



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**[2025] CSIH 13
P868/23**

Lord Malcolm
Lord Armstrong
Lord Clark

OPINION OF THE COURT

delivered by **LORD MALCOLM**

in the reclaiming motion

by

SIMON McLEAN

Petitioner and Reclaimer

against

ABERDEEN CITY COUNCIL

Respondent

Petitioner and Reclaimer: Cherry, K.C, M Dailly, (sol adv); Drummond Miller LLP (for Govan Law Centre, Glasgow)

Respondent: N McLean, (sol adv); Brodies LLP

20 May 2025

[1] Mr Simon McLean lives in Torry, Aberdeen, and along with others uses nearby St Fittick's Park (the Park) for recreational, health and general wellbeing purposes. It is owned by Aberdeen City Council. These proceedings arise from a concern that part of the Park will be given over to industrial and business use. In 2021 ETZ Ltd was established as a private sector led not - for - profit company aiming to create what has been described as an "integrated energy cluster" focussed on delivery of net zero. In terms of the Aberdeen Local

Development Plan 2023, adopted by the Council in June 2023, an area of the Park was designated as part of an Energy Transition Zone at Aberdeen South Harbour with a policy presumption in favour of development related to renewable energy.

[2] In 2023 ETZ submitted a masterplan to the Council. While it was out for consultation, the Chief Officer of the Council's Corporate Landlord function prepared a report to the Council entitled "Land Options within the Energy Transition Zone", the stated purpose being to provide an updated position on the planning status of the land under Council ownership. It presented options to develop three sites, including part of the Park, in a strategic Partnership with ETZ and the Port of Aberdeen to drive a transition towards renewable energy technologies and sustainable practices.

[3] The author's recommendations included that the Park be made available to support future investment and development in the Energy Transition Zone, whilst also improving local amenity; that it should remain in Council ownership; and that he should enter into discussions as to optimum partnership arrangements and consider how returns could be re-invested in the Zone and the local community. The outlined options were: (i) do nothing, (ii) development by the Council, (iii) sale of the sites, and (iv) development in partnership with ETZ and the Port. It was recognised that if delivered the proposals would involve greenfield land being developed for business use which may generate objections. It was stated that an integrated impact assessment was not required at this stage.

[4] The report was considered by the Council on 11 September 2023. The resultant resolution included the following. The Park and another site should remain in Council ownership and only be available for lease where an end user and financial terms were agreed by the Council. The Chief Officer should begin formal dialogue with ETZ and the Port to discuss the optimum partnership arrangements to take forward the future

development of the sites and ensure delivery of the outcomes identified by ETZ in its masterplan and in the North East Regional Economic Strategy. There would be engagement with ETZ, the Port, and any other interested party as to any development proposals, including mitigation measures relative to the impact on local residents. Consideration was required as to how a proportion of the lease income could be used for the benefit of the local community, with approval of any leases contingent on approval of the community benefit package. The outcome of discussions was to be reported to the Council.

[5] Mr McLean lodged a petition seeking judicial review of the resolution of 11 September 2023 and an order setting it aside so far as it concerns St Fittick's Park. The resolution was challenged on the basis that certain of the councillors had a personal interest or apparent personal interest in ETZ, and thus the decision was vitiated by apparent bias. It was also contended that industrial development of the Park had been predetermined by the Council thus it had fettered its discretion, and separately, there had not been a fair process in breach of the petitioner's legitimate expectation. Furthermore it was submitted that the Council failed in its public service equality duty under section 149 of the Equality Act 2010 when reaching what was described as a policy decision in relation to the Park; and it ought first to have carried out an equality impact assessment in terms of Regulation 5 of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. It is said that this would have identified the impact of development of the Park upon those with the protected characteristics of age and disability.

