**OUTER HOUSE, COURT OF SESSION**

**[2021] CSOH 93**

**P963/20**

OPINION OF LORD WEIR

In the cause

WESTEND RESIDENTS CIC

Petitioners

against

DUNDEE CITY COUNCIL

Respondents

**Petitioners: Logan; Campbell Smith LLP**
**Respondents: Armstrong QC; Gillespie Macandrew LLP**

10 September 2021

**Introduction**

[1] The petitioners are a community interest company incorporated to represent the interests of the residents of the West End Suburbs Conservation Area ("the conservation area") in the city of Dundee. The respondents are the planning authority for the Dundee City Council area in terms of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"). Blackness Avenue is a residential street situated within the conservation area.

[2] On 1 September 2020 the respondents granted an application submitted through their agent, Steve Pyer of "Ride On Scotland", for planning permission for the installation of an e-bike docking station, comprising 10 docking points and a terminal ("the

development"), on the public footpath outside the entrance to the Category B listed tenement property at 5 Blackness Avenue ("the Permission"). The petitioners, on various grounds, seek declarator that the Permission purportedly granted is *ultra vires* and of no effect.

**Background**

[3] The background to the submission of the application for planning permission for the development is taken from a report by Suller & Clark (no 6/8 of process) prepared on behalf of the petitioners in November 2020 as part of a review of the granting of the Permission, the essential facts of which I did not understand to be disputed. The original proposal was part of a wider E-bike scheme being developed throughout the Dundee City Council area by the petitioners and their application agent, Ride on Scotland. There had already been a number of other applications for E-bike docking stations granted throughout the city, albeit primarily in sites within the existing public realm in commercial, industrial, retail or education environments on main thoroughfares. The only other application relating to a site adjacent to residential properties, on the footpath at Magdalen Yard Road, Dundee, was objected to by residents and withdrawn.

[4] The application with which this petition is concerned was submitted on 20 September 2019, and advertised in the Evening Telegraph as a development affecting a conservation area on 6 December 2019. It attracted five letters of objection on issues relating to (i) adverse effect on a listed building, street scene and conservation area; (ii) noise nuisance; (iii) poor design; (iv) privacy and overlooking of neighbours affected; (v) road/pedestrian safety, (vi) impact on access to waste bins and parking spaces; and (vii) unsuitability of the site where disability access was required.

[5] The application was subsequently assessed by an appointed officer of the respondents, Caitlin Duffy. Her assessment was recorded in the "Report of Handling by Appointed Officer" dated 31 August 2020 (no 6/2 of process). Following Ms Duffy's assessment and consideration of the application, Robert Gray, a senior manager in the respondents' planning team, authorised the decision to approve planning permission. The Permission was duly issued on 1 September 2020 (no 7/10 of process).

**Legal framework**

[6] Regulation 13 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 ("the 2013 Regulations") provides *inter alia* as follows:

> "**13.– Design and access statements**
>
> (1) Subject to paragraph (3), an application for planning permission for development belonging to the categories of national developments or major developments must be accompanied by a design and access statement.
>
> (2) Subject to paragraph (3), an application for planning permission belonging to the category of local developments where the land to which the application relates is situated within–
>
> (a) a World Heritage Site;
> (b) a conservation area;
> (c) a historic garden or designed landscape;
> (d) a National Scenic Area;
> (e) the site of a scheduled monument, or
> (f) the curtilage of a category A listed building,
>
> must be accompanied by a design statement other than where the development in question comprises the alteration or extension of an existing building.
>
> (3) This regulation does not apply to –
>
> (a) an application for planning permission made under section 42 of [the Town and Country Planning (Scotland) Act 1997];
> (b) an application for planning permission for –

(i) engineering or mining operations;
(ii) householder development, or
(iii) a material change in the use of land or buildings: or

(c) an application for planning permission in principle.

(4) A design statement is a written statement about the design principles and concepts that have been applied to the development and which-

(a) explains the policy or approach adopted as to design and how any policies relating to design in the development plan have been taken into account;
(b) describes the steps taken to appraise the context of the development and demonstrates how the design of the development takes that context into account in relation to its proposed use; and
(c) states what, if any, consultation has been undertaken on issues relating to the design principles and concepts that have been applied to the development and what account has been taken of the outcome of any such consultation."

