Application ID: LA04/2020/0559/F

Renovation and single storey rear extension to dwelling, construction of a new detached garage and new entrance gates and pillars - 24 Malone Park, Belfast

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Speaking Note for the Applicant
Andras House Limited

Introduction

I have been appointed to review the legal submissions made on behalf of the objector, Mr Agnew. I therefore focus on the legal and policy parameters for the Council's decision, and confirm that there is no legal impediment to permission being granted. Also speaking in support of the Applicant are Mr Dawson Stelfox, Stelfox Conservation Consultants, and Mr Leo Brown of 22 Malone Park.

Four key questions

Four key questions arise:

1. What did the Court of Appeal say in *Gilligan*?
2. What did the Court of Appeal not say in *Gilligan*?
3. How should the 1.5x ratio be interpreted?
4. Could the Council lawfully grant permission even if the 1.5x ratio were exceeded?

1. What did the Court of Appeal say in *Gilligan*?

The Court of Appeal said three things:

The first thing it said was that "*policy statements are not mandatory requirements ... the* [Council] *... is free to override or depart from any part of it if it considers it justified ... the* [Council] *is entitled to attribute such weight as it thinks fit to any consideration, and ... that is a question of planning judgment entirely for the* [Council]" [1].

[1] Paragraph 12, emphasis added. Paragraph 12 in full states: *Article 3(1) of the 1991 Order imposes a duty on the* [Council] *to "formulate and co-ordinate policy for securing the orderly and consistent development of land and the planning of that development." In performance of that duty the* [Council] *has produced a number of planning policy statements, which, if relevant to an application, constitute material considerations. Before examining these we should observe that these policy statements are not mandatory requirements which must be construed with the strictness applied to legislation, nor must every single item be adopted and followed like a statutory condition. As we stated in Re Belfast Chamber of Trade's Application [2001] NICA 6 at page 3, the* [Council] *in making planning decisions is not obliged to adhere to each point of the policy statement and is free to override or depart from any part of it if it considers it justified. That remark is, however, subject to the qualifications that the* [Council] *must have regard to any such point if it is relevant to the application and consider it before departing from it, and that the more categorical in expression a requirement in a policy statement may be the more carefully it must weigh the factors which*

That is entirely consistent with what the Court of Appeal said in ***Stewart*** that planning policies are *"not ... a straightjacket and do not have to be slavishly followed* [2].

The second thing it said was that the 1.5x ratio ("the ratio") should not be gauged by reference to the coverage of the dwelling plus recent additions, but by reference to the dwelling as originally built [3].

The third thing it said was that an undesirable precedent would be set by including recent additions, because that would allow the footprint to be increased cumulatively until it was larger than the original [4].

2. What did the Court of Appeal not say in *Gilligan*?

It did not say:

1. Anything about the meaning of the term *"original dwelling"* in the Guide, nor say or imply that that meaning was limited to the dwelling-house itself and excluded ancillary outbuildings dating back to the time the dwelling was built.

2. Anything to cast doubt on the propriety of including original outbuildings in the ratio.

3. Anything to require the Committee to give determining weight to the ratio [5].

4. Anything to curb the exercise of the Committee's planning judgement or entitlement to weigh other material considerations against the Guide [6].

5. Anything about creating an undesirable precedent by including in the ratio ancillary outbuildings that dated back to the original dwelling. So, the objector is flatly wrong that including those outbuildings *"opens up the same precedent that the Court of Appeal warned against"* (paragraph 8 of the objector speaking note).

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cause it to depart from the statement before it does so. Subject to this obligation, the [Council] *is entitled to attribute such weight as it thinks fit to any consideration, and, as was made clear in Lord Hoffmann's familiar observation in Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All ER 636 at 657, that is a question of planning judgment entirely for the planning authority".*

[2] *Re Stewart's Application* [2003] NICA 4, paragraph 9, emphasis added, per Carswell LCJ.

[3] Paragraph 25.

[4] *"... one or more developers could by a series of planning applications increase the footprint of the premises by 150 per cent each time until it became substantially larger than the original, which would completely stultify the object of the provision"* (paragraph 25).

