

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Ulster Architectural Heritage Society's Application [2014] NIQB 21

IN THE MATTER OF AN APPLICATION BY THE ULSTER ARCHITECTURAL
HERITAGE SOCIETY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] This is a challenge to the decisions of 2 May 2012 whereby the respondent granted planning permission to Carlisle Property Developments Ltd to demolish a four storey 19th Century warehouse located in Queen Street, Belfast and to construct on the site a seven storey residential/retail development.

Facts

[2] The property in question is a Victorian warehouse/commercial development which was built to service the needs of the linen and clothing industries. It is situated in a designated conservation area. Demolition consent and planning permission had previously been granted at the location with the proposed new building being a 9-storey block comprising retail and residential use. This original planning permission was quashed on Judicial Review in January 2010.

[3] On 12 January 2010 agents for the developer submitted the following documents: 'Comments and Estimated Costs on Repairs to Achieve a Reasonable lettable condition' and 'Comments upon possible improvements to increase floor loadings'. Appendices to these documents included, Estimate of cost to repair building, Engineers Report, Estimated Rental Values, Original Condition report (2008). These documents submit that there are significant structural defects in the building and conclude that 'On economic grounds it is beyond dispute that the building should be demolished and replaced.'

[4] In February 2010 Structural Engineer (David Ridell) and Quantity Surveyor (Eric Truesdale) from the Central Procurement Directorate (CPD) visited the premises and considered the reports submitted by the developer's agents. The Engineer submitted that it was possible to refurbish the building but that substantial works would be required. He also advised that if these works proved to be financially prohibitive, consideration should be given to demolition.

[5] On 20 April 2010 the developer's agent submitted an addendum to its estimated cost of repair and renovation to the building and on 4 June 2010 the Quantity Surveyor broadly endorsed the developer's agent's figures. It was estimated that the cost for retention and renovation including facade retention ranged from £3,950,000 to £4,300,000.

[6] In May 2010 John McIlhagga, Conservation Area Architect (CAA) submitted a consultation report on the proposed development. He was of the opinion that the original 9 storey proposed development was contrary to Pol BH12 of PPS 6. He states that it is an important historical asset that should be allowed to continue to contribute positively to the area, terminating its existence now would not be contextually appropriate.

[7] On 1 July 2010 a revised development proposal was submitted (Demolition plus replacement by seven storey building with ground floor retail units, basement car parking and 58 residential apartments).

[8] On 12 August 2010 the Conservation Officer (CO) considered the revised 7-storey proposal. He stated that 'The amended drawings do not change the conclusion reached in my earlier comments'. His earlier comments were to the effect that the proposed development was not acceptable.

[9] On 6 September 2010 the owner's agents wrote to the Divisional Planning Manager. They submitted that repair of the building was not economically viable, that the department need not follow policy criteria slavishly, but that nevertheless the policy criteria are met in the instant application and that as repair and reuse is not economically viable at all the application is one of the rare occasions in which demolition is unavoidable.

[10] On 3 November 2010 the case officer met the in-house engineer and quantity surveyor from CPD during which the revised proposal was discussed. They expressed the view that retaining and renovating the building was possible but also that the costs associated with the new scheme were comparable with the costings which they had previously prepared.

[11] On 16 May 2011 the Planning Service sought advice from Land and Property Services (LPS) regarding the likely value of the building if renovated in accordance

with any of the three schemes identified by the Developers agents. LPS advised that none of the schemes were economically viable.

[12] In May 2011 the Departments Conservation Officer (CO) was consulted in relation to the applications. The CO considered that the proposed demolition and replacement would result in serious prejudice to the conservation area.

[13] On 25 May 2011 the case officer submitted a detailed report on both the demolition consent application and the redevelopment application. She recommended that both should be refused. There was also a group discussion of proposed demolition and replacement scheme. It is decided to depart from the case officers recommendations and recommend instead that the proposal be approved.

[14] On 2 June 2011 both applications were listed for consideration by Belfast City Council Planning Department. A request was made that the applications be deferred for consideration at an office meeting with UAHS. On 14 June 2011 at the UAHS office meeting there were differences of opinion about findings of fact and methodologies used in various calculations.

[15] On 23 June 2011 the UAHS submitted further representations requesting the opportunity to submit suggestions on how the building could be retained with the benefit of assistance from architects.

[16] On 19 July 2011 Joan Bryson, Principal Planning Officer carried out an internal inspection of the building by a senior planning officer. She noted that the building was largely vacant and a large number of structural defects were evident. She prepared a report of the visit.

