Neutral Citation No. [2002] NIQB 53 | *Ref:* **COGH3228**

Judgment: approved by the Court for handing down | *Delivered:* **10/10/02**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BARRY GILLIGAN, VALERIE ALLEN, ANTHONY COX, MAEVE FEE, HENRY GLOVER AND MALONE PARK RESIDENTS' ASSOCIATION FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE PLANNING SERVICE OF THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND DATED 16 JANUARY 2002

COGHLIN J

[1] The first five-named applicants are the beneficial owners of properties situate at Malone Park and Malone Park Lane, Belfast while the sixth-named applicant is Malone Park Residents Association Ltd ("the Association"), a limited liability company having its registered office at Malone Park, Belfast. The members of the sixth-named applicant are residents of Malone Park, Malone Park Central and its Board of Directors. By means of these proceedings the applicants seek to judicially review a decision of the Planning Service of the Department of the Environment ("the Department") taken on 16 January 2002 granting planning permission to Stephen McComb ("the notice party") for the conversion of 3 Malone Park into residential accommodation comprising five apartments.

Background facts

[2] In December 1993 in the course of providing the introduction for the Department's document designating Malone Park/Adelaide Park as Conservation Areas, Robert Atkins, then Minister of the Environment and the Economy wrote as follows:

> "The Malone area of South Belfast is developed as a high quality residential environment containing one of the

> largest concentrations of individually designed Edwardian and Victorian villas in the Province. The growth of this prestigious suburb was linked to the emergence of Belfast as a major industrial centre and the desire by the wealthy to move away from the city centre.
>
> Today the character of the suburb is threatened by redevelopment, infill and changes of use and a number of localities have already changed substantially. However, within this wider area Malone and Adelaide Parks retain much of their original character and remain as fine examples of a turn of the century housing environment of some distinction."

[3] 3 Malone Park originally comprised a two storey, double-fronted, red bricked Victorian house which, for many years, had been the home of Mrs Kathleen Gray. On 7 August 1972 planning permission was granted in respect of 3 Malone Park to authorise a change of use from dwellinghouse to Old People's Home. On 18 November 1991 a further planning permission was granted enabling a change of use from granny flat to extension to the premises which were then described as "a residential home". However, despite its use as a residential home, it appears that, at all material times, Mrs Gray continued to use the premises as her own personal residence. Over the years further rather unsympathetic and incongruous extensions and outbuildings have been constructed.

[4] Mrs Gray eventually sold 3 Malone Park to the notice party who subsequently submitted and then withdrew an application for planning permission to convert the premises into nine town-houses. On 29 August 2000 the notice party submitted a further application for planning permission to convert the premises into five apartments and planning permission was granted by the Department on foot of this application on 3 November 2000. The applicants then applied for judicial review of that decision which was quashed by consent on 9 February 2001. The notice party then submitted an amended application in respect of which the Department granted planning permission on 16 January 2002 and this is the decision which is sought to be impugned by the applicants in these proceedings.

The statutory and planning framework

[5] Section 3(1) of the Planning (Northern Ireland) Order 1991 ("the 1991 Order") provides that:

> "3.-(1) The Department shall formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development."

The definition of "development" and the mechanisms by which planning applications and planning control are regulated are contained within other Articles of the 1991 Order. Article 25(1) of the 1991 Order requires the Department, when determining applications for planning permission, to have regard to "… the development plan, so far as material to the application, and to any other material considerations …" and by virtue of Article 15 of the Planning (General Development Order) (Northern Ireland) 1993 ("the 1993 Order") the Department is obliged to consult the relevant District Council and to take into account any representations which it may receive from that body before determining an application for planning permission.

[6] Article 50 of the 1991 Order provides:

> "50.-(1) The Department may designate areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance.
>
> …
>
> (5) Where any area is for the time being designated as a conservation area, special attention shall be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any buildings or other land in that area, of any powers under this Order."

