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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McLean Bookmakers and North West Bookmakers' Applications [2014] NIQB 32

IN THE MATTER OF AN APPLICATION BY McLEAN BOOKMAKERS FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY NORTH WEST BOOKMAKERS LTD FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS TAKEN BY THE DEPARTMENT OF ENVIRONMENT PLANNING SERVICE

TREACY J

Introduction

[1] The applicants in this combined judicial review challenge decisions made by the Department of Environment Planning Service ("the respondent") whereby planning permission was granted to Toal's Bookmakers ("the High Street application") and Sean Graham Bookmakers ("the Castle Street application") to allow them to extend their premises onto High Street, Belfast and Castle Street, Belfast respectively. Both applications raise common issues.

[2] The High Street Application concerns a change of use from a passport office to a bookmaking office to allow extension of the existing office, together with the construction of a new flat roof over an existing internal courtyard. The Castle Street Application relates to a change of use and extension of the existing retail unit to a bookmaking office, to facilitate the extension of the existing bookmaking office.

[3] The applicants in the High Street application are McLean Bookmakers and North West Bookmakers Ltd. The single applicant in the Castle Street application is

North West Bookmakers Ltd. Toal's Bookmakers and Sean Graham Bookmakers are Notice Parties to the proceedings.

[4] Mr McGleenan QC and Mr McQuitty appeared for the applicants, Mr McLaughlin QC appeared for the respondent and Mr Humphreys QC and Mr Lunney appeared for the Notice Party Sean Graham Bookmakers.

Background

[5] Both development proposals involve existing bookmaker's offices, located within Belfast City Centre Conservation Area. In both cases, the existing offices have ground level frontage onto the public street. Both bookmakers wish to convert nearby ground floor premises located on a different street and also a rear courtyard, which will facilitate internal connection between the two offices. The result will be an extended bookmaker's office, with double frontage onto two public streets. In both cases, the development site lies within the draft boundaries of the Primary Retail Core (as defined by the draft Belfast Metropolitan Area Plan - "BMAP"), but outside the proposed area of Primary Retail Frontage.

[6] In the case of the High Street application, the existing bookmaker's office fronts onto Pottinger's Entry. It is proposed to extend the bookmakers into the former passport office. Permission has been granted for a change of use to a bookmaker's office and also to construct a new flat roof over an existing internal courtyard, which will provide a connection and a larger office. The development will not involve any external alteration to the street view or to the facades of the building. All proposed construction works are internal and will not be visible to public view.

[7] In the case of the Castle Street application, the existing bookmaker's office fronts onto King Street. It is proposed to convert a small retail unit with frontage onto Castle Street (formerly used as a hair salon). The two premises will be connected by the enclosure of an existing storage area to the rear of the Castle Street premises. Again, no alteration to the existing frontages will take place and the new construction works will not be visible to public view.

[8] In both cases, planning permission has been granted for a change of use to a bookmaker's office and also for the building works to the internal courtyards. Signage was not included within either permission. This is regulated by a separate application process under the Planning (Control of Advertisements) (NI) Regulations 1992 and PPS 17 *Control of Outdoor Advertisements*.

Grounds of Challenge

[9] In summary the applicants contend that the impugned decision of 16th May 2012 was unlawful and ought to be quashed. The main thrust of both cases relates to the respondent's failure to have regard to the licensing issues (Ground 2) and to the

alleged breaches of PPS 6 (Grounds 1 and 4). In the applicants' combined skeleton argument they summarised their grounds of challenge as follows:

(i) Ground 1 - An extension of the magnitude proposed at this location in a conservation area is contrary to section 7.8 of PPS 6. The respondent has misdirected themselves in concluding that this was only a "change of use" and not an extension for the purposes of PPS 6.

(ii) Ground 2 - The respondent failed to take into account a relevant factor namely that where a bookmaker seeks to expand a bookmaking office by way of extension to existing premises it is not necessary to demonstrate "demand" for such premises in respect of any subsequent licensing proceedings ("the licensing issue").

(iii) Ground 3 – The respondent's conclusion that there would be no loss of retail space as a result of the impugned decision amounted to a misdirection.

(iv) Ground 4 – The impugned decision was made contrary to section 7.6 of PPS 6 in respect of the "grain" of the conservation area.

(v) Ground 5 – The respondent has failed to have regard to section 9 of the DOE Advice Note DCAN 3.