[17] On 27 July 2011 the UAHS together with the Forum for Alternative (FAB) Belfast submitted a report to the Department and the developer detailing a facade retention option.

[18] In November 2011 the owner's professional advisers commented on the facade retention option submitted by UAHS / FAB. It was asserted that the option was not economically viable and that the option would restrict the internal layout. Joan Bryson prepared a detailed report on the applications recommending that both applications should be approved.

[19] Between November and December 2011 a number of objections were sent to the Minister. Ms Bryson considered that they raised no new information and as a result her recommendations were unchanged. The applications were referred back to Belfast City Council with an updated report and recommendation and on 17 November 2011 the Planning Committee of Belfast City Council considered the applications and decided that the Department's recommendations should be supported.

[20] On 21 December 2011 the Minister made a personal visit to the site and carried out an internal inspection of the building. Following this visit the Minister decided that UAHS should also be afforded the opportunity to conduct an internal inspection of the building.

[21] On 3 February 2012 the UAHS visited the site and conducted an internal inspection. There was no agreement between UAHS and the owner's advisors upon the figures which were relied upon in support of the conclusion that the facade retention scheme was not financially viable. The owner's advisor agreed to submit a report outlining the figures which he relied upon, as they had not previously been set out in detail.

[22] On 10 February 2012 the owner's agents provided a report detailing the figures relied upon to conclude that facade retention scheme was not viable. In response to this report Ms Bryson re-consulted CPD and LPS on the structural and economic feasibility of facade retention scheme.

[23] On 3 April 2012 the UAHS responded to the figures submitted by the owner's agents. They contended that the Department had not properly considered the costs associated with retention and that insufficient efforts had been made to market the building. This letter was considered at a meeting on 12 April 2012 between the Minister and senior planning officials. The Minister gave Ms Bryson authority to issue approvals for both applications. On 20 April the Department responded to the letter from UAHS dated 3 April.

[24] On 2 May 2012 Ms Bryson signed approvals for the applications which were issued on 3 May 2012.

Relief Sought

[25] The applicant seeks the following relief:

- “(a) A declaration that the decision of the Respondent dated 2 May 2012 to allow the demolition of the warehouse and replacement with the new building is unlawful;
- (b) An order of certiorari quashing the said decisions;
- (c) An order of mandamus compelling the Respondent to review and revoke the said decisions;

...

(d) ...

(e) ...

(f) Interim relief, namely an order restraining the Notice Party, Carlisle Property Developments Limited, whether by themselves, their servants or agents, from carrying out any works of demolition to the premises the subject of these proceedings until trial or further Order and/or an Order suspending the permissions granted by the Department to the Notice Party which are the subject of these proceedings until trial of further order."

Grounds on which relief is sought

[26] Relief is sought on the following grounds:

"(a) The Department's decision to grant the consents in respect of this building is in breach of planning policy and in clear breach of its own stated assessment criteria and in breach of the Applicant's legitimate expectation that such policy would be adhered to on the following bases:

(i) The decisions fail to meet the South Lakeland 'no harm' test, in that the CAO, CAA and DCA concluded that the loss of the Victorian warehouse and its replacement with a 7 storey would result in harm.

(ii) The department has not made sufficient inquiry into whether genuine efforts have been made without success to continue the present use or find alternative uses for the building as required by PPS6.

(iii) It is evident that the decision would constitute a fundamental change in how conservation area policy is interpreted by affording determining weight to economic considerations

and setting a damaging precedent in this regard.

- (iv) The department has misdirected itself as to the weight to be given to the profitability of a development scheme and to the methodology of calculation of economic viability.

- (b) The decision is irrational for the reasons set out at subparagraph (a) above and illogically contrary to forceful recommendations of its own Conservation Area Officer, Conservation Area Architect and Development Control Officer.

- (c) The decision fails to take into account or give sufficient weight to the relevant factors set out at sub-paragraph (a) above disproportionately favouring the developer's economic interests contrary to the objectives of the planning legislation."

Relevant Law

[27] Article 50 of The Planning (Northern Ireland) Order 1991 ("the 1991 Order") states:

"Conservation Areas

1. The Department may designate areas of special architectural or historic interest the character of appearance of which it is desirable to preserve or enhance
...

2. Where any area is for the time being designated as a conservation area, special attention shall be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any buildings or other land in that area, of any powers under the order."

[28] Planning Policy Statement 6: Planning, Archaeology and the Built Environment states:

“Preamble

Among the numerous and wide-ranging responsibilities of the Department of the Environment for Northern Ireland are planning and heritage protection. The Department is the unitary planning authority for Northern Ireland and is responsible for regulating development and the use of land in the public interest.