[7] Planning Policy Statements set out the policies of the Department on particular aspects of land-use planning and apply to the whole of Northern Ireland. They are regarded by the Department as being material considerations to take into account when preparing development plans and also in relation to individual planning applications and appeals. The general principles observed by the Department in formulating planning policies, making development plans and exercising control of development appear in Planning Policy Statement 1 which was issued in March 1998. Principle 15 is entitled "Design Considerations" and provides that:

> "15. New buildings and their curtilages have a significant effect on the character and quality of an area. They define public spaces, streets and vistas and inevitably create the context for future development. These effects will often be to the benefit of an area but they can be detrimental. They are matters of proper public interest. The appearance of proposed development and its relationship to its surroundings are therefore material considerations in determining

> planning applications and appeals. Such considerations relate to the design of buildings and to urban design. These are distinct, albeit closely interrelated subjects. Both are important. Both require an understanding of the context in which development takes place whether in urban or rural areas."

Principle 43 refers to non-statutory supplementary planning guidance prepared by the Department to supplement, elucidate and exemplify its policy documents and development plans. Such guidance includes Development Control Advice Notes which explain the criteria and technical standards that the Department considers when dealing with specific categories or particular aspects of development, and design guides for specific areas such as conservation area guides.

[8] Planning Policy Statement 6 was published by the Department in March 1999 and is entitled "Planning, Archaeology and the Build Heritage". This document contains details of Policy BH12 "New Development in a Conservation Area" and provides that:

> "The Department will normally only permit development proposals for new buildings, alterations, extensions and changes of use in, or which impact on the setting of, a conservation area where all the following criteria are met:
>
> (*a*) The development preserves or enhances the character and appearance of the area;
>
> (*b*) The development is in sympathy with the characteristic built form of the area;
>
> (*c*) The scale, form, materials and detailing of the development respects the characteristics of adjoining buildings in the area;
>
> (*d*) The development does not result in environmental problems such as noise, nuisance or disturbance which would be detrimental to the particular character of the area;
>
> (*e*) Important views within, into and out of the area are protected;
>
> (*f*) Trees and other landscape features contributing to the character or appearance of the area are protected; and

(*g*) The development conforms with the guidance set out in conservation area documents."

Subsequent sections of Policy BH12 deal with, for example, alterations and extensions, change of use and design guides appropriate to conservation areas.

[9] Planning Policy Statement 7 is entitled "Quality Residential Environments" and contains, inter alia, Policy QD1 relating to "quality in new residential development". Policy QD1 states:

> "Planning permission will only be granted for a new residential development where it is demonstrated that the proposal will create a quality and sustainable residential environment. The design and layout of residential development should be based on an overall design concept that draws upon the positive aspects of the character and appearance of the surrounding area.
>
> In established residential areas proposals for housing development will not be permitted where they would result in unacceptable damage to the local character, environmental quality or residential amenity of these areas.
>
> In Conservation Areas and Areas of Townscape Character housing proposals will be required to maintain or enhance their distinctive character and appearance. In the primarily residential parts of these designated areas proposals involving intensification of site usage or site coverage will only be permitted in exceptional circumstances."

[10] In December 1993 the Department published a document in accordance with Article 50 of the 1991 Order designating Malone Park/Adelaide Park a conservation area within the surrounding Area of Townscape Character. This document contained both Development and Design Guidelines and paragraph 4 of the former dealt with "residential use". This paragraph provided that:

> "The predominant land use is single family residential and this plays an important role in shaping the character of both Parks. The Department will seek to protect and promote this residential character.
>
> Change to flats, special residential and non-residential uses is considered to be inappropriate. In the case of such applications the onus will be on applicants to

> demonstrate conclusively that properties are no longer suitable for single family use."