Relevant Statutory Framework

[10] The applicants submitted that the respondents did not have proper regard to the "evasion" of the licensing requirements in the Betting, Gaming, Lotteries and Amusements (NI) Order 1985 ("the 1985 Order") through the granting of planning permission for extensions to existing bookmaker's offices which did not require proof of demand.

[11] For the sake of completeness I have set out the entirety of Art 12 of the 1985 Order below. The principal point to be noted is that Art 12(4) provides that a court shall, subject to paras 5 and 7, refuse an application for the grant of a bookmakers licence unless it is satisfied of the various matters set out at 12(4)(a)-(k). This includes the requirement at 12(4)(j) that a court shall refuse an application unless it is satisfied as to inadequacy of existing premises to meet demand. But the requirement of inadequacy is expressly subject to 12(7) which provides that 12(4)(j) does not apply to an application in respect of premises on the site of a licensed office for which the applicant already holds a bookmakers licence.

[12] Article 12 of the 1985 Order provides:

> ***"Grant of bookmaking office licences***
>
> 12.—(1) An application for the grant of a bookmaking office licence shall be made to a county court.

(2) The procedure for applications for the grant of bookmaking office licences is set out in Schedule 2.

(3) On an application for the grant of a bookmaking office licence the court shall hear the objections, if any, made under Schedule 2.

(4) A court shall, subject to paragraphs (5) and (7), refuse an application for the grant of a bookmaking office licence unless it is satisfied—

(a) that the procedure relating to the application set out in Schedule 2 has been complied with; and

(b) that the applicant is a licensed bookmaker; and

(c) that the applicant is not a person in respect of whom a disqualification order in respect of bookmaking office licences under Article 30 or 53 is in force; and

(d) that the premises are not premises in respect of which a disqualification order under Article 30 is in force; and

(e) that there is in force in respect of the premises a fire certificate; and

(f) that the applicant owns the premises either in fee simple or for a term of years of which at least 21 are unexpired at the date of the application; and

(g) that the premises will not injuriously affect, or be detrimental to, the interests of persons attending a place of worship, a religious institution, a school or premises habitually used by members of a youth organisation in the vicinity of the premises; and

(h) that the premises do not form part of licensed premises within the meaning of the Licensing (Northern Ireland) Order 1996; and

(j) that, having regard to the demand in the locality in which the premises to which the application relates are situated for facilities afforded by

licensed offices, the number of such offices for the time being available (including any premises for which a licence is provisionally granted) to meet that demand is inadequate, and

(k) either—

(i) that there is in force **planning permission** to use the premises as a bookmaking office for the period during which the licence would be in force; or

(ii) that the premises may be used as such an office for that period without such permission.

(5) A court may grant a bookmaking office licence notwithstanding that the procedure relating to the application set out in Schedule 2 has not been complied with if, having regard to the circumstances, it is reasonable to do so.

(6) A court may refuse an application for the grant of a bookmaking office licence if it is satisfied—

(a) that the premises are not suitable as a licensed office; or

(b) that the applicant has been convicted of an offence under this Part or Chapter III of Part III or Part I of the [1957 c. 19 (N.I.)] Betting and Lotteries Act (Northern Ireland) 1957.

(7) Paragraph(4)(j) shall not apply to an application for the grant of a bookmaking office licence in respect of premises which are on the site or in the vicinity of a licensed office for which the applicant holds a bookmaking office licence and which is a licensed office to which Article 26(1)(a) to (e) applies.

(8) Where the court refuses an application for the grant of a bookmaking office licence, it shall specify in its order the reasons for its refusal."

[13] Article 14 of the 1985 Order makes provision for the grant of a provisional licence. It provides:

Provisional grant of bookmaking office licences

14.—(1) Where premises are about to be constructed, altered or extended or are in the course of construction, alteration or extension, an application may be made to a county court for the provisional grant of a bookmaking office licence for those premises.

(2) An application for the provisional grant of a bookmaking office licence may be made by the licensed bookmaker who proposes to be the owner of the business to be carried on under the licence after it has been declared final under paragraph (7).

(3) The procedure for applications for the provisional grant of bookmaking office licences is set out in Part I of Schedule 2 as modified by Part II of that Schedule.

(4) For the purposes of the provisional grant of bookmaking office licences Article 12 shall have effect as if—

(a) any reference in paragraphs (3) to (8) to the grant of a bookmaking office licence were a reference to the provisional grant of such a licence; and

(b) where the application relates to premises about to be constructed or in the course of construction, any reference in paragraphs (4)(f) to (k), (6) and (7) to the premises were a reference to the proposed premises and paragraph (4)(d) and (e) were omitted.
…."

