlement zone would have no affect on Ardencaple House or its setting.”

[19] Between the response to the request for pre-application advice and the lodging of the planning application Ms Scott made another visit to the site with others to determine whether it might be included within the development plan. Subsequently Ms Scott was assigned the planning application and undertook a further visit on 30 April 2018. She had regard to the pre-application advice. She said that she was satisfied in terms of the duty the proposed development would not affect Ardencaple House or its setting. Accordingly she did not require to have special regard to the desirability of preserving Ardencaple House or its setting when determining the application. In doing so she exercised her professional judgement. She further explained that having identified that this was not a determining issue she was not required to address it in her report of handling.

Submissions

[20] Counsel for the petitioner relied on his note of argument. He emphasised that there was no mention of Ardencaple House on the report of handling. Ms Scott’s affidavits looked as if they had been prepared by someone else conscious of the legal consequences of her position. He took exception to various passages in the affidavits. He submitted that it was clear that whatever assessment had been undertaken Ms Scott had at no time visited Ardencaple House, despite requests that she do so. The nearest she had got was half way to

the house. She had never attempted to assess the extent of the actual setting of the house. She had not assessed the proposed development against policy LDP ENV 16(A). She did not evaluate the significance of the distance or visibility other than to state it correctly as 1.5km.

[21] Counsel for the respondent emphasised that Ms Scott had undertaken three visits to the site and its vicinity. The petitioner had relied heavily on the failure by Ms Scott to visit Artdencaple House. As the argument had developed the issue had narrowed to whether or not it was possible to assess the impact of the development on the setting of the House without visiting the house. He submitted that it would be extraordinary if a court was to hold that the failure to do so was an error of law.

Discussion

[22] I am satisfied that there is no error of law in the decision made by the respondents. Nor is the decision irrational. It should be remembered that this was an application for a single dwelling house in an area which was the subject of a local plan policy which, subject to compliance with other policies, and, in particular for these purposes LDP 9, supported development on this site. LDP 9 requires the design of development and structures to be compatible with the surroundings. Particular attention is to be given to the massing, form and design details within sensitive locations. The long list of locations includes the setting of listed buildings. The report of handling makes clear that this policy was addressed. In the reasons section the report states that the proposal accords with, *inter alia*, LDP 9.

[23] Counsel for the petitioner criticised the affidavits from Ms Scott. However I have no reason to go behind these documents. The affidavits show that Ms Scott was familiar with the area having visited three times in connection with proposed development. While it is true that she did not visit Artdencaple House itself, despite being asked to do so, she did in

fact walk half way towards the house during the visit on the pre-application assessment. She said that she was satisfied that development within the development zone would not affect Ardencaple House or its setting and gave her reasons for her opinion. While she was asked to make a visit during consideration of the application she made a judgement, in conjunction with her supervisor, that such a visit was not required.

[24] I am not satisfied that Ms Scott's failure to visit the House amounts to a failure to take into account a material consideration or was irrational. I agree with counsel for the respondent that it would be an odd and unwelcome development in planning law if courts were to tell planning officers that before they could make a professional judgement on whether the setting of a listed building was affected by a development they must visit the building itself.

[25] It is clear on the authorities and in particular *Simson*, that the question as to whether the threshold or gateway for the application of section 59(2) of the Act was matter for the planning authority. The affidavit from Ms Scott demonstrates that the respondent considered that the threshold had not been reached. That being the case it was not necessary to mention it in the report of handling. Indeed to do so might be regarded as otiose. In planning law parlance it was not a determining issue.

[26] In their note of argument the respondents submit that even if there was a failure as averred by the petitioners the court should exercise its discretion to refuse the petition. In the circumstances I do not need to decide this issue.

Decision

[27] For these reasons I shall sustain the second plea in law for the respondents and refuse the petition.