...

This Planning Policy Statement, PPS 6 Planning, Archaeology and the Built Heritage sets out the Department’s planning policies for the protection and conservation of archaeological remains and features of the built heritage and advises on the treatment of these issues in development plans. It embodies the Government’s commitment to sustainable development and environmental stewardship.

...

Policy Explanation

The planning policies of this Statement outline the main criteria that the Department will employ in assessing proposals which affect the archaeological or built heritage. These policies however should not be read as the only tests of acceptability for such development proposals. In making its decisions the Department will assess proposals against all planning policies and other material considerations that are relevant to it.

...

The inclusion of the word “normally” is considered necessary by the Department in many instances to ensure that there is no public misunderstanding of its planning policies. It is generally recognised that occasionally there will be circumstances where other

material considerations may outweigh these policies. In particular the Department recognises that where a policy is a negative definition, i.e. stating what will not be permitted, such a policy provides a general guideline but cannot be an absolute bar to a decision beneficial to the citizen. Each case must be considered on its merits to see whether an exception would be justified. The Department therefore considers it important to retain the word “normally” in many of its policies in order that the public clearly understand that exceptions can on occasion be made.”

[29] Para 1.0 entitled Planning and Conservation states:

“Our Archaeological and Built Heritage

1.1. The modern landscape of Northern Ireland is the result of some 9,000 years of human activity and change on the natural topography which has left us with a rich but vulnerable legacy. Archaeological and historic features such as tombs and forts, castles and churches, townhouses and farmhouses, grand architecture and vernacular buildings, industrial features and planned parklands are all significant sources of information about our past, and are often landmarks in our present surroundings.

1.2. The physical survivals of our past are to be valued and protected for their own sake, as a central part of our common cultural heritage. They are an irreplaceable record which contributes, through formal education and in many other ways, to our understanding of both the present and the past. Their presence adds to the quality of our lives, by enhancing the familiar and cherished local scene and sustaining the sense of local distinctiveness which is such an important aspect of the character and appearance of our cities, towns, villages and countryside.

Sustainable Development and Environmental Stewardship

1.3. ... In the pursuit of sustainable development it is recognised that our archaeological and built heritage is a finite resource which requires effective

stewardship so that it may be enjoyed today and passed on in good order to inform future generations.

...

1.4. The function of the planning system is to regulate the development and use of land in the public interest. It has to take account of the Government's objective of promoting sustainable economic growth, and make provision for development to meet the needs of the community. Planning is also a key instrument for protecting and enhancing our environment and preserving our archaeological and built heritage.

1.5. While our landscape and townscape will continue to change in response to the needs of society, the planning system aims to resolve any conflict between conservation and development to secure mutual benefit as well as to prevent development that is detrimental to our heritage. Avoiding the neglect and loss of built fabric and promoting the efficient use and reuse of land and buildings are two ways in which the planning system can contribute towards sustainable economic development. The aim of stewardship of our archaeological and built heritage is not therefore to halt change, rather to manage it positively in ways which allow us as a society to weigh up and regularly re-evaluate what we regard as important.

1.6. The Department has the responsibility for identifying, recording and protecting our archaeological and built heritage through scheduling historic monuments, listing buildings of special architectural or historic interest and designating other sites and areas of heritage significance. Consistent with the objectives of each designation, the Department through its planning functions, administered by Planning Service, will seek to ensure that features of the archaeological and built heritage are appropriately protected from unnecessary damage and destruction. Consultation procedures related to the development plan and development control

processes will ensure that decisions affecting our heritage are brought into the public domain.

Conservation and Economic Prosperity

1.10. Government policy is to promote economic vitality and growth through the ongoing regeneration of our built environment. One way this may be achieved is by ensuring that, to the fullest possible extent, the built heritage remains in continuing use or active re-use, as an integral part of the living and working community. Archaeological sites and monuments can rarely be re-used, but most historic buildings can still be put to good economic use in, for example, commercial or residential occupation. They are a valuable material resource and can make a positive contribution to economic prosperity and our overall quality of life, provided that they are properly maintained and their historic integrity is respected: the avoidable loss of fabric through neglect is a waste of economic as well as environmental resources.

1.11. Conservation itself can play a key part in promoting economic prosperity by ensuring that an area offers attractive living and working conditions which will encourage inward investment - environmental quality in today's world is increasingly a key factor in many commercial decisions. In return, economic prosperity can secure the vitality of historic areas and buildings. What is crucially important is that any changes we do make are of a quality which future generations will respect and admire.

..."