[14] Article 26 makes provision for temporary licences and includes the condition referred to in Article 12(7) of the Order which disapplies the need to prove demand in certain circumstances. Article 26 provides:

"Temporary continuance of business in certain circumstances

26.—(1) **Where any licensed office—**

(a) has, by reason of fire, tempest, or other unforeseen and unavoidable calamity, become

incapable of being used for the business carried on in it under the bookmaking office licence; or

(b) has been or, is likely to be, acquired or demolished, either wholly or to a substantial extent, under any statutory provision; or

(c) has been or, is likely to be, extended to include premises which are, or are to be constructed so as to be, contiguous to it; or

(d) is or is to be used for the purpose of the same business in conjunction with additional premises which are or are to be constructed adjacent to it; or

(e) has been or is to be wholly or substantially demolished and new premises have been or are to be constructed wholly or partly within its curtilage;

and the licensed bookmaker is unable to carry on the business of a bookmaker in the licensed office, a court of summary jurisdiction may, on an application made by him in compliance with the procedure set out in Schedule 6, make an order authorising the continuance of that business in –…."

<u>Relevant Planning Policy & Guidance</u>

[15] "PPS 6 – Policy BH 12. New Development in a Conservation Area" states:

The Department will normally only permit development proposals for new buildings, alterations, extensions and changes of use in, or which make an impact upon the setting of a conservation area where all of the following circumstances are met:

(a) the development preserves or enhances the character and appearance of the area;

(b) the development is in sympathy with the characteristic build 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.

[16] The Justification and Amplification text for the policy contains the following commentary:

> **"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.
>
> **Change of Use**
>
> 7.9. In assessing applications for the change of use of a property within a conservation area consideration will be given to both the general land use policies of the Department and the impact of the proposed use on the character and appearance of the conservation area. New uses will normally only be acceptable where any associated external alterations, for example

> new shop fronts, are sympathetic to their setting and relate in scale, proportions and materials to the remainder of the building and the local street scene."

[17] DCAN 3 is a Development Control Advice Notice for development consisting of bookmaking offices. It was published in 1983, prior to the enactment of the Betting, Gaming, Lotteries and Amusements (NI) Order 1985. Relevant extracts include the following:

> "2. A proposal to develop a bookmaking office, whether by new construction or by the material change of use of existing premises, requires planning permission. Bookmaking offices are expressly excluded from the definitions of both "shop" and "office" given in the Planning (Use Classes) Order 1973 so that a change in the use of either type of premises will require the consent of the Department.
>
> 4. The two forms of control, ie, planning control and licensing are quite distinct and should not be confused. The Department, as planning authority, in determining a proposal will deal only with those aspects of the proposal which are relevant to planning. Since the 1957 Act allows the licensing authority to consider matters such as the need for new premises having regard to the facilities already existing and social issues, the Department takes the view that planning powers should not duplicate the provisions of other legislation.
>
> 9. The question of loss of retail floor space and the fact that the proximity of bookmaking offices may discourage the location of certain types of retail outlet will be considered when appropriate. In some instances it may be possible for bookmaking offices to locate on the upper floors of a building thus avoiding the problems associated with breaks in the continuity of shopping frontage. However, cognisance will need to be taken of Section 7 of the Betting and Lotteries Act (NI) 1957. In particular it will be necessary to ensure that the premises does not form part of premises licensed for the sale of intoxicating liquor, and that it does not communicate internally with other premises."

[18] Para 51 of PPS1 – General Principles provides guidance upon the approach to determining planning applications where there is an overlap with another statutory licensing process:

> "51. The Department will base its decisions on planning applications on planning grounds alone. It will not use its planning powers to secure objectives achievable under non-planning legislation, such as the Building Regulations or the Water Act. The grant of planning permission does not remove the need for any other consents, nor does it imply that such consents will necessarily be forthcoming. However, provided a consideration is material in planning terms, it will be taken into account, notwithstanding the fact that other regulatory machinery may exist."

Applicable Legal Principles

[19] In Stringer v Minister of Housing and Local Government [1971] 1 All ER 65 at 77 Cooke J said that any consideration which related to the use and development of land was capable of being a planning consideration, its materiality [or otherwise] depending on the individual circumstances of the case. In Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All ER 636 [in a case concerning planning obligations] the House of Lords considered that for something to be a material consideration, it must (1) serve a planning purpose; and (2) have a connection with the proposed development which is not *de minimis*.