Representation and submissions

[11] The applicants were represented by Mr Morgan QC and Mr Patrick Good while Mr McCloskey QC and Mrs Gemma Loughran and Mr Horner QC and Ms Jacqueline Simpson appeared, respectively, on behalf of the respondents and the notice party. I am grateful to the counsel concerned and their instructing solicitors for the careful and detailed preparation of the case and the helpful and succinct submissions advanced to the court.

[12] On behalf of the applicants, Mr Morgan QC focused his arguments upon four specific aspects of the impugned decision.

(a) The respondent failed to take into account a material consideration, namely the suitability of the subject premises for single family residential accommodation with a view to protecting and enhancing the Conservation Area within which the premises lie.

[13] Mr Morgan QC emphasised the statutory duty cast upon the Department by Article 25(1) of the 1991 Order to take into account "any other material consideration" when dealing with applications for planning permission and noted that it was common case that the predominant land use in Malone Park was single family residential and that this use played an important role in shaping the character of the Park. Accordingly, he argued, quite apart from policy, the Department, as a matter of common law, ought to have taken into account the suitability of the premises for single family residential accommodation with a view to protecting and enhancing the character of the conservation area. While he did not suggest that such a consideration should necessarily have outweighed and dominated all other material considerations, Mr Morgan QC did submit that failure to take it into account altogether rendered the Department's decision unlawful in accordance with the principles set out in Tesco Stores Ltd v Secretary of State [1995] 2 All England Reports 636 at 657: Re Wellworth & Co Ltd's Application [1996] NI 509 at 527/28.

[14] With regard to the relationship between this "free-standing" factor and the Department's policy documents, Mr Morgan QC referred to passages in the judgment of Nicholson LJ in Re FA Wellworth's Application at pages 534b and 535g in which the learned Lord Justice said:

> "The implication of the argument that the Department's approach was in accord with its policy document was that all material considerations were contained in it. But on a planning application it is the duty of the Department to have regard to 'material considerations'. If a policy document purports to exclude such a consideration, the court will not permit the Department to rely on the

> document in order to justify exclusion of the consideration … The Department's policy statements cannot make irrelevant any factor which is a material consideration in a particular case. It must have regard to its policy document but it cannot rely on it exclusively to construe it in such a way as to justify a failure to have regard to a material consideration if that consideration is not explicitly spelt out in the policy document."

Mr Morgan QC also noted the finding by Kerr J at page 540 of his judgment in the same case that the Department had interpreted its policy in such a way as to curtail its evaluation of and, thereby, failed to have proper regard to, a material consideration.

[15] Mr Morgan QC accepted that 3 Malone Park had not been used as a single family residence for approximately thirty years but he relied upon a series of decisions referred to at pages 2-3275 to 2-3277 of the Planning Encyclopaedia as establishing that an alternative use might constitute a material consideration even if such use had never been put into effect – see, for example, Clyde & Co v Secretary of State for the Environment [1977] 1 Weekly Law Reports 926.

[16] In a submission which was supported by Mr Horner QC on behalf of the notice party, Mr McCloskey QC maintained that, as a matter of law, in the circumstances of this particular case, use of the premises as single family accommodation was not a material consideration. He further argued that the authorities cited by Mr Morgan QC from pages 2-3275 to 2-3277 were concerned with competitions between "existing" and "proposed" uses rather than "potential" uses. Both he and Mr Horner QC emphasised the practical difficulties that would be faced by the Department if it was required to investigate the existence, identities, plans etc of alternative bidders in relation to potential use as a material consideration.

[17] The authorities confirm that it is a matter for the court to identify the material considerations to be taken into account in any particular case and this will depend upon a consideration of all the relevant circumstances. In this case, bearing in mind the prolonged existing use of the subject premises as a Class 13 nursing home, I have come to the conclusion that potential use as a single family residence was not a free-standing material consideration and, accordingly, I reject this submission on behalf of the applicant. If I am wrong about such a conclusion, given the long use as a Class 13 home, I do not consider that, in the circumstances of the case, such a free-standing consideration would have been of any significant weight. I am further satisfied that the Department was entitled to promulgate policy/policies incorporating any such consideration and to consider it within the context of such policies. The applicant did not suggest that any policy/policies of the Department curtailed or excluded the Department from having regard to any such consideration and, indeed, Mr Morgan QC expressly accepted that, within the confines of this case,

it did not matter whether such a consideration was taken into account as free-standing or in the context of the relevant Departmental policies.