[30] Para 2 entitled **Conservation Areas** states:

"2.18. Article 50 of the Planning (NI) Order 1991 provides the Department with the power to designate an area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance as a conservation area.

..."

[31] Para 7.0 Conservation Areas

“Conservation Area Control

7.1. Conservation area designation introduces control over the demolition of unlisted buildings within conservation areas (Article 51 of the Planning (NI) Order 1991).

Anyone wishing to demolish a building must first apply to the Department for “conservation area consent” and it is a criminal offence to carry out such work without consent.

The Importance of Conservation Areas

7.2. Many of our cities, towns and villages contain areas of architectural or historic interest which have a particular character considered worthy of conservation. The Department has designated a number of these areas as conservation areas. Great importance is attached to the preservation of the existing character and appearance of such areas allied to the promotion of their economic well-being.

7.3. Article 50 (5) of the Planning (NI) Order 1991 requires that “where any area is for the time being designated as a conservation area special attention shall be paid to the desirability of preserving or enhancing its character or appearance.” This will be the prime consideration for the Department in the exercise of its planning functions within conservation areas. There will be a presumption against the grant of planning permission or conservation area consent where development proposals would conflict with this requirement, although in exceptional cases this presumption may be overridden in favour of development which is desirable on the ground of some other public interest.

...”

[32] Policy BH 12: New Development in a Conservation Area 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 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.”

[33] Para 7 entitled **Justification and Amplification** states:

“7.4. The Department does not wish to stifle development in conservation areas. The emphasis will be on the careful control and positive management of change, to enable the area to remain alive and prosperous, but at the same time to ensure that any new development accords with the area’s special architectural or historic interest.

7.5. Designation as a conservation area puts an onus on prospective developers to produce a very high standard of design, which respects or enhances the particular qualities of the area in question.

Notwithstanding the acceptability of proposals in terms of other planning issues, where any proposed development would harm the character, appearance or setting of a conservation area it will not normally be permitted.

General Criteria

New Buildings

7.7. The development of new buildings in a conservation area should be a stimulus to imaginative, high quality design, and seen as an opportunity to enhance the area.

What is important is not that new buildings should directly imitate earlier styles, rather that they should be designed with respect for their context, as part of a larger whole which has a well-established character and appearance of its own.

Therefore while development of a gap site in a traditional terrace may require a very sensitive design approach to maintain the overall integrity of the area in other cases modern designs sympathetic and complimentary to the existing character of the area may be acceptable.

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."

[34] The relevant parts of Policy BH14 state:

“Demolition in a Conservation Area

The Department will normally only permit the demolition of an unlisted building in a conservation area where the building makes no material contribution to the character or appearance of the area. Where conservation area consent for demolition is granted this will normally be conditional on prior agreement for the redevelopment of the site and appropriate arrangements for recording the building before its demolition.

Justification and Amplification

7.16. The demolition of even a single building and the construction of a new building or buildings in its place could result in the character or appearance of a conservation area, or part of it, being severely prejudiced. In such circumstances the whole purpose of designating the conservation area could be undermined.

7.17. The Department will operate a presumption in favour of retaining any building which makes a positive contribution to the character or appearance of a conservation area. In determining proposals for demolition of unlisted buildings the Department will therefore take account of the part played in the architectural or historic interest of the area by the building for which demolition is proposed, and in particular of the wider effects of demolition on the building’s surroundings and on the conservation area as a whole. In assessing proposals the Department will have regard to the same broad criteria outlined above for the demolition of listed buildings (see para 6.5 and policy BH 10 above).

7.18. In cases where demolition may be appropriate, for example where a building does not make any significant contribution to a conservation area, the Department will normally require full information and detailed plans about what is proposed for the site

after demolition to accompany conservation area consent applications.

...

7.20. The preservation of the public elevations alone of an unlisted building in a conservation area which makes a material contribution to its appearance or character will only be acceptable in exceptional circumstances, provided the scale of the overall development proposal will not be detrimental to the areas character that conservation areas are not marred by vacant sites awaiting redevelopment or appearance and the scheme can be implemented without serious risk to the retained structure. In such cases the Department, in addition to requiring detailed plans of the proposed development, will require the submission of a structural engineer's report indicating what measures are to be taken to protect those parts of the building to be retained during construction work.