[7] Paragraph 4.9 of the Dundee Local Development Plan 2019 ("the Local Development Plan") provides as follows:

> "Design statements will be required to accompany planning applications for all National and Major developments and for Local developments where it affects the character and/or appearance of a Conservation Area, Historic Garden/Designed Landscape, curtilages of Category A listed buildings or the site of a Scheduled Monument. A design statement may also be required to accompany a planning application for other forms of development where design sensitivity is considered a critical issue."

**Submissions for the petitioners**

[8] Counsel for the petitioners submitted that there were serious errors in the process by which the permission was granted. In particular, it was a matter of agreement that no design statement was prepared to accompany the application for planning permission. That the application should have been accompanied by a design statement was a mandatory requirement of regulation 13(2) of the 2013 Regulations. Counsel recognised that regulation 13(3) listed certain exceptions to that requirement, and that those exceptions

extended to an application for planning permission for engineering operations. The respondents appeared to place reliance on that exception but that reliance was *ex post facto* and disingenuous. The respondents had lodged an affidavit sworn by Caitlin Duffy on 7 April 2021. She was the planning officer responsible for assessing the application for its compliance with statutory requirements. It was apparent from her affidavit that Ms Duffy did not give any consideration to the question whether the installation of the docking station connoted an engineering operation at all. In considering whether a design statement was required all she appeared to have done was compare the application with other applications and/or developments where she had previously required one.

[9] In any event, the installation of a docking station could not properly be characterised as an engineering operation. Section 277 of the 1997 Act defined "engineering operations" as including "the formation or laying out of a means of access to roads". That definition was scarcely helpful. But the term should be given its ordinary meaning in the English language. It must mean operations of the kind usually undertaken by an engineer in the sense of calling for the skills of an engineer (*Fayrewood Fish Farms Ltd* v *Secretary of State for the Environment and Hampshire Council* [1984] JPL 267). Whether or not something was an "engineering operation" was a matter of statutory construction and not one where the court was obliged to defer to the planning authority as a matter of "planning judgment". Approached on that basis there was nothing in the installation of a completed docking station containing docking points which required an engineer, or involved an engineering operation.

[10] The argument advanced by the respondents that the Report of Handling addressed all of the issues which would have been raised in a design statement should be rejected. Design statements required to be drafted in accordance with policies and principles in both

Planning Advice Note ("PAN") 68 and PAN 78. Preparation of a design statement triggered a process which was iterative in character, and different from that which would be followed where no such statement was necessary. For example, in meeting the requirements of regulation 13(4) of the 2013 Regulations, a design statement would require an appraisal setting out how such a modern adaptation as the docking station would fit in with the surrounding conservation area in a position outside a listed building. It would also require to state what consultation had been undertaken in relation to the design principles and concepts that had been applied and what account had been taken of the outcome of any such consultation. It was clear that the Report of Handling fell far short of the requirements for a design statement. It stated in terms that "no consultations were received" when there was a positive obligation to initiate such consultation. Moreover, the policy considerations in the Report of Handling were entirely in the context of the Local Development Plan. Neither PAN 68 nor PAN 78 were even mentioned. Had a design statement accompanied the application for planning permission it was possible that a different decision may have been reached. The petition was not, therefore, academic. The absence of a design statement vitiated the decision to grant planning permission for the development, and the order for declarator should be granted as craved.

**Submissions for the respondents**

[11] It will be apparent from my summary of his submissions that counsel for the petitioners' concentration was on the absence of a design statement from the application for planning permission, and the legal effect of that. He did not make submissions in support of those averments in the petition which criticised the consistency of the grant of planning permission with policies 51, 49 and 8.60 of the Local Development Plan (statements 6(d), (e)

and (f), respectively). To the extent that a substantial part of senior counsel's response dealt with those issues, I have not considered it necessary to rehearse those submissions at this point.

[12] However, addressing those arguments which were insisted on, senior counsel referred to four particular points from which he submitted that the petition should be refused. First, the lack of a design statement was not an issue identified by any person who did object to the application. Indeed the petitioners' own planning consultants had not raised it as an issue, and the petitioners had produced no expert evidence either that a statement should have been submitted or that the installation of the docking station was not an engineering operation.

[13] Secondly, the planning officer who processed the application, Ms Duffy, did not consider that a design statement should have accompanied the application. In any event, the officer who authorised the decision to approve planning permission for the application to install the docking station, Mr Gray, considered that the installation of the docking station could "reasonably be taken to constitute engineering operations" (affidavit of David Gray dated 11 March 2021). That was a matter of judgment which, in the absence of any evidence to the contrary, was not open to challenge. Accordingly, the petitioners had not made out a basis for the assertion that a design statement should have accompanied the application for planning permission.

