

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 14.03.2003

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY BARRY GILLIGAN AND
OTHERS FOR JUDICIAL REVIEW

Before: Carswell LCJ, Nicholson and McCollum LJJ

CARSWELL LCJ

[1] Malone Park in South Belfast is part of an area developed as a high-quality residential environment, containing one of the largest concentrations of individually designed Edwardian and Victorian villas in the Province. It retains much of its original character and remains, as the Malone Park/Adelaide Park Conservation Area document states, as a fine example of a turn of the century housing environment of some distinction. As part of the built heritage it merits particularly careful consideration when planning permission is sought for development proposals within the area. The Department of the Environment as planning authority has the function, in protection of the public interest, of requiring that such development is carried out in a way that would not cause demonstrable harm to interests of acknowledged importance. To this end it has commendably laid down criteria for particular application to development proposals put forward in conservation areas such as Malone Park.

[2] The present appeal concerns such a development proposal contained in a planning application made by Steven McCombe to convert the dwelling house 3 Malone Park, which had been used as an old people's home for some 30 years, into five apartments. The application, as amended, involved the demolition of heterogeneous extension buildings at the rear of the house and replacing them with a substantial two-storey return some 14.6 metres deep. The Department on 3 November 2000 granted planning permission for the application, subject to certain conditions. The applicants in the judicial review proceedings, who are a number of residents of Malone Park and Malone Park Lane, together with a residents' association, brought

proceedings for judicial review of the Department's decision. Coghlin J on 10 October 2002 made an order of certiorari quashing the planning decision and the Department appealed to this court.

[3] 3 Malone Park is a Victorian red brick dwelling house with a double bay frontage and pitched roof, rising at the front to a height of two and a half storeys, which is consistent with the height of the adjacent properties. As originally built, it had a small two-storey return typical of those in dwellings of the period in this area. The house, like most of the other dwelling houses in the area, is situate in a large plot with a mature garden. It lies within the Malone Park Conservation Area.

[4] For many years the house was the dwelling house of Mrs Cathleen Gray. In 1970 she was granted general planning permission by Belfast Corporation, the then planning authority, for a change of use into that of an old people's home. In the documents before us it was regularly described as a nursing home, but we did not have any evidence about the actual use to which the premises were put, whether nursing or merely residential facilities were provided for the occupants. It was not in dispute, however, that the change of use took them out of Class 14 (*Dwellinghouses*) in the Schedule to the Planning (Use Classes) Order (Northern Ireland) 1989 into Class 13 (*Residential institutions*), which covers use -

“(a) for the provision of residential accommodation and care to people in need of care (other than a use within Class 14 (dwellinghouses),

(b) as a hospital or nursing home, or

(c) as a residential school, college or training centre.”

It appears that Mrs Gray herself also continued to reside in the house until it was sold to Mr McCombe.

[5] In 1980 and 1992 planning permission was given by the Department, perhaps rather surprisingly, for extensions which were conservatively described by the judge as being unsympathetic and incongruous. As built, the extensions to the rear of the house consisted of a number of single and two-storey constructions, which extended some 20.9 metres in all behind the original main block, in addition to which there were a free-standing garage, shed and oil tank. The extensions and additions were justly described in a departmental document as being “of varying styles and poor in quality both visually and in terms of material used.”

[6] It appears that over time the number of residents dwindled and at some stage before or after the next planning application was made Mrs Gray sold the premises to Mr McCombe. Mr McCombe, who describes himself as a building contractor/hotelier by occupation, had previously been concerned in a number of schemes with a business partner Francis Cullen in Counties Antrim and Down to develop a hotel, bars, houses and apartments. He deposed in his affidavit that he originally wished to acquire the premises as a family home, but that the amount of the purchase price, when added to the cost of renovation, made this uneconomic, so that he decided to buy them with his partner for re-development. He and Mr Cullen initially considered renovating the premises to continue their use as a nursing home. They then consulted an architect Mr Des Ewing, who on 25 November 1999 submitted a planning application on Mr McCombe's behalf to demolish the rear part of the main house and the extensions and additions and to convert the premises, with very substantial new additions, into nine "town and coach houses". There were strong local objections and Mr McCombe withdrew this application.

