



An
Bord
Pleanála

Inspector's Report

Development	Retain panel fence and landscaping ground works and permission for reduction in height of panel fence, Ballynafarsid, Rostellan, Midleton, Co. Cork.
Planning Authority	Cork County Council
Planning Authority Reg. Ref.	16/4788
Applicant	Donal O'Shea
Type of Application	Retention Permission & Permission
Planning Authority Decision	Grant subject to conditions
Appellant(s)	Joseph Peter Donnelly
Type of Appeal	3 rd Party v. Grant
Observer(s)	None
Inspector	Pauline Fitzpatrick
Date of Site Inspection	02/09/16

1.0 SITE LOCATION AND DESCRIPTION

1.1. The site in question constitutes the rear garden of a mid-terrace two storey dwelling fronting onto the R630 in Rostellan in south-east Cork. The garden area is roughly L-shaped effectively wrapping around the rear yard of the adjoining dwelling occupied by the appellant. Due to the differential in ground levels of in the region of 7 metres between the dwelling and the rear boundary wall, the rear garden is laid out in terraces accessed via steps. The 2nd level is approx. the same as the 1st floor level of the dwellings. A c. 1.5 metre high steel decorative fence has been erected along the shared boundary with the appellant. The same decorative fencing is utilised along the eastern boundary and is stepped due to the increase in ground levels. The rear boundary onto the Radharc na Mara housing scheme to the south is delineated by stone and block wall. A block wall backed with planting delineates the shared boundary with the dwelling to the west.

2.0 PROPOSED DEVELOPMENT

2.1. Permission is being sought to retain:

- Ground works and landscaping
- Panel fence erected along the north-eastern section of the garden on the boundary to the adjoining dwelling. The said fence is to be reduced in height from 1.55 metres to 1.1 metres over ground level.

3.0 PLANNING AUTHORITY DECISION

3.1. Decision

The Planning Authority decided to grant permission for the above described development subject to 2 conditions requiring the development to be in accordance with the submitted plans and that all construction waste be disposed of in a licensed facility.

3.2. **Planning Authority Reports**

The **Executive Planner** notes that the application has arisen following the outcome of a Part 5 declaration of exemption (D290-14). The declaration dismissed the question regarding the change of use of the rear garden area but determined that the landscaping and fencing works would require permission. Whilst it is considered that the potential overshadowing impact is difficult to accurately judge it is accepted that there may be some merit in the objector's claims. A photograph from 2009 shows that some form of timber fence was on the lands prior to the landscaping works occurring. Given the level difference any fencing is likely to have some negative impact on neighbouring property. The applicant should be able to construct some level of boundary fence to demarcate his property. The lowering of the fence to 1.1 metres should also assist in mitigating some of the overshadowing concerns and is a reasonable compromise. The issue of the 'use' has been considered as part of the section 5 declaration. The case referred to by the objector in Cork City Council in which the Board adjudicated that the conversion of public open space to private use was not exempt is not comparable. An extract of the report on the Section 5 declaration with respect to this matter is provided. A grant of permission subject to conditions is recommended.

3.3. **Other Technical Reports**

Irish Water has no objection.

The **Area Engineer** has no objection.

The **Heritage Officer** is satisfied that the works will not have a significant impact on the Cork Harbour SPA.

3.4. **Third Party Observations**

An objection to the proposal received by the Planning Authority has been forwarded to the Board for its information. The issues raised are comparable to those cited in the grounds of appeal set out in section 6 below.

4.0 **PLANNING HISTORY**

4.1. **D/290/14** - the current appellant sought a declaration under Section 5 as to whether the works and change of use carried out by the adjoining resident on lands immediately to the south (rear) of his property are, or are not, development and are, or are not, exempted development.

The PA concluded that:

- The change of use, involving the incorporation into the curtilage of a private dwelling, land which was formally used as common ground to which the applicant's dwelling had access and which was previously intended to form part of the public open space for the housing development permitted under Planning Reg. 3556/99, is not considered to be 'development' as defined under Section 3 of the Planning and Development Act 2000-2012.
- Having taken into consideration Class 5 and Class 6 of Schedule 2 Part 1 of the Planning and Development Regulations 2001, the works that have taken place (site landscaping and the creation of a new boundary) is considered to be 'development' but not 'exempted development' for the purposes of the Act.

5.0 **POLICY CONTEXT**

The site is within the settlement boundary of Whitegate/Aghada in the Midleton Electoral Area Local Area Plan, 2011.