(b) Single family residential accommodation as a matter of policy

[18] The parties were in general agreement that the policy documents relating to this consideration included paragraphs 28, 33 and 43 of PPS1, Policy BH12 of PPS6, Policy QD1 of PPS7, Development Guidance Note 4 and paragraph 4 of the Development and Design Guidelines contained in the document designating the Malone Park/Adelaide Park conservation areas.

[19] According to Policy BH12 contained in PPS6 the Department will normally only permit development proposals for new buildings, alterations, extensions and changes of use in, or which impact on the setting of, a conservation area where all the criteria therein specified are met. Such criteria include the fact that:

> "(*g*) The development conforms with the guidance set out in conservation area documents."

[20] In such circumstances, Mr Morgan QC relied upon paragraph 4 of the development guidelines contained in the Malone Park/Adelaide Park Conservation Area document which is headed "Residential Use" and which states that:

> "The predominant land use is a single family residential and this plays an important role in shaping the character of both Parks. The Department will seek to protect and promote this residential character.
>
> Change to flats, special residential and non-residential uses is considered to be inappropriate. In the cases of such applications the onus will be on applicants to demonstrate conclusively that properties are no longer suitable for single family use."

While he accepted that the actual user of the subject building might be relevant in deciding whether the test was satisfied or, if it was failed, the weight to be given to any such failure, Mr Morgan QC maintained that the proposal in respect of No 3 Malone Park should have been subjected to this test and rejected any suggestion that the use of the word "normally" justified an exception in respect of a building with a long pre-existing non-residential use. In his submission to approach the test on the basis that it applied only to properties which, at the material time, were in use as single family residential units was to add a gloss which was not present in the policy.

[21] The correct interpretation of planning policy and construction of the documents in which such policy is contained is a matter for the court bearing in

mind that such policies are not to be subjected to the same degree of analysis as a statutory instrument or piece of primary legislation – Re FA Wellworth & Co's Application [1996] NI 509: Re Belfast Chamber of Trade and Commerce Application (unreported NICA 23 February 2001). Parliament has entrusted the Department with the primary responsibility for supervising development and it is important to bear in mind that, depending on the circumstances, an appropriate type of development may help to sustain the vitality of a conservation area. Applying these principles, it seems to me that the aim of the policy contained in paragraph 4 of the Conservation Area Development Guidelines was to recognise the important role played by single family residential use in shaping the character of both Parks and to protect and promote this character by severely restricting applications for change of use from single family residence to those properties that "… are no longer suitable for single family use". Accordingly, I do not consider that the Department failed to take into account a material consideration by omitting to apply this test to premises which had not been used for single family residence for approximately thirty years. If I am wrong about this conclusion, it seems to me that the fact that the premises had not been in single family residential use for approximately twenty-three years prior to the designation of the conservation area coupled with the use of the word "normally" in Policy BH12, as explained at page 5 of PPS6, would have justified the Department in exempting these premises from the test set out in paragraph 4 of the Conservation Area Development Guidelines provided that the change of use complied with the general requirements of paragraph 7.9 of PPS6. In the circumstances, I reject Mr Morgan QC's submissions based upon this ground.

[22] Before leaving this aspect of the case I think it is important to make two further points. First, it is clear from the affidavits of Ms Valerie Allen and the correspondence from the other residents objecting to the proposal that one of their main concerns was the setting of a precedent leading to an increase in the numbers of properties converted for the purpose of multiple occupation whether as apartments or otherwise. While it is not for this court to speculate as to the outcome of future applications it seems to me that such a development is unlikely in view of the clear recognition by the Department's principal planning officer that No 3 was the only Class 13 institution in use in Malone Park and that in the case of any other premises occupied as a single family residence it would undoubtedly be necessary for any potential developer to comply with the stringent test set out paragraph 4 of the Conservation Agency Development Guidelines.