Para 6.5

6.5. The issues that are generally relevant to the consideration of all listed building consent applications and planning applications affecting a listed building are:

- (a) the importance of the building, its intrinsic architectural and historic interest and rarity, in the context of Northern Ireland and in local terms;
- (b) the particular physical features of the building (which may include its design, plan, materials or location) which justify its inclusion in the list: list descriptions may draw attention to features of particular interest or value, but they are not exhaustive and other features of importance (e.g. interiors) may come to light after the building's inclusion in the list;
- (c) the building's setting and its contribution to the local scene, which may be very important, e.g. where it forms an element in a group, park,

garden or other townscape or landscape, or where it shares particular architectural forms or details with other buildings nearby; and

- (d) the extent to which the proposed works would bring substantial benefits for the community, in particular by contributing to the economic regeneration of the area or the enhancement of its environment (including other listed buildings)."

[35] The relevant parts of **Policy BH 10** states:

"Demolition of a Listed Building

There will be a presumption in favour of retaining listed buildings. The Department will not permit the demolition of a listed building unless there are exceptional reasons why the building cannot be retained in its original or a reasonably modified form. Where, exceptionally, listed building consent is granted for demolition this will normally be conditional on prior agreement for the redevelopment of the site and appropriate arrangements for recording the building before its demolition.

Justification and Amplification

6.22. The destruction of historic buildings is very seldom necessary for reasons of good planning; more often it is a result of neglect or the failure to make imaginative efforts to find new uses for them or to incorporate them into a new development.

6.23. There are many outstanding buildings for which it is in practice almost inconceivable that consent for demolition would ever be granted. The demolition of any Grade A or Grade B+ building should be wholly exceptional and should require the strongest justification. Indeed consent will not be given for the total or substantial demolition of any listed building without clear and convincing evidence that all reasonable efforts have been made to sustain existing uses or find viable new uses, and these efforts have failed; that preservation in some form of

charitable or community ownership is not possible or suitable; or that redevelopment would produce substantial benefits for the community which would decisively outweigh the loss resulting from demolition.

6.24. While it is acknowledged that very occasionally demolition of a listed building will be unavoidable, consent will not be given simply because redevelopment is economically more attractive to the developer than repair and re-use of the building, or because the developer acquired the building at a price that reflected the potential for redevelopment rather than the condition and constraints of the existing historic building.

6.25. Accordingly where proposed works would result in the total demolition of a listed building, or of any significant part of it, the Department, in addition to the general criteria set out in para 7.5 above, will address the following factors:

- (a) the condition of the building, the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use. Any such assessment will be based on consistent and long-term assumptions. Less favourable levels of rents and yields cannot automatically be assumed for historic buildings. Also, they may offer proven technical performance, physical attractiveness and functional spaces that, in an age of rapid change, may outlast the short-lived and inflexible technical specifications that have sometimes shaped new developments. Any assessment will also take account of the possibility of tax allowances and exemptions and of grants from public or charitable sources. In the rare cases where it is clear that a building has been deliberately neglected in the hope of obtaining consent for demolition, less weight will be given to the costs of repair;
- (b) the adequacy of efforts made to retain the building in use. The Department will require to

be satisfied that genuine efforts have been made without success to continue the present use or to find compatible alternative uses for the building. This includes the offer of the unrestricted freehold of the building on the open market at a realistic price reflecting the building's condition (the offer of a lease only, or the imposition of restrictive covenants, would normally reduce the chances of finding a new use for the building); and

- (c) the merits of alternative proposals for the site. Whilst these are a material consideration, the Department's view is that subjective claims for the architectural merits of proposed replacement buildings will not in themselves be held to justify the demolition of any listed building. There may very exceptionally be cases where the proposed works would bring substantial benefits for the community, which have to be weighed against the arguments in favour of preservation. Even in these circumstances it will often be feasible to incorporate listed buildings within new development.

6.26. It is preferable that proposals for the demolition of a listed building are not considered in isolation from proposals for subsequent redevelopment. The Department may therefore request developers to submit detailed drawings illustrating the proposed redevelopment of the site to accompany a listed building consent application for demolition."

Arguments

Applicants Arguments

[36] Before permitting demolition of a building in a Conservation Area the Department should be satisfied that there are no alternatives. Given the exceptionality of demolition the Department should be satisfied of this to a high standard.

[37] In reaching its decision the Department used costs comparisons which contained an inflated site value and only considered three options for repair. A viable and profitable facade retention scheme was proposed by the developer but ignored and therefore was not taken into account.

[38] Contrary to Policy BH10 and the factors set out at para 6.25 of PPS6 the building has not been marketed for sale which is a relevant consideration for the decision maker.

[39] In reaching its decision the Department did not have a cost comparison between any scheme involving retention of the original building or even its facade and demolition and complete rebuild. This ought to have been relevant information which ought to have been taken into account. Further, in reaching its decision the Department did not have any detail of how the building will be finished. This is again relevant information which should have been considered.