[20] In Telling and Duxbury's Planning Law and Procedure [2012, 15th Edition] at para 8.87 the position is summarised as follows:

> "The question of whether a particular issue is or is not material has come before the courts on numerous occasions, and the courts in general adopted a liberal approach. Indeed, some indication of the width of 'material considerations' is afforded by the 2010 decision in R (on the application of Copeland) v Tower Hamlets London Borough Council [2010] EWHC 1845 (Admin). Here a grant of planning permission for a fast food takeaway was legally challenged on the basis that the local planning authority had failed to consider the proximity of the premises to a local secondary school. The planning committee had been erroneously advised that the promotion of healthy eating was a valid concern, but not a 'material consideration' in the planning context. Cranston J quashed the grant of permission on the

> ground of failure to have regard to a material consideration. It seems that although the promotion of healthy eating is a social objective, it is one relating to the physical use of the land and therefore capable of amounting to a planning consideration."

[21] In Copeland Cranston J provides a helpful summary of some of the relevant authorities at para [21] et seq:

> "[21] In *R (On Application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] JPL 431, [2003] P & CR 19, the Court of Appeal addressed what was a material consideration in the planning context. Jonathan Parker LJ said:
>
> > "121. In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues."
>
> It is trite law that the weight to be attached to any material consideration is a matter for the decision maker, subject to Wednesbury unreasonableness: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20, [70].
>
> [22] Promoting social objectives may be a material consideration in the planning context. Planning controls in order to promote social objectives are considerations which can relate to physical land use. Whether a social objective is relevant in a particular case turns on the circumstances. As long as the

promotion of the social goal is lawfully within the planning sphere it matters not that it falls elsewhere as well.

[23] In Stringer v Ministry of Housing and Local Government [1971] WLR 1281, [1971] 1 All ER 65, Cooke J said:

> "It may be conceded at once that the material considerations to which the Minister is entitled and bound to have regard in deciding the appeal must be considerations of a planning nature. I find it impossible, however, to accept the view that such considerations are limited to matters relating to amenity. So far as I am aware, there is no authority for such a proposition and it seems to me wrong in principle. In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration."

The Government's Planning Policy Statement 1: Delivering Sustainable Development of 2005 refers to promoting, amongst other things, personal well-being and to the need for planning authorities to seek to achieve outcomes which enable social, environmental and economic objectives to be effected together.

[24] In its correspondence with the claimant's solicitors the council referred to *Westminster City Council v Great Portland Estates* [1985] AC 661. There, the House of Lords held that the test of what is a material consideration in the planning context was whether it served a planning purpose relating to the character of the use of land. However Lord Scarman, with whom the other law lords agreed, said (page 670 E to F):

> "It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as to the background to the consideration of character of land use. It can, however, and sometimes should be given direct effect as an exception

under a special circumstance. But such circumstances when they arise will be considered not as a general rule but as exceptions to a general rule to be met in special cases."

That passage was cited in Newport Borough Council v Secretary of State for Wales [1998] ELR 174, [1998] JPL 377, where the Court of Appeal held that it was a material error of law to hold that a genuinely held public perception of danger from a proposed development, albeit that it was unfounded, could never amount to a valid ground for refusal."

[22] In Harrison v Secretary of State for Communities and Local Government [2009] EWHC 3382 (Admin) the court considered the extent to which matters regulated by other legislation can be a material consideration under planning legislation. That case concerned a decision by a local planning authority to take enforcement proceedings alleging a material change of use of a site from agriculture to mixed use involving the manufacture of animal by-products and a concern over the possibility of pollution. At paras [19]-[21] the court set out what it considered to be the proper approach in those circumstances:

"[19] PPS 23 at paragraphs 2 and 10 describes the pollution control regimes and planning regimes as complementary. Planning system "plays a key role in determining the location for development" (paragraph 2) particularly in respect of development which "may give rise to pollution" (paragraph 10). The planning system has to determine whether the development itself is an acceptable use of land and the impact of those uses. This to my mind is distinct from the IPPC process which "controls the processes or emissions themselves". PPS 23 advises that planning decision makers "work on the assumption that the relevant pollution control regime will be properly applied and enforced." Guidance is however broad guidance to be applied sensibly having regard to all the facts in a wide range of different situations. It works on the assumption that an appropriate location is chosen for a particular activity not that pollution control will make any activity acceptable in any given situation.