[23] Secondly, while recognising the difficult and demanding task faced by the Planning Authority, it is important to bear in mind that, in the words of PPS1, "the town and country planning system exists to regulate the development and use of land in the public interest" and that the "public" includes not only planners and developers but ordinary citizens who are liable to be more or less directly effected by or concerned about the implications of planning decisions depending on the particular circumstances. This is especially the case with concepts such as Conservation Areas where protection of the architectural, social and historical heritage is of primary concern. During the course of the hearing Mr McCloskey QC,

on behalf of the Department, properly conceded that the unqualified reader would probably need legal advice to untangle the relationship between the various planning policies and, in particular, to appreciate that, while it might bear all the appearances of being a self-contained document, the policies contained in the Malone Park/Adelaide Park Conservation Area document, crucially, require to be read in conjunction with Policy BH12 of PPS6. In my view such a situation is neither justified nor necessary, falls short of the standards required of open and transparent government and has the potential to unnecessarily increase any sense of disillusionment or cynicism which may be engendered by the perceived operation of the planning process.

(c) Failure to take into account the relationship between the proposed development and the originally constructed dwelling.

[24] In support of his argument under this heading, Mr Morgan QC concentrated on paragraph 1 of the development guidelines contained in the Malone Park/Adelaide Park Conservation Area document and, in particular, the paragraph reading:

> "In order to allow landscape to remain dominant the established relationship between building mass and gardens should be respected and retained where possible. In no circumstances should building coverage be more than one-and-a-half times that of the original dwelling."

[25] When the application for planning permission to convert the subject premises into five apartments was submitted by the notice party on 29 August 2000, in view of the fact that the proposal related to a designated conservation area, the Department sensibly referred the application to a chartered architect specialising in conservation issues. The conservation architect reported to the Department on 28 September 2000 criticising a number of features of the proposal, some of which he felt "severely disfigured" the original building and expressing his belief that the proposed rear extension was incompatible in scale when seen alongside the original building. His overall opinion was that, while the existing return could be demolished, the proposed extension would be detrimental to both the existing building and the Malone Park conservation area. Despite this adverse opinion from the conservation architect, the Department saw fit to grant planning permission in respect of this proposal on 3 November 2000 and it was only after an application for judicial review by the current applicants that this decision was subsequently quashed by order of the court on consent.

[26] The notice party subsequently submitted an amended proposal incorporating a number of the recommendations made by the conservation architect and this amended scheme was furnished to the architect by the Department for his further views. The architect reported again on 21 May 2001 and, while this document was couched in less negative terms than his first report, he again expressed the view that

a number of items needed to be resolved before the scheme could proceed. The architect expressed considerable concern about the new rear structure, the form, bulk, length, height and detailing of which combined to produce an extension which he thought tended to be "overbearing, resulting in an uncomfortable fit alongside the original". He expressed the view that the length of the new two storey extension should certainly be less than eleven metres and that, otherwise, the bulk and height of the new work was unsatisfactory both for the original dwelling and the character and appearance of the conservation area. Despite being furnished with photo montages, this remained his ultimate view which was confirmed in his final report of 29 August 2001.

[27] In a report to the Department's Development Control Group, which was chaired by the principal planning officer, the Development Control Officer, Mr Coates, noted the concerns expressed by the conservation architect in his reports of May and September 2001 but simply went on to record that many of the earlier design changes had been incorporated into the scheme and that removal of the poor quality and unsympathetic extensions would, in his opinion represent an enhancement of the conservation area. In the same report, dated 3 October 2001, Mr Coates recorded that he had revised his opinion that the proposal failed to comply with paragraph 1 of the development guidelines in the Conservation Area document because the proposed building coverage would be more than one-and-a-half times that of the original dwelling since, on reflection, in the absence of a defining date, he had come to the view that paragraph 1 could be interpreted as referring to the "structure at the time of designation". If this interpretation was adopted, Mr Coates noted that the proposal complied with the 1.5 limit.