[7] On 29 August 2000 Mr Ewing submitted on Mr McCombe's behalf a second application, the proposal being described as "Change of use/conversion of nursing home into 5 no. apartments (Includes demolition in rear & extension works to side & rear)". The proposal was on a materially smaller scale than that put forward in 1999, but involved a substantial extension to the rear of the main house. Many objections were made by residents of Malone Park, and the Department consulted Mr John McIlhagga, described as the Conservation Area Architect, on conservation issues relating to the application. His opinion, given on 28 September 2000, was that -

"while the existing return could be demolished, the proposed extensions would be detrimental to both the existing building and Malone Park Conservation Area."

He enumerated a number of items which needed to be addressed before the scheme could proceed, relating to bays to the side of the house, the side and front doors, car parking and fencing. In relation to the proposed work to the rear of the main house he expressed the following opinion:

"(a) Scale:

I believe that the proposed rear extension is incompatible in scale when seen alongside the original building. In my opinion, the scheme is unacceptable as an extension to an original building within Malone Park Conservation Area.

If permission is given to demolish the existing return and to construct a new extension, then the new rear structure must be subservient to the main dwelling. It must be secondary to the dominant architectural work on the site.

(b) Recommended Position And Size of New Extension:

I believe that the following constraints should be considered:

- The walls of the new extension should be set back at least 1.500-2.000 metres from the rear corners of the main house. The extension should not line through with the existing gables.
- The existing two storey return is approximately 6.500 metres long. From site observations, I believe that a new two storey extension should go no further than 11.000 metres from the rear wall of the main house.

(c) Design Approach To Extension:

In my opinion, there is a flaw in the design approach to the rear extension.

The appearance of the rear extension must relate closely to the appearance of the original main building, it should appear to grow out of the primary structure. It is not appropriate to produce a design which introduces different elements and details from that which exist on the main dwelling. I believe that the proposed scheme displays elements and details visually unrelated to the original house ie ridge tiles, eaves detail, verge detail, window openings and heads, window frames."

[8] Notwithstanding Mr McIlhagga's adverse opinion, the Department on 3 November 2000 gave planning permission for the proposed development, subject to conditions which are not material for present purposes. The respondents brought an application for judicial review of the Department's decision and the planning permission was quashed by consent on 9 February 2001. We had no evidence about the grounds on which this was done and that application was not discussed in the argument before us and formed no part of our consideration of this appeal.

[9] The developer on a series of dates in May, June and August 2001 submitted amended plans in support of his application of 29 August 2000. The Department again consulted Mr McIlhagga, who in a report dated 21 May 2001 gave his opinion that a number of items, which he listed in the report, required to be resolved before the scheme could proceed. In relation to the proposed new rear addition he set out his views in detail in paragraphs 3.3.1 to 3.3.3 of his report:

"3.3 New Rear Addition

3.3.1 Approach To Assessment

While accepting that the original two storey return and recent rear extensions could be removed and a new structure erected, there are certain conditions which the proposed addition must meet in order to provide an acceptable contextual solution.

My comments are guided by the belief that the design of the new rear structure should be based on an approach which does not attempt to replicate the original main house in size, appearance and features. The new structure should clearly be secondary in importance and appearance while at the same time, combining with the original to form a harmonious visual entity.

3.3.2 Expression

The proposed rear addition as shown on the amended drawings, does not fully express itself as a secondary structure when judged against the existing dwelling. Its form, bulk, length, height and detailing combine to produce an expression which tends to be

overbearing, resulting in an uncomfortably fit alongside the original.

In order to ensure that a visually compatible design solution is achieved, I believe that amendments will have to be made to the proposals.

3.3.3 Visual Scale/Massing

There is a large increase in the massing (bulk and height) of the new addition when compared to the existing rear structures.