[20] It cannot be right in my judgment that paragraph 10 simply says that the planning system must assume that no pollution issues will arise.

Indeed, in the case of Hopkins Developments Ltd -v- (1) The Secretary of State (2) North Wiltshire District Council [2007] Env LR 14 George Bartlett QC sitting as a Deputy High Court Judge upheld an Inspector's decision which decided that the amenities of the area and the local residents would be seriously harmed by dust emissions. In the High Court challenge, it was argued that the Inspector had to assume the proper application of the pollution control regime and accordingly he erred in law in deciding that there would be serious harm to the amenity of the area by reason of dust emissions. The Court rejected that contention at paragraph 15 in the following terms:-

> "This is an argument that is superficially attractive. But it is dependent on the underlying assumption that, in relation to the likely impact of the pollutants to which the 2000 Regulations apply, primacy must be accorded to the judgment of the Regulator above that of the planning authority. I can see no basis for such an assumption, and it does not appear to me that the passage from paragraph 10 of PPS 23 that I have quoted above provides support for it. It would effectively mean that, unless it was clear to the planning authority that the plant could never achieve a Permit (cf Gateshead per Gladwell LJ at 359), the potential impact of pollutants could never enter into its consideration of whether planning permission should be granted. The thrust of paragraph 10 is that planning authorities should focus on the impacts rather than the control of emissions, not that they must subordinate their judgment on the impacts to those of the pollution control authority. I therefore reject Mr Wadsley's contention that it was not open to the Inspector to conclude that the impact of the dust would be seriously adverse".

[21] The thrust of the decision in Hopkins …. is that the planning decision maker was entitled to reach his own conclusions as to the impact of the proposed development on amenity and whether the site under consideration was the appropriate location for the

> proposed development. The fact that the impact might be capable of being regulated under a pollution control regime did not necessarily mean that the only possible option available to an Inspector was to leave everything to that regime. If the planning decision maker considered that there might be adverse consequences because of the effects of the proposed development on amenity and/or issues as to the appropriateness of locating the development of the site in question, he was entitled to have regard to such matters as material considerations in making his decision on the planning merits of the proposed development."

Ground 2 -The Licensing Issue

[23] The extension of a bookmakers office of the nature proposed in these applications engages two regulatory processes - the planning process and the licensing process. The planning process ascertains whether a development proposal represents an acceptable land use. In determining that question the planning authority must take account of all material considerations. Any matter is capable of being a material consideration, provided it relates to the use and development of land. Where the proposed development engages another regulatory process, the outcome of which can impact upon the operation of the proposed development, that could be a material consideration in the planning decision. The other regulatory process can be material to a planning decision where that process relates to the use and development of the land and where its outcome can potentially impact upon the planning judgment which the planning authority must form.

[24] Decisions on planning applications must be determined on planning grounds alone. The grant of planning permission does not remove the need for obtaining other consents. Provided a consideration is material in planning terms it must be taken into account, notwithstanding the fact that other regulatory machinery may exist. Any consideration which relates to the use and development of land is capable of being a planning consideration. These principles are reflected in PPS 1 which I have set out above at para [18].

[25] As the court observed in Harrison v Secretary of State for Communities and Local Government [2009] EWHC 3382 at para [21] the fact that the impact might be capable of being regulated under another [pollution control] regime did not necessarily mean that the only possible option available to an Inspector was to leave everything to that regime. If the planning decision maker considered that there might be adverse consequences because of the effects of the proposed development on amenity and/or issues as to the appropriateness of locating the development of the site in question, he was entitled to have regard to such matters as material

considerations in making his decision on the planning merits of the proposed development.

[26] However, the authorities on parallel regulatory processes relied upon by the applicants are inapt in the present case. This is because, as Mr McLaughlin submitted, the two regulatory processes in the present case are not parallel but *sequential* processes in which the planning application is determined first. This is a feature of the relevant statutory regime for the licensing of bookmakers which by Art 12(4)(k)of the 1985 Order requires that planning permission must be in place prior to the grant of a bookmaker's licence.

[27] The applicant is not contending that the outcome of the licensing process might influence the exercise of planning judgment. The applicants case is that the planning process might influence the outcome of the licensing process and that the respondent erred in failing to take account of the provisions of the 1985 Order which permits an extension of a bookmaking office without demonstrating demand. The applicant has adduced no authority in support of the proposition that a planning permission, itself granted by reference to material planning considerations, can be impugned for failing to take account of the influence which the grant of planning permission may have in a separate licensing process. In my judgement the provisions of the 1985 Order which permit the extension of a bookmaking office without demonstrating demand was not a material planning consideration.