[6] The Lord Ordinary's and this court's attention was drawn only to the proposition that an equality impact assessment was required in respect of the Chief Officer's report so far as it related to the Park; the remaining complaints were either refused permission or not maintained. The Council lodged an affidavit from the author of the report which recorded

his view that at its meeting the Council had not made a decision to lease the Park for development. Until a number of matters became clear he would be unable to make a recommendation as to its future use.

[7] In the view of the Lord Ordinary (see [2024] CSOH 77) the Council did no more than rule out selling the Park and authorise discussions with potential developers/tenants as to what development of the Park and other areas might entail. The desire was to collect information which would then be reported to the Council. Logically that process should precede the exercise sought by Mr McLean. An equality impact assessment at this stage would have to be done without knowledge of the proposal under consideration. It was noted that there had been no challenge to the designation of the Park as suitable for development in the Aberdeen Local Development Plan. The passing of the resolution of 11 September 2023 in the absence of an equality impact assessment involved no breach of statutory duty thus the petition was refused. The petitioner has reclaimed (appealed) that decision to this court.

[8] The Lord Ordinary described the issue in dispute as a very narrow point. We agree. The key submission before this court was that the Lord Ordinary erred in his characterisation of the Council's resolution. Contrary to the description suggested by the Council, it was not "a step along the way" of a wider decision-making process; the resolution was an important policy decision approving development of the Park. It followed that the public service equality duty was engaged.

[9] Various authorities on the subject from England and Wales were cited, however there was nothing between the parties as to the law. We do not consider it necessary to rehearse the well-established legal principles relating to the section 149 obligations on the Council; they can be found in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA

Civ 1345 at paragraph 25. It is plain that not every decision by a public body requires an equality impact assessment; were it otherwise public administration would grind to a halt.

In *Sheakh v Lambeth LBC* [2022] EWCA Civ 457 it was noted that section 149 does not mandate the production of an assessment at any particular moment in a process of decision-making (paragraph 10). In *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 it was observed that, generally, judicial review is concerned with actions or other events which have, or will have, substantive legal consequences (paragraph 32).

[10] The determining factor here is whether the proposition that the resolution was a policy decision which approved development of the Park is well-founded. In our view it is not. We have not identified any flaw in the Lord Ordinary's reasoning. The resolution of 11 September 2023 concerning the Park occurred in the policy context of it having already been designated in the Aberdeen Local Development Plan as potentially suitable for development, including industrial use. That designation was not challenged. Any development of the Park is contingent on the grant of planning permission and a Council resolution to lease the Park. Unlike the resolution of 11 September 2023, both of those decisions carry the potential to create substantive legal rights. However, the resolution under challenge involves no more than the ingathering of information in the light of a policy decision already made and which may, or may not, lead to a process which does engage the public service equality duty. It cannot be said that, in the absence of a specific proposal, the view that an equality impact assessment was not required was unreasonable or erroneous in law. As submitted for the Council, it was entitled to await details as to any proposed development, including the economic and social effects; potential mitigations; any community benefits; and the potential for re-investment arising from a transaction.

[11] Some reliance was placed on the drilling of bore holes in the Park, but this did not change the nature of the impugned resolution. We were informed that drilling was allowed by a licence granted under delegated powers as part of the information gathering process, specifically regarding ground conditions and any restraints on development. The submission based on the 2012 Regulations does not advance matters. Regulation 5 and the potential engagement of the section 149 duty arises only in the context of the application of a proposed new or revised policy or practice.

[12] For these reasons the reclaiming motion is refused. We adhere to the Lord Ordinary's refusal of the petition in his interlocutor of 7 August 2024.

[13] By way of a postscript it can be noted that planning permission in principle for development of land, including part of the Park, was granted subject to conditions on 24 January 2025. It was preceded by an integrated impact assessment dated 30 October 2024 which, among other things, considered Equality Act 2010 protected characteristics. On behalf of Mr McLean it has been submitted that it failed to comply with the statutory requirements; however, given the court's decision that the challenge to the resolution of 11 September 2023 was properly refused, the competence or otherwise of that subsequent assessment is of no relevance in this reclaiming motion.