In my previous consultation report dated 28 September 2000, I had stated that I believed that a new two storey extension should go no further than 11.000 metres from the rear wall of the main house. In my opinion, this condition would allow a satisfactory visual relationship to be established between the existing building and a new two storey addition. Beyond this distance, the role of the extension would visually change and the dominance of the main house would be severely reduced.

Having assessed the submitted scheme which proposes the construction of a new three storey extension, my view is that its length should certainly be less than 11.000 metres. This is because the bulk and height of the new work has a visual scale greater than the existing building. The proposed situation is unsatisfactory for both the original dwelling and for the character and appearance of the Conservation Area, particularly when viewed along the rears of properties in the locality.

I believe that if the volume and shape of the new addition were altered so that its appearance was more akin to a two storey structure, the length could go to around 11.000 metres, as stated previously. In

order to achieve this, the following could be considered:

- The length of the addition to be reduced accordingly.
- The eaves lines to be lowered to approximately the top of the heads over the first floor windows.
- The ridge line to be lowered as much as possible.

The proposal to commence the external walls of the addition approximately 1.600 metres back from each rear corner of the main house, is acceptable. "

[10] Mr McIlhagga gave a brief further report dated 29 August 2001. In this report he states that the modifications to the proposals in respect of the main house had been incorporated into the application, which was to be welcomed. In respect of the extension to the rear Mr McIlhagga stated his opinion:

"My previous concerns about the length, height and form of the proposed three storey scheme, still remain. I believe that the large bulk of the new rear addition will be detrimental to the character and appearance of both the original main house and the Malone Conservation Area. In my opinion, the bulk needs to be reduced and the form changed in order to ensure that the proposed scheme results in a sympathetic contextual fit."

The Department proceeded to give further consideration to the amended application, and we shall return in more detail later to the matters which it took into account in doing so. On 16 January 2002 it gave planning permission for the development, as amended, subject to conditions which are not material for the purposes of this appeal. The respondents commenced proceedings for judicial review by an Order 53 statement lodged on 6 February 2002 and by order dated 10 October 2002 Coghlin J quashed the planning decision of 16 January 2002.

[11] Under the Planning (Northern Ireland) Order 1991 (the 1991 Order) all development, which term includes the work proposed in respect of 3 Malone Park, requires planning permission, for which application is made under Article 20 to the Department. Planning applications are considered in the first

instance by the Planning Service, an agency within the Department, which will in all but exceptional major applications grant or refuse permission on behalf of the Department. By Article 25 the Department must have regard to the development plan, so far as material to the application, and to any other material considerations.

[12] Article 3(1) of the 1991 Order imposes a duty on the Department to “formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development.” In performance of that duty the Department has produced a number of planning policy statements, which, if relevant to an application, constitute material considerations. Before examining these we should observe that these policy statements are not mandatory requirements which must be construed with the strictness applied to legislation, nor must every single item be adopted and followed like a statutory condition. As we stated in *Re Belfast Chamber of Trade’s Application* [2001] NICA 6 at page 3, the Department in making planning decisions is not obliged to adhere to each point of the policy statement and is free to override or depart from any part of it if it considers it justified. That remark is, however, subject to the qualifications that the Department must have regard to any such point if it is relevant to the application and consider it before departing from it, and that the more categorical in expression a requirement in a policy statement may be the more carefully it must weigh the factors which cause it to depart from the statement before it does so. Subject to this obligation, the Department is entitled to attribute such weight as it thinks fit to any consideration, and, as was made clear in Lord Hoffmann’s familiar observation in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657, that is a question of planning judgment entirely for the planning authority.

[13] In Planning Policy Statement 1, issued in 1998, the Department set out the general principles which it observes in matters such as exercising control of development. One of the matters which it aims to do, as set out in paragraph 12, is to conserve the built heritage. In paragraph 15 it is stated that the appearance of proposed development and its relationship to its surroundings are material considerations.