[28] Even if the effect of a planning permission upon another licensing process could be a material consideration the absence of a requirement to demonstrate "demand" does not flow from the planning decision but from the licensing legislation. The 1985 Order recognises two different forms of licensing application with different procedural requirements. The procedure for the grant of a new license does require proof of demand whereas the procedure for extending existing premises does not.

[29] The statutory requirements for obtaining a bookmaking office licence over extended premises does not engage questions of land use and development over which the Department is required to exercise judgment when making a planning decision. The Department has no discretion to exercise on that issue and its planning decision on whether a bookmaking office is an appropriate land use at this location, cannot alter those statutory requirements. The operation or content of those statutory requirements under the 1985 Order therefore cannot be a material consideration in the planning decision.

[30] Mr McLaughlin submitted, correctly, that the fallacy of the applicants' contention is demonstrated by the practical consequences of it. I agree with the following passage from his skeleton argument: "the Department's powers are limited to granting permission, refusing permission or granting subject to conditions. Assuming that the proposal is acceptable in all other respects, if the applicant is right, the Department would then be required to take account of the fact

that a bookmaker's licence could subsequently be obtained without the need to prove "demand". However, even if it regarded that outcome as undesirable, it is entirely powerless to change it, through its planning decision. It has no power to require that the bookmaker should prove "demand" during the licence application. It only has power to refuse the application altogether. The important point being that desirability of proving "demand" cannot actually be reflected in the Department's exercise of planning judgment. All the Department could do is consider or "take note" of this consequence. It cannot act upon it, by allowing it to influence its decision making. This begs the question: if a factor cannot actually influence the decision making process, how can it be a material consideration? Insofar as it might be contended that the Department could reflect its disapproval by refusing permission, this would be to invite the Department to subvert the statutory function of the licensing Court by pre-determining a licensing process over which it has no statutory responsibility. This would be a classic example of a failure to use statutory powers, in a bona fide manner, to achieve the purposes for which they were conferred".

[31] For these reasons I agree with the respondent that the statutory procedural requirements for obtaining a bookmakers licence over extended premises are not a material consideration in the determination of this type of application involving a change of use and ancillary operational development.

Ground 5 - The DCAN 3 Issue

[32] The applicant contended that the Department failed to have regard to Section 9 of DCAN 3 notwithstanding that DCAN 3 is listed in both Development Control Officer's reports as a relevant material consideration which was taken into account by the Department. DCAN 3 is a Development Control Advice Notice, specifically relating to applications for bookmaking offices published by the Department in 1983 and publicly available on its website. The Department accepted that the contents of this publication are material considerations in the determination of bookmaking applications to which it relates.

[33] Insofar as the applicant appeared to contend that DCAN 3 requires the Department to take account of the licensing legislation in the broad sense I reject that proposition. Para 9 of DCAN 3 identifies one aspect of the licensing process which may be material to certain types of bookmaking office applications. The para addresses the issue of loss of retail floor space which can arise in a bookmaker's application for a city centre location and this issue is acknowledged to be a material consideration in the planning decision. The guidance makes clear that the identified problem can sometimes be avoided by locating the office on an upper floor – "the upper floor solution" - and thus preserving areas of ground level retail frontage.

[34] Para 9 identifies one aspect of the licensing process which may be material to certain types of bookmaking office applications. The limited extent to which the licensing process might be taken into account as part of an "upper floor" proposal is

an example of an appropriate instance in which the planning authority might take account of the outcome of a parallel regulatory process. This arises because the outcome of that process, in the limited circumstances identified, is directly relevant to the exercise of planning judgment and hence could be a material consideration in the decision making process.

[35] The development proposals here did not involve any "upper floor solution" or other attempt to preserve retail frontage in a manner which might require the Department to take account of these potential areas of refusal within the licensing legislation. Accordingly, this portion of DCAN 3 did not arise on the facts and was not material to these decisions.

[36] As appears clear from the reports by the development control officers, the Department did take account of DCAN 3 and those aspects of it which were relevant to the planning decision. There was no need to take account of the statutory provisions referred to in para 9, since they simply were not relevant to these applications.