[28] On 30 October 2001 the Development Control Group met for the purpose of considering the amended proposal including the reports from Mr Coates and the conservation architect. The report compiled as a result of that meeting noted that the recommendation of the conservation architect that the two storey return should not be more than eleven metres from the rear wall was based on the 6.5 metres by which the original return extended and did not take into account the fact that subsequent extensions added to the original building had increased the overall length to 20.9 metres. This observation was repeated at paragraph 33.3 which also records that Mr McIlhagga did not identify the enhancement of the "built form" which the proposed extension would represent in conjunction with the removal of the existing poor quality extension and outbuildings. In her affidavit, the principal planning officer, Ms O'Toole, confirmed that the reasons for not accepting the views of the conservation architect were set out at paragraph 3.3 of the Development Control Group's report of 30 October 2001.

[29] It seems to me that there are a number of concerns about the manner in which this consideration was taken into account by the Department in the course of arriving at the impugned decision:

(i) In applying the test for the relationship between building mass and gardens contained in paragraph 1 of the Conservation Area Development Guidelines, namely, that "in no circumstances should building coverage be more than 1½ times that of the original dwelling" the Department interpreted the test as referring to the currently existing situation at 3 Malone Park. Such an approach was put forward "on reflection" by the Development Control Officer in his report of 3 October 2001 to the Development Control Group. In paragraph 5(*e*) of her affidavit of 29 May 2002 the principal planning officer confirmed that this interpretation was adopted by the Group in the following terms:

> "It was the view of the Development Control Group that we should take account of the existing situation at 3 Malone Park including the extensions approved and implemented. To have made calculations on a built form which had not existed for a considerable number of years would have been unreasonable."

I do not consider that such an interpretation of the policy set out in the Conservation Area document was either lawful or reasonable bearing in mind the whole ethos of the document which was to protect and enhance the historical heritage of this area. In the words of the Minister of the Environment and the Economy introducing the document "… within this wider area Malone and Adelaide Parks retain much of their original character and remain as fine examples of a turn of the century housing environment of some distinction". As noted earlier in this judgment it was common case between the parties that the existing extensions and outbuildings were unsightly, unsympathetic and of poor quality and clearly would not have complied with the requirements of paragraph 1 of the Conservation Area Development Guidelines. Nevertheless, it appears that these were preferred as the basis for calculations by the Department rather than "a built form which has not existed for a considerable number of years" a view which, in my opinion, runs the risk of missing the point of the development guidelines altogether.

(*ii*) The Department appears to have reached its preferred interpretation as a result of its view that Policy PPS6 post-dates and "takes priority" over the Conservation Area document and, therefore, the latter should be afforded less weight – see, in particular, paragraph 15(*ii*) of Ms O'Toole's affidavit of 12 April 2002 and paragraph 5(*e*) of her subsequent affidavit of 29 May 2002. Curiously, the significance of this hierarchy of policy does not seem to appear in the record of the deliberations of the Development Control Group, paragraph 2.6 of which simply noted that:

> "Equally, there is no objection to the principle of a replacement extension to the rear provided an acceptable

> scheme can be achieved which pays due regard to the issues of the impact on the Conservation Area. In consideration of such issues the Division is guided by PPS6 the Conservation Area document (page 23; 1 para 2) and PPS7."