[14] Thirdly, the petitioners had neither averred nor submitted that the respondents, or their planning officer, had failed to consider the proposed development against policy 1 of the Local Development Plan. Policy 1 was concerned with design. It was all-encompassing and provided the test for determining whether a development met the requirement for high quality design and placemaking. While a design statement was no doubt intended to assist

in that determination, whether a development complied with policy 1 was a matter of planning judgment for the planning officer. The Report of Handling set out the basis upon which it was concluded that it did, and that conclusion was not itself challenged.

[15] In that connection, senior counsel rejected the petitioners' submission that the Report of Handling did not address all of the issues which might have arisen in a design statement. That submission was made under reference to PAN 68 and PAN 69. PAN 68 provided advice on design statements and why they were useful tools but recognised that they could be presented in various formats. PAN 78 similarly provided advice on inclusive design. But both were advisory documents. The assessment of the proposal against the relevant development plan policies and other material considerations set out in the Report of Handling covered all of the issues which were relevant to the determination of the application for planning permission. Reliance on the reference in the Report on Handling to the absence of consultations having been received was misconceived. That was properly understood to be a reference to consultations involving other local authority departments.

[16] Accordingly, fourthly, even if the court was of the view that a design statement should have accompanied the application, it was submitted that the petitioners had suffered no substantial prejudice by its absence. An applicant will be refused a remedy when he complains only of a procedural failure if that failure has caused him personally no such prejudice (*Walton* v *Scottish Ministers* [2012] UKSC 44, paragraph [112]). The Report on Handling set out an assessment of the proposal against the policies of the Local Development Plan and an appraisal of the context of the development, along with consideration of the objections which were received. These were precisely the sort of matters which, under regulation 13(4) of the 2013 Regulations, ought to be considered in a

design statement. The petitioners had not set out why it was substantially prejudiced by the absence of a design statement.

**Analysis and decision**

[17] The discussion before me ultimately became a narrow one. In summary, the petitioners' submission was that the absence of a design statement from the application for planning permission vitiated the Permission upon which the installation presently *in situ* at the bottom of Blackness Avenue depended. Had there been a design statement the impact of the Permission on the immediate vicinity of the listed building at 5 Blackness Avenue, and the character of the surrounding Conservation Area, would have been given proper consideration. The respondents' submission was that there was no requirement for a design statement, the installation of a docking station being in the nature of an engineering operation. Even if such a requirement was held to exist it would not have raised any issues not comprehensively addressed by the planning officer in the Report of Handling, and no substantial prejudice had been suffered by the petitioners by its absence.

[18] In attempting to address these competing positions, there is force in the petitioners' submission that the respondents' characterisation of the installation of the docking station as an engineering operation is one reached *ex post facto*. In the application for planning permission (no 6/1 of process, p 6 of 7), the applicant answered the *pro forma* question whether a design statement had been provided in terms of 2013 Regulations, that such was "not applicable" to the application. That was against the background of the proposed development site plainly being located within the conservation area, and therefore falling within the scope of regulation 13(2), unless one of the specific exceptions in regulation 13(3) applied. How the matter was addressed by the respondents is to be found in the affidavit of

Caitlin Duffy, who was the planning officer to whom the application for planning permission was allocated. She deponed as follows:

> "I therefore required to consider the siting, design, scale, amenity and visual impact of the proposed development. As it was proposed to site the station adjacent to a listed building within a conservation area, it was necessary to consider the impact of the proposed development on the setting of the listed building and the character of the conservation area. I was aware that a number of objections had been submitted to the development, and it was therefore my role to consider these in the assessment of the application. I did not consider the application to be a case where a design statement was required, in comparison with and from knowledge of the nature and scale of other applications/developments where I had previously required one."