[40] The proposal fails the 'no harm' test which is a relevant consideration.

[41] In considering that the costs of the three options for repair each failed to achieve viability was a determining factor the Group failed to give sufficient weight to all of the other factors, they also departed from their own policy, failed to understand their own policy and set a very dangerous precedent.

[42] If policy is to be departed from the reasons for the departure must be based on evidence justifying such a departure and the reasons for the departure must be adequate and intelligible. The reasons must be material planning reasons.

Respondents Arguments

[43] The applicable principles in a challenge to a planning decision are as follows:

- “(a) The judicial review court is exercising a supervisory, not an appellate jurisdiction. In the absence of demonstrable error of law or irrationality the court cannot interfere.
- (b) Matters of planning judgment are within the exclusive province of the local planning authority or relevant minister.
- (c) The courts will not entertain a submission that the decision-maker gave underweight to one argument or failed to give weight at all to another.”

[44] The House of Lords held that preserving the character and appearance of the CA could be achieved by development which left the area unharmed. This approach is reflected in the policies referred to above in PPS6.

[45] In relation to the 'no harm' test the respondent argued that the fact that a proposal will cause harm should lead to a refusal of permission is unarguable. The report took into account the views of the CA advisor that the development will cause harm however this is not a determinative factor alone. The Report then considered the other material considerations including that the proposed new scheme itself would be acceptable and the regeneration benefits of the scheme. The weighing of these factors was entirely a matter for the decision maker.

[46] The decision was not made entirely on economic considerations. It is clear from the report that the condition of the building and the viability of maintaining it are highly material factors.

[47] The Department did not misdirect itself with regard to the relevant policies and took into account all the material considerations.

[48] The Department did make sufficient inquiry into whether genuine efforts had been made to continue the present use. The Report notes that the owner had been in possession of the building since 1973 and had maintained and repaired the building throughout. The report considers the difficulties with using the building in its current condition.

[49] It was not reasonable and proportionate in the circumstances to require the owner to market the premises, because it was entirely clear that there was no alternative use and therefore marketing would have achieved nothing. In any case given the high profile of the building and the long period the application had been under consideration, it is effectively inconceivable that if there was an alternative use with a prospective purchaser that they would not have come forward.

[50] The department did not give determining weight to economic considerations. The decision involved giving weight to a series of factors in accordance with the policy.

[51] The issue of precedent was expressly referred to in the Report at para 10.2 so this was a consideration which was taken into account and given weight. However in any event a decision such as the present in truth depends entirely on the facts of the particular case including the nature of the building, its condition, the cost of works to it and the viability of relevant uses. There is very little precedent value. It may be that a developer seeks to rely on a case as a precedent, but that does not mean that it actually has any weight in the argument.

[52] In relation to the weight to be given to the profitability of a development, weight is a matter for the decision maker.

[53] Also, the profitability of the development scheme is merely another way of referring to the viability of retaining the building. If a scheme of retention and refurbishment (or facade replacement) produces no profit then it will not be viable and is extremely unlikely to be undertaken. This is a standard way of assessing the likelihood of a form of development actually taking place. The issue is not the profitability of the scheme for which permission was granted, but whether there was any reasonable likelihood of a scheme, which allowed the building to be retained in active uses, being brought forward.

[54] There was no misdirection in respect of the methodology for calculating viability. The calculations were undertaken in accordance with standard practice. There can be no basis on judicial review to go behind standard valuation practice as set out in an expert report. No evidence is produced by the applicant that Mr Smyth's methodology did not follow standard practice.

Discussion

[55] Before discussing the instant application I will set out some general principles to be gleaned from a full reading of PPS6: Planning, Archaeology and the Built Environment:

- (a) The Department of the Environment is responsible for planning and heritage protection.
- (b) The Department is responsible for regulating development and use of land in the public interest.
- (c) Planning Policy Statements are material to decisions on individual planning application.
- (d) PPS6 sets out the departments planning policies for the protection of inter alia the built heritage and advises on the treatment of same in development plans.
- (e) Policy Planning statements are the main criteria employed by the department in assessing proposals.
- (f) However, Planning Policy Statements are not the only tests of acceptability of proposals.