In her first affidavit Ms O'Toole relied upon the provisions of paragraph 43 of PPS1 as establishing that the Conservation Area document should not carry as much weight in planning policy terms as a development plan or a planning policy statement. However, paragraph 43 makes no reference to the relative weight to be attributed to these policies and simply refers to non-statutory planning guidance which supplements, elucidates and exemplifies policy documents and development plans including, for example, conservation area guides. As in this case, such a guide is produced subsequent to a specific area being designated as a conservation area by the Department in accordance with the statutory procedure set out in Article 50 of the Planning (Northern Ireland) Order 1991. While there is no doubt that, as a matter of temporal sequence, Policy BH12 in PPS6 came into existence subsequent to the Conservation Area document relating to Malone Park/Adelaide Park, it is not clear to me why this fact, in itself, should give priority to the former over the latter as asserted by Ms O'Toole at paragraph 5(*e*) of her second affidavit. Section 7 of PPS1, which contains Policy BH12, relates to conservation areas in general, whereas it is quite clear that the Malone Park/Adelaide Park Conservation Area document was generated with the requirements of one specific area in mind. Thus, if any question of priority arises, it seems to me that it would be reasonable to anticipate that it would be that of the latter over the former. Such an approach would appear to be entirely consistent with the wording of paragraph 7.12 of PPS6 which deals with conservation area design guides and provides that:

> "The Department will therefore attach great weight to the need for proposals for new development to accord with the specific guidance drawn up for each particular conservation area."

Accordingly, it seems to me that the Department has mis-understood and mis-interpreted its policy in relation to this consideration.

(*iii*) Ultimately, it was the relationship between the proposed rear extension and the original building which remained the stumbling block for the conservation architect and which he considered to be unsatisfactory for both the original dwelling and the character and appearance of the conservation area. This approach reflected the requirements of paragraph 1 of the Conservation Area Development Guidelines in which it was recorded that, inter alia:

> "The Department will be pre-disposed to refuse applications for extensions to property which it considers will detract from the character of the Area. This will include proposals which give rise to unsatisfactory proportions, or seriously infringe on the setting, or are considered overbearing in relation to the form of the original buildings."

In dealing with the report from the conservation architect, Mr Coates simply recorded that a number of his recommendations had been incorporated in design changes and that the removal of the poor quality and unsympathetic extensions would, in his view, represent an enhancement of the conservation area. The report of the Development Control Group also focused upon the enhancement that would result from removal of the poor quality extensions and outbuildings without dealing with the substance of the conservation architect's objection. The conservation architect was clearly aware that the proposal would involve the removal of the existing return, unsatisfactory extension and outbuildings which, undoubtedly, would be a benefit, but, assuming that a balance was being sought, what seems to be missing is a reasoned explanation on the part of the Department as to why this goal could only be achieved by erecting an extension which their own expert advice considered to be contrary to the development guidelines. Furthermore, there is nothing to indicate whether the Department sought to reconcile the phrase "in no circumstances" with the word "normally" and , if so, whether and how such a reconciliation was achieved.

[30] For the reasons set out above I am satisfied that the applicants' case has been made out in relation to this ground.

(d) Reliance upon the demolition of the unsatisfactory extensions as justification for the development.

[31] In relation to this ground Mr Morgan QC argued that while it was clear from the affidavits and the various exhibited documents that the Department had placed considerable weight upon this consideration, they had been in error in doing so since it was inconceivable that any development proposal would not have included a similar result. While there is no doubt that removal of the unsightly and poor quality extensions and outbuildings could be viewed as a benefit, I do not accept that total or partial removal would be an inevitable consequence of any development application. Ultimately, this seems to me to be a question of weight and, consequently, one that fell very much within the discretion of the Department in accordance with the principles set out by Lord Hoffman in Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All England Reports 636 and approved by the Court of Appeal in Northern Ireland in Re FA Wellworth & Co's Application [1996] NI 509. Therefore, I reject Mr Morgan QC's submissions in relation to this point.

[32] Accordingly, for the reasons set out above, I propose to grant the application and quash the decision.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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and

IN THE MATTER OF A DECISION BY THE PLANNING SERVICE OF THE DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND DATED 16 JANUARY 2002

JUDGMENT

OF

COGHLIN J