[19] If there had been a statutory basis for her not requiring the provision of a design statement, it is surprising that that was not stated explicitly in Ms Duffy's affidavit. Absent such a statement it is reasonable, in my view, to infer that Ms Duffy did not consider the implications, for the application for planning permission, of regulation 13(3) of the 2013 Regulations (as opposed to conducting a comparison of the application with others in which she had required a design statement). Close scrutiny of the respondents' pleadings discloses that it is not expressly averred that she did so (cf. answer 6 b.), even although elsewhere in the answers, and on various specific matters, there are references to the respondents' appointed officer having exercised planning judgment, and nor did senior counsel submit that she did. Rather, he did not appear to demur from the suggestion put by the court that the passage in her affidavit, quoted above, indicated that Ms Duffy had not addressed her mind specifically to the question whether the development constituted an engineering operation for the purposes of regulation 13(3). Moreover, the affidavit of her manager, Mr Gray, again makes no reference to Ms Duffy, or anyone else, having concluded that the installation of the docking station was an engineering operation at the time when

the application was submitted and considered. Instead it offers what is, in effect, an opinion that the development could "reasonably be taken to constitute engineering operations".

[20] That state of affairs renders somewhat sterile senior counsel's submission that whether something amounted to an engineering operation was not a matter of statutory construction and a question of law (as contended for by the petitioners), but rather a question of planning judgment. As it happens I consider that his submission was correct, and that whether or not a particular operation constituted an engineering operation was a matter of judgment for the decision maker, based on the facts presented, or on inference from those facts (*Coleshill & District Investment Co. Ltd.* [1969] 1 WLR 746, pp 756A-E; 760B-E). But that was a judgment which ought properly to have been made at the time when the application for planning permission, minus the design statement, was submitted because the land to which the application related *was* situated in a conservation area, and *prima facie* the requirement for a design statement in regulation 13(2), consistent with paragraph 4.9 of the Local Development Plan, *was* engaged. (Senior counsel submitted that paragraph 4.9 of the Local Development Plan was textual rather than a policy, and that it was the policies of the Local Development Plan (and, in particular, policy 1) against which a proposal required to be considered. That is no doubt correct. But the text is relevant in as much as it may be taken to inform the process by which the respondents envisage that the policy objectives will be capable of achievement).

[21] The nature and appearance of the docking station, as clearly illustrated in the photograph lodged at no 6/9 of process, might induce on the part of many a degree of scepticism about the respondents' late characterisation of the installation of the docking station as an engineering operation. If it was necessary to decide that issue, I should have been inclined to the view, in coming to it, that those features, taken with the obvious

intention of the applicant that the docking station be permanently located, as street furniture, within the conservation area, immediately adjacent to a listed traditional west end tenement, militated against a concentration on the process of installation rather than the end result. However, it is unnecessary to resolve the question either way. The point is that unless the relevant planning officer, in this case Ms Duffy, determined at the time that the installation of the docking installation constituted an engineering operation, the requirement for a design statement was applicable, and the application for planning permission was erroneous to state otherwise. Whatever conclusion she would have reached on the facts at that time cannot now be determined because it does not appear that any such judgment was exercised at all. That constituted a procedural failure in the planning process.

[22] The issue then comes to be whether that failure justifies the granting of decree of declarator that the Permission was *ultra vires* and of no effect. In that respect, the petitioners aver that "had there been a design statement the impact the permission ha[d] on the immediate vicinity of the listed building and Conservation Area would have been given proper consideration". Counsel for the petitioners refined that position in the course of argument to the proposition that, had there been a design statement, it was possible that a different decision may have been reached. He also submitted that the issue of material prejudice did not arise. It was enough that there was a statutory requirement which had not been followed. Conversely, senior counsel for the respondents submitted that a design statement would not have raised any issues not comprehensively addressed in the Report of Handling. If there had been a procedural error, the petitioners had not suffered any substantial prejudice (*Walton* v *Scottish Ministers* [2012] UKSC 44, paragraph [112], per Lord Carnwath). The court should refuse the remedy sought.

[23] The failure, which I have found to have occurred in this case, is procedural in character. I accept the respondents' submission that, absent any substantive defect, it is open to the court to refuse a remedy where no substantial prejudice has been shown (*Walton* v *Scottish Ministers, supra.*; *De Smith's Judicial Review* (8th Edition, paragraph 17-034). Given the petitioners' contention that, had a design statement accompanied the application, a different decision may have been reached, one might have expected their argument to illustrate, by reference to the Report of Handling, those aspects of the planning officer's assessment which were rendered deficient by its absence. But counsel for the petitioners made it clear during the course of his submissions that the petitioners no longer insisted in those arguments advanced in the petition which identified conflict between the Permission and the relevant policies set out in the Local Development Plan (and, in particular, policies 49 and 51, and the statement set out in paragraph 8.60 concerning compatibility with national policy and best practice guidance, and particularly Historic Environment Scotland Policy Statement 3 ("HEP3")).