- (g) In making decisions on a proposal the Department will assess proposals against all relevant planning policy statements and other material considerations.
- (h) Occasionally there may be circumstances where other material considerations may outweigh a relevant Planning Policy Statement.
- (i) In particular, if a policy is expressed negatively (i.e. denoting what will not be done) this can only be general guidance and is never an absolute bar to a decision beneficial to the citizen.
- (j) Each application will be considered on its merits to see whether an exception would be justified.
- (k) Historic buildings are a significant source of information about the past.
- (l) The physical survivals of our past are to be protected as a central part of our cultural heritage.
- (m) The physical survivals of our past are also an irreplaceable record.
- (n) The physical survivals of our past add to the quality of our lives.
- (o) Our built heritage is a finite resource which requires effective stewardship so that it may be enjoyed today and passed on in order to inform future generations.
- (p) The function of the planning system is to regulate the development and use of land in the public interest.
- (q) The planning system aims to resolve any conflict between conservation and development to secure mutual benefit as well as to prevent development that is detrimental to our heritage.
- (r) Avoiding neglect and loss of built fabric is a means by which the Planning system can contribute towards sustainable economic development.
- (s) The aim of stewardship is not to halt change, but to manage it positively.
- (t) The policy is to promote economic vitality through regeneration. This is to be achieved through ensuring to the fullest possible extent that our built heritage remains in active use.

- (u) Conservation plays a role in creating attractive living and working conditions which encourage inward investment.

[56] Some further general points in relation to 'Conservation Areas':

- (a) Conservation areas are designated as such pursuant to Article 50 of the Planning Order as they are deemed to be areas of special architectural or historical interest. It is therefore considered desirable to preserve and enhance the character and appearance of Conservation areas. Key points of the policy relating to Conservation areas include:
 - (i) Special attention should be paid to the desirability of preserving or enhancing the character and appearance of such areas. This will be the prime consideration for the department in the exercise of its planning function within conservation areas.
 - (ii) There is a presumption against the grant of planning permission or conservation area consent in these areas where the development will conflict with the requirement to preserve or enhance the character / appearance of the conservation area.
 - (iii) In exceptional cases this presumption may be overridden in favour of development which is desirable on the ground of some other public interest.

Demolition of a Building in a Conservation Area

- (a) Demolition in a conservation area will 'normally only be permitted where the building makes no material contribution to the character or appearance of the area'.
- (b) The justification and amplification text notes that demolition of even one building can severely prejudice the character and appearance of the whole area and as a result, any such demolition can undermine the whole purpose of designating an area as a conservation area in the first place.
- (c) There is a presumption in favour of retaining any building which makes a positive contribution to the character/appearance of the conservation area. In considering any application for demolition in a conservation area the Department is obliged to consider the part played by the building in the architectural and historical interest of the area, as well as the wider effects of demolition on the surroundings and on the conservation area as a whole. The Department is further

obliged to 'have regard' to the same broad criteria as outlined for demolition of a listed building, these criteria are found at para 6.5 of the statement and in policy BH10.

- (d) These considerations in brief are as follows:
 - (i) The importance of the building.
 - (ii) The particular features of the building.
 - (iii) The setting of the building and the contribution it makes to the area.
 - (iv) The extent to which the proposed works would bring substantial benefits to the community, in particular by contributing to the economic regeneration of the area or the enhancement of its environment.
 - (v) Clear and convincing evidence that reasonable efforts have been made to sustain existing uses or find viable new ones and that these efforts have failed including the possibility of charitable or community ownership.
 - (vi) Whether the proposal would provide substantial benefits for the community which would decisively outweigh the loss from demolition.
 - (vii) Consent will not be given simply because redevelopment is economically more attractive to the developer.
 - (viii) The condition of the building and cost of repair as against the importance of the building and the value derived from its continued use.
 - (ix) The department should be satisfied that genuine attempts to find alternative uses have been made including the unrestricted offer of the freehold on the open market.
 - (x) The merits of the alternative proposal.

The Decision to Grant Planning Permission

[57] In exercising the supervisory function of the Judicial Review Court the court is only empowered to review whether the Department applied its policy lawfully and fairly, I am not empowered to interfere with the expert planning judgement of

the Department. To this end, questions of the weight to be attached to the material considerations which weighed in the balance of the final decisions are within the sole province of the Department.

[58] However, where there is a presumption in the policy, the Department are obliged to have regard to that presumptive weight and cannot in their decision undermine that presumption. Presumptions in policy are there to protect the overriding objectives of the policy itself and to undermine them would be to nullify the policy.

[59] It is important first of all to look at the documents which outline the considerations that were taken into account in reaching the final decision. The key documents are as follows:

- (a) 25 May 2011: The case officers report on the two applications and the notes of the group meetings considering these reports (also on 25th May 2011). Considerations taken into account in the production of these documents included:
 - (i) Consultation response of conservation officer.
 - (ii) Consultation response of Conservation area architect.
 - (iii) Policy consideration.
 - (iv) Objections and letters of support.
 - (v) All information submitted by developer's agents in relation to the condition of the building, costings for repairs etc;
 - (vi) Note of group discussion of case officers report and reasons for departing from same.