[14] Planning Policy Statement 6, dealing with planning, archaeology and the built heritage, was issued in 1999. Policy BH 12, comprising part of PPS 6, states 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 (sic) the characteristics of adjoining buildings in the area;

* * * * *

- (g) the development conforms with the guidelines set out in conservation area documents."

It is pointed out in the introduction to PPS 6 that the inclusion of the word "normally" is considered necessary in order that the public should clearly understand that exceptions can on occasion be made, where other material considerations outweigh its planning policies. Paragraph 7.6 includes in the general issues to be taken into account in assessing development proposals in a conservation area "the appropriateness of the overall massing of the development", its scale and "its relationship with its context ie whether it sits comfortably." That paragraph also states:

"It is also important where new uses are proposed that these respect the unique character and general ambience of a conservation area ..."

Paragraph 7.8 deals with alterations and extensions:

"7.8. Proposals for the alteration or extension of properties in a conservation area will normally be acceptable where they are sensitive to the existing building, in keeping with the character and appearance of the particular area and will not prejudice the amenities of adjacent properties. Extensions should be subsidiary to the building, of an appropriate scale, use appropriate materials and should normally be located on the rear elevations of a property. Very careful consideration will be required for alterations and extensions affecting the roof of a property as these may be particularly detrimental to the character and appearance of a conservation area."

Paragraph 7.12 on Design Guides states:

“7.12. As each conservation area has its own unique style and character, local policies and guidance for the conservation and enhancement of the area are set out in the relevant designation documents and design guides, which are produced by the Department in consultation with local district councils and the Historic Buildings Council. These constitute supplementary planning guidance and are considered to be an important material consideration. 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.”

[15] In 2001 the Department produced PPS 7, entitled “Quality Residential Environments”. Policy QD 1, “Quality in New Residential Development”, states:

“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.”

It goes on to say that all proposals for residential development will be expected to conform to all of the criteria there listed. Criterion (a) reads:

“(a) the development respects the surrounding context and is appropriate to the character and topography of the site in terms of layout, scale, proportions, massing and appearance of buildings, structures and landscaped and hard surfaced areas;”

The paragraph setting out the criteria concludes:

“Any proposal for residential development which fails to produce an appropriate quality of design will not be permitted, even on land identified for residential use in a development plan.”

Paragraph 4.10 of PPS 7 then goes on:

“4.10 Accordingly in assessing housing proposals in Conservation Areas and Areas of Townscape Character, the protection of the existing character and distinctive qualities of the area will be paramount. Notwithstanding the Department’s broader policy to promote more housing within urban areas, proposals in the primarily residential parts of these designated areas which involve intensification of site usage or site coverage will not normally be acceptable. Such proposals usually involve demolition, plot sub-division or plot amalgamation which can be particularly detrimental to their character and appearance. Proposals involving intensification in these areas will only be permitted in the following exceptional circumstances:

- (a) an extension in keeping with the scale and character of the dwelling and its surroundings; or
- (b) the sympathetic conversion of a large dwelling in appropriate locations to smaller units; or
- (c) the development of a significant gap site within an otherwise substantial and continuously built up frontage provided this would be of a density and character prevailing in the area.”

[16] Under Article 50 of the 1991 Order the Department may designate areas of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance. By Article 50(5), when an area is so designated special attention is to be paid to the desirability of preserving or enhancing its character in the exercise of powers under the Order. Malone Park had been designated a Conservation Area in 1993, when the Malone Park/Adelaide Park Conservation Areas document was issued. It sets out at pages 23 to 26 a number of development guidelines, some more categorically prescriptive than others, which “will be used by the Department to assess the suitability of proposals”. On page 23 it is stated:

“The Department will encourage the retention of existing buildings and emphasis will be placed on the protection and restoration of the individual architectural character of each building.

Extensions should be designed in such a manner as to appear either as an integral part of the original dwelling or alternatively as a self-contained design statement which complements the original. The Department will be predisposed 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 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.