[5] As opposed to the *"great weight"* mandated by paragraph 7.12 of PPS6 or the *"considerable importance and weight"* required by Section 104's 'special regard' requirement, neither of which must be determining weight.

[6] Consistently with paragraph 6.18 of the SPPS.

3. How should the ratio be interpreted?

As the ***Nelson*** [7] decision confirms, the Guide must be interpreted by reference to its intended purpose. The ratio's purpose is *"to allow landscape to remain dominant"* as compared to *"building mass"* [8]. To that end, *"the established relationship between building mass and gardens should be respected and retained where possible"* [9]. Original outbuildings are, of course, part of the *"established relationship between building mass and gardens".* What would be the logic in the Guide intending to exclude original outbuildings in order to respect and retain the established relationship between building mass and gardens? That would not respect and retain the established relationship, but fundamentally distort it, by artificially deleting from that historic relationship part of the original building mass. Relatedly, the Applicant makes five points:

1. The Guide itself uses the words *"dwelling"*, *"buildings"* and *"property"* interchangeably to refer to historic built form, with no intent to distinguish between the living part of a house and ancillary outbuildings apparent. It refers [10] to refusing extension proposals which are *"considered overbearing in relation to the form of the original buildings"*, plural, which is not consistent with the notion that the only original built form that matters is the house itself.

2. The *particular* use to which individual parts of a residential property are used – whether in primary residential occupation or ancillary to that occupation – is completely irrelevant to the retention of the dominance of landscaping that is key to the character and appearance of Malone Park.

3. There is nothing in Northern Ireland planning legislation, planning policy, or in the decision-taking of the Planning Appeals Commission to suggest that the term *"dwelling"* in planning policy and guidance excludes outbuildings and other structures ancillary to the dwelling-house itself.

4. In ***Moore*** [11], the English Court of Appeal held that converting the outbuildings of a house to holiday units involved a change of use from a single dwelling-house to use as two or more dwelling-houses, so the Court of Appeal plainly treated the outbuildings as part of the dwelling. As an English Court of Appeal decision, ***Moore*** is not strictly binding in this jurisdiction, but it has strong persuasive value and is likely to be given very significant weight by our courts.

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[7] *Re Nelson's Application* (unreported, Kerr J, 1997)

[8] Page 23 of the Guide.

[9] Page 23 of the Guide.

[10] Page 23.

[11] *Moore v SOSETR & New Forest District Council* (1999) 77 P & CR 114 at 118, per Nourse LJ:

"It is clear from the judgment of Simon Brown L.J. (with whom Dillon and Farquharson L.JJ. agreed) in Van Dyck v. Secretary of State for the Environment [1993] 1 P.L.R. 124 that the concept of the planning unit has no part to play in a case where there has been a change from use as a single dwelling-house to use as two or more separate dwelling-houses within section 55(3)(a) ... The actual decision in that case was that the predecessor of what is now section 171B(2) of the Act, when construed in the context of section 55(3)(a) and the definition of "building" in section 336(1) , is capable of applying to a subdivision of one single dwelling-house into two or more separate dwelling-houses so as to give protection from enforcement action to the new dwelling-houses after the four year period has expired. I agree with Mr Alesbury that both the observations of Simon Brown L.J. and the actual decision are directly applicable to this case" (emphasis added).

5. In the ***Creighton*** [12] appeals the PAC included within the ratio calculation an ancillary garage [13]. Following ***ABO Wind*** PAC decisions *"must either be accepted and respected or challenged through the courts"* [14]. The PAC approach in those appeals has never been challenged through the courts, and must therefore be accepted and respected.

4. Could the Council lawfully grant permission even if the 1.5x ratio were exceeded?

Absolutely, yes, in the exercise of its planning judgement.