[37] Furthermore, since publication of DCAN 3, the licensing legislation has been amended. Article 12 now provides for a single application to a Court. There are two material changes:

> (i) The grounds for refusal set out in Article 12 only include the incorporation of the proposed bookmaking office into premises licensed to sell liquor [Art 12(4)(h)]. The previous prohibition upon "*internal communication*" has been repealed and not re-enacted.
>
> (ii) The 1985 Order now requires the premises to have planning permission for use as a bookmaking office, before the license can be granted [Art 12(4)(k)(i)].

[38] The question of whether there is any "internal communication" with other premises is no longer relevant in any planning application. Moreover neither bookmaking office has any connection with or forms part of a premises licensed to sell intoxicating liquor. As the respondent submitted these parts of the former and current statute are therefore irrelevant and could not impact upon the outcome of the planning decision. Any alleged failure to take account of them is immaterial.

<u>Grounds 1 & 4 - PPS 6</u>

[39] Since both of the proposed development sites are located within Belfast City Centre Conservation Area Policy BH 12 of PPS 6 was therefore a material consideration in the determination of both applications. The applicant's challenge

on this ground amounted to a contention that the development proposals will have an adverse impact upon the character or appearance of the conservation area. This is a pure rationality challenge to the planning judgment of the Department on this issue.

[40] In considering the legality of the Department's judgment on the impact of the development on the conservation area the respondent submitted that several features of both development proposals were important namely:

(i) That neither proposal involved alteration to the existing facades or external appearance of the buildings affected.

(ii) All construction works would relate to existing internal courtyards, which would not be visible to the public, viewed from the street.

(iii) Any external advertising would be regulated by a separate application process.

(iv) The development sites are located within the city centre and are surrounded by premises dedicated to retail and commercial uses.

(v) In both cases, a bookmaking office is already present and trading, with other bookmaking offices within the locality.

[41] In setting out this ground of challenge the applicant relied on Article 50(5) of the 1991 Order which requires that for development in a conservation area "…*special attention shall be paid to the desirability of preserving or enhancing its character or appearance..*" and by reference to paras 7.6 and 7.8, both of which form part of the "Justification and Amplification" section of policy BH 12.

[42] The respondent submitted that in considering Article 50(5), Policy BH 12 and the amplification provisions of that policy, none of these are prescriptive about the types of development which should be permitted within a conservation area. On the contrary, the respondent says that all of them call for the exercise of planning judgment by the Department upon the impact of the development upon the setting of the conservation area.

[43] Further, the respondent submits that the applicant's challenge on this ground raises an issue of interpretation over part of Amplification text for Policy BH 12 and argues that the type of development proposal in this case is governed by the text relating to "*extensions*" rather than the text relating to "*changes of use*". The Department does not accept this argument and contends that, on proper analysis,

the applications incorporated both types of development proposal, each part of which fell to be considered under the guidelines for each type. The respondent makes the following points on this issue:

(i) The amplification text should properly be read in light of the wording of the policy itself. The introductory words of Policy BH 12 are important. They provide:

> "The Department will normally only permit development proposals for new buildings, alterations, extensions and changes of use in, or which make an impact upon the setting of a conservation area where all of the following circumstances are met……" (emphasis added).

(ii) The 1991 order recognises two forms of development which require planning permission: operational development (ie construction work) and material changes in use. The introductory wording of BH 12 refers to "*development proposals*" and then identifies four types of development: "*new buildings, alterations, extensions and changes in use*". It is submitted that the first three categories are plainly different forms of operational development, namely changes in the built form of buildings within the conservation area. This is entirely consistent with Article 11(2) of the 1991 Order which defines "*building operations*" to include: "*(b) rebuilding; (c) structural alteration of or addition to buildings…*". An "*extension*" is therefore not an identifiable form of development recognised under the 1991 Order. It is clear from the context in which the word is used in Policy BH 12, that it is intended to mean an addition to the building.

(iii) The guidelines within the Amplification text for each of these types of development proposal should be read in light of these definitions.

(iv) The development proposals in both of these applications, properly analysed, involved both changes of use and also modest operational development. While the cumulative effect of the component parts of the proposal might be conveniently described as an "*extension*", this does not detract from the nature of the development which has

actually been authorised. The Department was therefore perfectly entitled to consider the aspects of the development which related to the use of the existing commercial premises (ie. hair salon and passport office) and the internal courtyard as a bookmakers office to be applications for a "change of use". It was therefore not a misdirection for the Department to consider the acceptability of this aspect of the proposal by reference to the guidelines on "change of use" and to consider the guidelines on "alterations and extension" to be applicable to the proposed operational development works of enclosing the courtyards.