[24] Against that background there is a superficial attraction to senior counsel's argument that proper consideration was given to the impact of the installation on the immediate vicinity of the listed building and Conservation Area, and that accordingly the absence of a design statement can have had no practical consequence. To illustrate that point he submitted that the Report on Handling addressed the twin issues of noise and "activity" associated with the use of the docking station and concluded – in a manner which was no longer criticised – that these features were not of sufficient weight to justify refusing the application. Similarly, the Report of Handling set out conclusions on the key relevant considerations in relation to the application of policies 49 and 51 of the Local Development Plan and the Conservation Area. As regards HEP3, senior counsel submitted that the Report

of Handling identified that there would be no detrimental impact on the Conservation Area. That was a planning judgment for the relevant officer to make and she had done so.

[25] However, I have ultimately come to the view that it would be inappropriate for the court, in the exercise of its discretion, to refuse the petitioners any remedy on this basis. I do not consider that it can be said with confidence that the outcome would not have been affected if, after proper consideration of the question, the respondents had required the submission of a design statement. The requirements for a design statement are clearly set out in regulation 13(4) of the 2013 Regulations. These include the requirement for an appraisal of the context of the development, how its design has taken that context into account, and what consultation has been undertaken on issues relating to the design principles and concepts that have been applied. It is, of course, correct that the requirement relating to consultation is qualified, in regulation 13(4) by the words "if any". But the point is that the process envisaged is one which is underpinned by clarity and openness about what is being proposed. That much is clear from the extracts from PAN 68, to which I was referred by counsel for the petitioners.

[26] The difficulty I have with the respondents' argument is that it appears to assume that a design statement is intended only for consideration by the planning authority. But that cannot be correct. Regulation 18 of the 2013 Regulations requires the planning authority to give notice of an application for planning permission to the "Owner, Lessee or Occupier" of neighbouring land. It no longer appears to be disputed that that was done in the instant case. Regulation 18(3) requires the notice to contain certain information about the application, including a statement as to "how the application, plans or drawings relating to it and other documents submitted in connection with it may be inspected". Similar wording is employed in the public notice (no 7/5 of process), which no doubt reflects the statutory

wording of the relevant regulation (which is stated in the notice, perhaps erroneously, to be regulation 5 of the Town and Country Planning (Listed Buildings and Conservation Areas) (Scotland) Regulations 1987; the wording is now reflected in regulation 8 of the Planning (Listed Building Consent and Conservation Area Consent Procedure) (Scotland) Regulations 2015). The wording is also reflected in the terms of the newspaper advertisement (no 7/4 of process). The conclusion is unavoidable that any design statement accompanying the application for planning permission would have been available for scrutiny by the public along with the application itself, even if not before the application was submitted. That serves to illustrate why it is that a design statement is a communication tool which enables others within the local community to understand the design rationale of a particular proposal and, ultimately, to participate in the planning process.

[27] It is impossible to know what the outcome of the process of public notification would have been had a design statement accompanied the application for planning permission in this case. One certainly cannot assume that the same five objectors, or only those five objectors, would have come forward with the same objections. It is significant though that, had there been one more objection, the matter would require to have been considered by a committee of the respondents. It is again no doubt correct, as the respondents aver in answer 5, that the committee would have had the same obligations in relation to the determination of the application as the appointed officer, Ms Duffy. But it does not follow that the committee would have reached the same conclusion as she did.

[28] Accordingly, I reject the respondents' submission that the petitioners can show no substantial prejudice arising from the procedural error which I have found to have occurred in this case. My conclusion that there was a procedural failure to address the question whether a design statement should have been submitted does of course leave open the

possibility that, on reconsideration, the respondents will take the view that it is unnecessary. But that decision-making process, advised by the terms of regulation 13(2) and (3) of the 2013 Regulations, must still be followed.

**Conclusion**

[29] It was not suggested by the respondents that the remedy sought was not one which could properly be granted if I were otherwise prepared to grant the petition. Accordingly I shall grant decree of declarator that the planning permission purportedly granted on 1 September 2020 for the installation of an e-bike docking station containing 10 docking points and a terminal at 5 Blackness Avenue, Dundee, is *ultra vires* and of no effect. All issues of expenses are reserved.