- (b) November 2011 Joan Bryson, Principal Planning Officer report to the Minister recommending approval of the applications. Considerations taken into account in the production of these documents included:
 - (i) Notes from office meeting with UAHS.
 - (ii) Representations from UAHS including provision of information regarding Facade retention scheme.
 - (iii) Response from owner's agents in relation to viability of facade retention scheme.

- (iv) Internal inspection by Joan Bryson.
- (c) 17 December 2011: The Planning committee considers that the recommendations should be supported. Considerations taken into account in the production of these documents included:
 - (i) Further objections received - not considered to include any new information so Ms Bryson's November recommendation was unchanged.
- (d) 12 April 2012: UAHS final representations are considered at a meeting and the Minister authorises Joan Bryson to approve both applications. Considerations taken into account in the production of these documents included:
 - (i) Note of ministers visit to the site
 - (ii) UAHS internal inspection
 - (iii) Responses from various other consultees to the facade retention scheme

Content of the Considerations

[60] On 25 May the case officer was minded to refuse the applications on the basis that they had a detrimental effect on the character/appearance of the conservation area and were contrary to policy BH14 and BH12 and that the proposed new build did not make an equal or greater contribution to the area. The case officer was also concerned about the precedent that may be set if the economic considerations were allowed to constitute an exceptional case.

[61] The note of the group discussion confirms that the case officer's report was considered but disagreed with. The group accepted that the options put forward for repair did not achieve viability. They considered this to be 'determining'. They also considered the economic benefits of the scheme.

[62] The report of November 2011 erred in considering that there is no presumption in favour of retention of buildings in conservation areas [see para 15.2 of Ms Brysons report]. While this presumption is not in the main text of the policy, it is found at paras 7.3 of the policy document and further at 7.17 of the justification and amplification text in the same document.

[63] The report of November 2011 notes that none of the options presented were economically viable, that the department was satisfied that genuine efforts had been made to retain the building, that the proposal may result in community benefits, that

the proposed development can contribute to economic regeneration in the area and that there are substantial structural defects with the site. On balance it is concluded that the group decision was well founded and should not be departed from.

[64] In April, consideration was given to UAHS final representations before granting approval. In dispensing with UAHS representations it was considered that costings used were objective and that it was unreasonable to demand that the developer try to market the property in the current economic climate.

Was the policy lawfully and fairly applied to the decision?

[65] In the first instance it must be observed that a landowner or developer making an application for planning permission has no right to the grant of planning permission. That right may be granted only by the Department in exercise of its planning functions. The duty of the department is to ensure land use in the public interest and it has developed policies which guide planning decisions. One of the 'public interests' defined in planning policy is the preservation of the built heritage.

[66] Conservation areas are designated as such because taking the buildings together, they form an area of particular architectural or historical interest. There is a presumption in the policy that any building which adds to this interest factor should be retained.

[67] When weighing up an application for development, and particularly for demolition consent, in a conservation area, the department must have regard to the presumption in favour of retaining. Against this presumption, it must weigh all other material considerations. The Department enjoys discretion as to the weight to be given to these other considerations.

[68] In the group decision of 25 May 2011 the group explicitly give 'determining' weight to the fact that the proposals for retention and repair were not economically viable. That is, the fact that the repair options submitted by the owner are insufficient to create a profit for the developer is considered sufficient to outweigh the presumption in favour of retaining the building.

[69] The problem with this decision is that the Department is not obliged to change the status quo. The instant application is not the end of the line for the building. It is not the only option. If this application were refused, the building would continue in use as it is at the moment for the time being. There would be no necessary detriment to the area. Nothing bad will immediately happen if the building continued in its present use save the effect of time on the fabric of the building which it is estimated will eventually render the building unusable in 30 years in the absence of alternative proposals.

[70] To my mind where the Department is obliged to have regard to a presumption, and there are two options available to it, one which respects the presumption, and one which does not, the existence of the presumption-respecting option is a very material consideration and one which must be considered and given its full presumptive weight.

[71] Key documents leading to the ultimate decision overlooked the existence of this presumption, and none of the documents gave any or proper consideration to the presumption-respecting option that was open to the department. For this reason I hold that the Department failed to properly take into account a very relevant consideration.

Conclusion

[72] For these reasons the application is allowed.