The opportunity to accommodate new development in Malone and Adelaide Parks is severely restricted. The Department will have to be satisfied that conversion and refurbishment of a building is not viable before redevelopment is considered. In such circumstances heights, building line and coverage should reflect those of the original dwelling on site and the design of new development should complement the existing architecture and townscape character.”

Paragraph 4 of the development guidelines states at page 24:

“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.”

[17] One other policy document to which reference was made was DGN 4, described as a Development Guidance Note for control of flat conversions and published in 1992. This stated in paragraphs 4.1 and 4.2:

“4.1 The Department may from time to time identify flat conversion areas in suitable locations to meet specialised housing needs such as those of students, single people of working age and small households and will produce subsidiary guidance notes accordingly. Within these areas planning permission will normally be granted for conversion to flats provided the proposed conversion complies with the car parking and design standards stipulated overleaf. (4.5 - 4.6).

4.2 Flat conversions will not normally be permitted outside flat conversion areas unless:-

- (a) the dwelling is considered to be no longer suitable for single family accommodation after an assessment of such factors as the size, age and condition of the existing dwellings, location and adjoining land uses;
- (b) the conversion of the existing dwelling would not adversely affect the character of adjoining and nearby residential areas;
- (c) an exceptional local need for flat accommodation has been demonstrated to justify conversion on the grounds of creation of extra dwelling units. Where terraces are concerned it should be noted that a case based on exceptional local need is more likely to be acceptable where

- comprehensive schemes for the conversion of complete terrace blocks are proposed rather than hap hazard proposals for single dwellings;
- (d) the change of use is considered acceptable as in filling between such existing uses or as a rounding off of such uses at the end of a terrace;
 - (e) the conversion is of suitable properties fronting main arterial routes, provided that the conversion would not result in development out of keeping with the character of adjoining and nearby residential areas consisting mainly of dwellings in single family accommodation;
 - (f) the conversion makes use of upper floors of suitable commercial properties;
 - (g) offices and other commercial properties are being brought back into residential use, provided that the conversion would not result in development out of keeping with the character of adjoining and nearby residential areas consisting mainly of dwellings in single family accommodation."

We do not understand Malone Park to lie within a flat conversion area. Ms O'Toole points out in paragraph 14 of her affidavit sworn on 12 April 2002 on behalf of the Department that this document was supplementary planning guidance, on which consultation had not taken place, and so it carries less weight than guidance notes on which there has been consultation. It appears, however, that it was invoked by the Planning Service as an additional ground in favour of allowing the development application because of the reference in paragraph 4.2(g) to the bringing back of "offices and other commercial properties" into residential use. This seems to us inapplicable to the present case and in so far as any significant weight has been placed upon this factor we must regard it as a misdirection.

[18] The revised and amended application was evaluated and processed by a specially constituted Development Control Group of three officers of the Planning Service, chaired by Ms O'Toole. The Group received a report from one of its members, Mr Jim Coates, together with the reports from

Mr McIlhagga to which we have referred. Mr Coates' report recommended approval of the proposal. It focuses mainly on the means by which the proposed development could be said to come within the policy documents and so receive planning permission. It does not deal at all with the firm objections put forward by Mr McIlhagga to the size and massing of the rear portion. At pages 1-2 it is stated, after a reference to the Malone Park/Adelaide Park Conservation Areas document:

"The document notes that the single-family residential use is the predominate (sic) land use, but not exclusively. In this case the property was formerly in use as a nursing home is now being returned to a residential use albeit as apartments. This in my opinion is not at odds with the CA Document, as the existing single family balance is not being reduced. The proposal given its existing use would also in my view not create an unacceptable precedent, as it does not involve the loss of a single family dwelling and does not represent a reduction of the preponderance of single family dwellings.

The document also states *that to allow the 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.* In my assessment of the original submission, my opinion was that the proposal failed to comply with this part of the CA Document. On reflection this statement is open to interpretation. Initially I took the view that the original dwelling was that at the time of its construction, the document however is not specific as to what is to be used as the defining date to be applied, and it can be interpreted as the structure at the time of designation. If this interpretation is used the proposal is within the 1.5 times limit. Even if this were not the case, the crucial point is whether or not landscape remains dominant, in this case no landscaping of significance is to be removed, and the CA Document states that the established relationship should be respected wherever possible, this is not proscriptive (sic) and allows for judgement.