(v) The Department was also perfectly rational in its conclusion that the building works for enclosure of the courtyard fell within the guidelines for "alterations and extensions" since they were subsidiary to the building, located to the rear, were not visible from public view and did not alter the appearance of the building.

[44] The respondent submits that this ground of challenge is founded upon a use of language rather that the substance the development proposal. The applicant refers to the use of the word "extension" in the text of BH 12 and also in the licensing legislation to contend that the two refer to one and the same thing. Properly construed the respondent submits that the word "*extension*" in the planning context clearly means an external addition to the built form of a building while in the licensing context it means an increase in the licensed internal floor space. The different meaning in the licensing context should not be used to distort the proper interpretation of policy BH12.

[45] For these reasons I agree with the respondent that there has been no misunderstanding of the relevant policy and no material misdirection about its application.

[46] The applicant contended that the Department disregarded/misdirected itself on the second half of para 7.6 PPS 6 relating to the character and ambiance of the conservation area and that it did not have proper regard to the over-arching requirement in Article 50(5) to consider the appearance and character of the conservation area.

[47] The respondent submitted that these contentions were in substance rationality challenges to the Department's conclusion that the development would not give rise to unacceptable impacts upon the conservation area. It is clear that the Department took account of the impact of the developments on the conservation area as

evidenced by its assessment of the applicable policies and guidelines and also the objections set out in the DCO report. The Department considered issues such as streetscape, noise, nuisance, car parking, surrounding uses within the city centre, nature of the proposed alterations etc all of which are directly relevant to an assessment of impact upon the conservation area.

[48] Furthermore, the respondent pointed out that the Department had the benefit of advice from the Conservation Officer, whose primary function is to provide advice upon whether a development within the Conservation Area would give rise to an unacceptable impact upon it. In both cases, the consultation response was prepared by direct reference to the criteria within BH 12 of PPS 6. In both cases, he raised no objection to the proposal.

[49] I agree with the respondent that given reliance upon such advice, when coupled with the Department's own assessment of impacts set out in the DCO report, it is clear that it has formed a perfectly lawful and rational view about whether the developments will preserve or enhance the character or appearance of the conservation area.

Ground 3 - Loss of Retail Space

[50] Since both development sites are located within the city centre the relevant current policy governing non-retail development proposals within city centres is PPS 5. The development sites are also within the proposed Primary Retail Core as defined in draft BMAP, but not within the proposed area of Primary Retail Frontage.

[51] In the case of the High Street application, the former Passport Office is currently empty and for many years was in commercial use as an office – not retail use. Accordingly, the grant of planning permission will not result in the "loss" of retail space. It will result in a continuation of the existing level of retail provision.

[52] In the case of Castle Street, there was an existing retail unit, which is very small. The loss of that use was considered to be acceptable. As set out in the DCO report:

> "The proposal was considered to comply with PPS 5, given the context of the site, the level of vacancy/dereliction, its location at the periphery of the primary retail core and the amount of retail floor space to be lost."

[53] The grant of permission was in accordance with PPS 5 and draft policy R1 in BMAP those policies.

[54] PPS 5 provides:

> "[23] …. Within primary retail core areas, the Department will control non-retail uses at ground floor level. Applications for change of use from shop to local services, such as building society offices, banks and estate agents, restaurants or hot-food take-away premises may be acceptable except where:
>
> - there would be a significant loss of retail floor space at ground level;
>
> - a clustering of non-retail uses is created; or
>
> - the area overall is tending to be dominated by non-retail uses."

[55] The policy is one of "*control*" of non-retail uses which does not prohibit non-retail uses nor change from retail to non-retail. I agree with the respondent that in substance the policy means that an application for non-retail would be judged on the planning merits, taking account of other general principles in PPS 5 regarding the promotion of city centres with an appropriate mixture of land uses such as shopping, employment, services and facilities.

[56] Similarly, policy R1 of draft BMAP, does not prohibit the grant of permission for non-retail uses at ground floor level within the primary retail core. It will be permitted where a series of criteria are met, including the no significant loss of retail floor space at ground floor level and the non-creation of a cluster or predominance of non-retail uses. I accept that these factors were taken into account by the Department in each case.

[57] For these reasons I agree with the respondent that both decisions were in accordance with the applicable planning policies and the Department took account of the considerations which were material to the application of those policies.

<u>Conclusion</u>

[58] Accordingly, for the above reasons the application is dismissed.