The Applicant and the Officers agree that the proposal is within the ratio, but the Officers have gone on to assess whether the proposal would be acceptable if the objectors were right and the proposal were to exceed the ratio. The Report concludes at paragraph 9.57 that in that event the proposal would exceed the ration by approximately 69 square metres, but:

"... while the guidance is worded strongly stating 'under no circumstances' it remains the case that planning policy is not a straightjacket for the planning authority (Carswell LCJ, Re Stewart's Application (2003) NICA 4). While paragraph 7.12 of PPS 6 states that the planning authority will attach 'great weight' to the need for proposals for new development to accord with the specific guidance drawn up for each particular Conservation Area it is entitled to depart from said Guidance where material considerations indicate otherwise".

The Report then in the following paragraphs sets out the material considerations that the Officers judge indicate that it would be appropriate to depart from the Guide's ratio, if that ratio were exceeded. In summary:

a) The proposal is *"modest"* and *"sympathetic"* both to the site and to the surrounding area.

b) The proposal with 17% building coverage will *"allow landscaping to remain dominant"*, fulfilling the rationale behind the ratio.

c) The proposal's design will actually enhance the character of the Conservation Area, in large part because the extension *"almost mirrors the extension of the neighbouring semi-detached property and therefore brings an element of symmetry to the rear of the dwellings"*.

That is the Officers' planning judgement, and by their recommendation to approve they invite Members to make the same planning judgement.

Section 104's 'special regard' provision requires Members to give *"considerable importance and weight"* to the desirability of preserving the character and appearance of the Conservation Area and to the desirability of enhancing it where an opportunity to do so arises. If, in their planning judgement, Members agree with the Officers that the proposal enhances the character and appearance of the Conservation Area - notwithstanding any breach of the ratio - then Members must give that positive factor considerable importance and weight. If, in their planning judgement, Members do not agree that there is enhancement but that there

[12] *2006/A0016 & A0017.*

[13] See the reference to 187 square metres overall footprint at paragraph 38 and Existing Site Block Plan Department reference 03, which shows that to achieve this figure the calculation of the footprint must have included the garage.

[14] *Re ABO Wind NI Limited and Another's Application* [2021] NIQB 96, per Humphreys J, at paragraph 100.

is an opportunity to enhance, then they must give that negative factor considerable importance and weight. However, even then paragraph 6.18 of the SPPS states that an exception can be made to the general presumption against granting permission where that lack of enhancement is outweighed by other material considerations grounded in the public interest, which would include the factors identified by the Officer, in particular that the proposal is sympathetic to the surrounding area and will allow landscaping to remain dominant, fulfilling the rationale behind the ratio. In short, if Members disagree with the Officers that there is enhancement Members can lawfully still grant permission by giving determining weight to other material considerations such as those identified by the Officers, in the exercise of their planning judgement. The Court of Appeal in ***Gilligan*** said nothing to the contrary.

Focussing then on the Guide's ratio, consistently with what the Court of Appeal said in both ***Stewart*** and ***Gilligan***, the Guide does not imprison Members within a straightjacket or require Members to follow the ratio slavishly, and Members are entitled to depart from the ratio if in the exercise of their planning judgement they consider that justified by material considerations such as those identified by the Officers.

While paragraph 7.12 of PPS 6 directs that *"great weight"* should be given to the Guide, that is not the same thing as determining weight, and the Court of Appeal in ***Gilligan*** did not require determining weight to be given to the Guide, or to the ratio. Nor did the Court of Appeal in ***Gilligan*** say anything to curb the exercise of the Committee's planning judgement or entitlement to weigh other material considerations against the Guide. Rather, the Court of Appeal respected that planning judgement, and that entitlement to decide what weight should be given to each of the material considerations, including the Guide.

Conclusion

Properly understood, the ratio should be calculated on the basis of the original dwelling house plus the outbuildings originally associated with it, and because the proposal will not exceed 1.5x the footprint of the original dwelling house plus the outbuildings originally associated with it is compliant with both the letter and the spirit of the ratio.

If Members were to disagree with the Applicant and the Officers that the proposal will not exceed the ratio, then in the exercise of their planning judgement Members may still lawfully grant permission by giving more weight to the other material considerations than to the ratio.

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