The proposal is in line with one of the Documents prime aims as stated on page 23; *The Department will encourage the retention of existing buildings.* It also has the benefit of removing existing inappropriate extensions and unifying them into one cohesive extension.”

Mr Coates states his conclusions in the final portion:

“Since this is for a COU from a nursing home to apartments this I feel will not result in an adverse impact on the area and that para 4.2(b) in DGN4 is met. Indeed in land use terms the proposed use would in my view enhance the character of the area by returning the property to a residential use.

Para 4.2(g) in DGN4 allows for flat conversions of commercial premises, this may be applicable if a nursing home is considered commercial.

The agent has supplied photomontages from public viewpoints to assist in determining the application. In my opinion the impact of the proposal on public views in the CA are limited and that visually the proposal has a neutral impact on the CA.

Mr McIlhagga the CA Architect has expressed concerns about the design in his reports in May and September 2001.

Many of the design changes suggested in his report of May 2001 have now been incorporated within the scheme. The removal of the poor quality and unsympathetic extensions that exist and its replacement with this proposal will in my view represent an enhancement of the CA.

In light of these considerations I recommend approval.”

[19] The conclusions of the Development Control Group are set out in the minutes of its meeting held on 30 October 2001, when it accepted and endorsed Mr Coates’ recommendation in favour of the proposal. On the issue in principle of accepting the proposed multiple occupation the minutes state in paragraphs 2.3 to 2.6:

- “2.3 The principle of the development proposal has been addressed in the DCO report.
- 2.4 This property has a lawful use as a nursing home which has had various extensions of differing styles over the years. It provided 14 bedrooms in total including 2 staff bedrooms. As such it no longer comprised a planning use within Class 14 (residential: dwelling unit). This fact is significant in that the proposal does not result in the loss of an existing family dwelling. It also distinguishes this plot from the remainder of the premises in this part of the Conservation Area of Malone Park.
- 2.5 It is therefore considered that acceptance of the principle of the change to apartments does not create a precedent within Malone Park since the site has a distinguishable provenance, nor in the circumstances is the proposal contrary to the Conservation Area document where it acknowledges the predominant land use is single family residential which the Department will seek to protect and promote (page 24:4). Although the document states that ‘Change to flats, special residential and non residential uses is considered to be inappropriate’, this property already has a lengthy history outside Class 14 as stated above (para 2.4).
- 2.6 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. Ideally a suitable scheme should result in enhancement but caselaw suggests the impact should at least be ‘neutral’.”

[20] The Group went on to discuss Mr McIlhagga's objections to the size and massing of the rear portion and the size of the "footprint" by comparison with that of the original dwelling. It did not deal with the substance of those objections. It merely expresses the view that there would be an enhancement through the removal of the inappropriate rear extensions, but does not consider whether the size and massing of the rear portion are suitable or whether they should be reduced, which was Mr McIlhagga's theme. It is apparent from section 3.3 of the minutes that the Group accepted Mr Coates' interpretation of the phrase "the original dwelling" in the Conservation Area document as being that of the building at the time of the application and not as it was when it was originally constructed as a single family dwelling.

[21] Ms O'Toole also stated in paragraph 15(ii) of her affidavit of 12 April 2002 that -

"The CA [Conservation Area] document is supplementary planning guidance and does not carry as much weight in planning policy terms as the development plan or a planning policy statement."

She went rather further in paragraph 5(e) of her second affidavit, where she stated that "PPS6 postdates and takes priority over the CA document." We share the difficulty felt by the judge in accepting these propositions. We agree with the opinion expressed by him at page 13 of his judgment:

"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."

We would only add that the Preamble to PPS6 stated that the policies of that statement would supersede a number of provisions of the Planning Strategy for Rural Northern Ireland, including Policy CON5 on Conservation Areas. It is apparent from the terms of the Planning Strategy that it excludes Belfast, with the clear implication that the Belfast Conservation Area policy documents are not superseded.

It appears that Ms O'Toole and her colleagues misdirected themselves on this issue. Whether this would without more suffice to vitiate the planning approval decision may be debatable, but it is a factor to be taken into account when determining the way in which the court should approach the case on consideration of the judge's overall conclusion.

[22] The judge considered the matters in respect of which the respondents impugned the planning decision under four heads:

- (a) The Department 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.
- (b) Single family residential accommodation as a matter of policy.
- (c) Failure to take into account the relationship between the proposed development and the originally constructed dwelling.
- (d) Reliance upon the demolition of the unsatisfactory extensions as justification for the development.

The judge held in favour of the Department on all but (c), but held that since it had misunderstood and misinterpreted it in relation to that aspect he would quash the planning decision.

[23] We can deal fairly briefly with head (d). We agree with the judge that removal of the unsightly post-1970 accretions was an obvious benefit and that it was not an inevitable consequence of any change of ownership that they would be removed, however probable that might be. A purchaser might wish to carry on the same user without changing the buildings, or an applicant for planning permission might conceivably wish to leave the extensions in order to save money. We might ourselves regard this as so unlikely as to be worth little consideration, but it is a matter of weight for the planning authority.

[24] Heads (a) and (b) can be considered together. It was argued on behalf of the respondents in the court below that the suitability of 3 Malone Park for use as single-family residential accommodation was a free-standing material consideration, which accordingly had to be taken into account by the Department. The judge held that it was not, because of the long period of use as an old people's home. On this argument the requirement at page 24 of the Conservation Area document, that applicants must demonstrate conclusively that properties are no longer suitable for single family use, did not then apply, because the property in question was not being used for residence by a single family use. As against that, it is stated in the same passage that the Department will seek to protect and *promote* single family residential character. In these circumstances it may be said that it was incumbent on the Department to address the question whether the house could be returned to such use. Since it did not address this question, it is not in a position to say that it put no weight on this factor, and it is not for the court to dismiss it on the ground that if it had done so it would have attributed no weight to it. Although this point was not raised by way of a respondent's notice or argued before us, we consider that there is merit in it. Whether or not we should take the point into account in determining the appeal, it should in our opinion be addressed properly when the Department comes to reconsider the matter.

We appreciate that it might be difficult in practice for a developer to demonstrate conclusively or the Department to verify that the property is no longer suitable for single family use, but we consider that an attempt must be made, and Mr Goan's evidence may be regarded as of importance in ascertaining the answer to the question.

[25] The main argument on the appeal centred round head (c), on which the judge found in favour of the respondents. The Development Control Group, whose conclusions were accepted by the Department, had decided that the ratio between the "footprint" of the development proposal and the "original dwelling" could correctly be based by looking at the coverage of the house together with its post-1970s accretions, rather than that of the house as it was originally built. This appears not only from the minutes of the Group to which we have referred, but also from the averment in paragraph 5(e) of Ms O'Toole's affidavit of 29 May 2002 where she says:

"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 has not existed for a considerable number of years would have been unreasonable."

The judge said, in a passage at page 12 of his judgment with which we agree:

"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."

We would only add that if the Department's construction were correct, one or more developers could by a series of planning applications increase the footprint of the premises by 150 per cent each time until it became substantially larger than the original, which would completely stultify the object of the provision. We accordingly hold, as did the judge, that the Department has misinterpreted and misapplied its policy in an important respect. It was clearly a material part of the Department's consideration in giving planning permission for the development, and it could not be regarded as having been so tangential or peripheral that it would have made no difference to the outcome if it had been correctly approached.

[26] On this ground alone we would affirm the judge's decision and quash the planning decision made by the Department, but when the other issue relating to single family dwelling is added to it we have no hesitation in holding that it cannot stand. We therefore dismiss the appeal.