6.0 THE APPEAL

6.1. Grounds of Appeal

The submission by McCutcheon Halley Walsh on behalf of the 3rd Party against the planning authority's notification of decision to grant permission and retention permission can be summarised as follows:

- The limited scope of the current retention application does not address the full extent of the unauthorised development on the site. The Board's decision under reference case RL3360 indicates that permission is required for the unauthorised change of use to private open space even though the area may not have been habitually used by the public for a full 10-year period.
- The panel fence to be retained and reduced in height has a significant adverse impact on the appellant's amenities. The fence blocks sunlight to his yard and rear windows which had the benefit of same before the works were carried out.
- The proposed lowering of the fence is minimal from 14.64mOD to 14.19mOD (450mm). Given that the overall height of the fence would be 4.28 metres above the appellant's ground floor level there would still be an unacceptable level of overshadowing.
- The reduction in overshadowing would be offset by the significant increase in overlooking. The height of the fence would only be 1.10m above ground level on the applicant's side of the boundary. This has safety implications.
- The applicant should be required to remove the full extent of the increase in ground levels before determining the need for any additional boundary fencing. There would little requirement for an increase in the height of the original boundary wall if the original ground levels were restored on the applicant's side.
- Any decision should be based on an accurate determination of the level differences that occurred as part of the stepping of the rear garden.

- It is contended that once the limit in terms of raising of ground specified in the Planning Regulations had been breached all of the works are considered to be unauthorised and require retention permission.
- A lower fence could provide a suitable boundary treatment if the unauthorised fill was removed. If the applicant is not willing to remove the surplus material the Board might consider a compromise where the boundary between the two properties is demarcated by the original stone wall, only, the proposed 1.10 screen fence is set back 2 metres from the boundary wall and the area in between planted with low maintenance plants with access for maintenance if necessary.

6.2. **Planning Authority Response**

No response received.

6.3. **Applicant's Response**

The submission by Sean R. McCarthy on behalf of the applicant which is accompanied by a response by the applicant can be summarised as follows:

- The panel fencing along the boundary is a significant improvement in that it eliminates any overlooking from the higher garden level of the subject property.
- Due to the steeply sloping ground to the rear (south) of the appellant's property the panel fence has no significant impact on overshadowing.
- The applicant did not take any public open space into his rear garden. The applicant is the legal owner of the property. Details of ownership and past activity pertaining to the garden are provided.

6.4. **Observations**

None

6.5. Further Responses

The applicant's response to the 3rd Party appeal was circulated for comment. The submission by McCutcheon, Halley, Walsh on behalf of the appellant can be summarised as follows:

- The works were carried out in 2006 at a time when the lands in question were part of larger area owned by a 3rd party (land registry map submitted in support). The area was not enclosed prior to this. The land was part of the public open space for the residential development granted under 99/3556 (aerial photograph submitted in support) and was enclosed when the residential scheme was being constructed.
- The ownership of the lands was not transferred until 2011 and not registered until 2014.
- The works are unauthorised as they were:
 - Inconsistent with the plans and particulars approved under ref. 3556/99
 - Were not exempted development as determined under declaration D/290/14 and,
 - Involved a material change of use from public to private open space.
- Prior to the enclosure there wasn't easy access to the lands with a stone wall delineating the boundary with no steps or means of access.
- The fence blocks the sun into the appellant's property which is a particular problem in the winter months when the sun is lower in the sky.

7.0 ASSESSMENT

I submit that the issue arising in this appeal pertains to the impact of the works to be retained and the proposed lowering of the panel fencing, on the residential amenities of the adjoining dwelling.

As can be extrapolated from the details on file the application for the development as described in the public notices came on foot of the Planning Authority's decision on a Section 5 declaration posed under ref. D/290/14 in which the erection of the fence and the site landscaping were adjudicated to be development and not to be exempted development. The Planning Authority also determined that the change of use involving the incorporation into the curtilage of a private dwelling, land which was formally used as common ground to which the applicant's dwelling had access and which was previously intended to form part of the public open space for the housing development permitted under Planning Reg. 3556/99, not to be development as defined under Section 3 of the Planning and Development Act 2000-2012.

Whilst the agent for the appellant considers that the scope of the current application does not address the full extent of the unauthorised development on the site and that the planning authority's decision on the said declaration above runs contrary to the Board's decision on case ref. RL3360 I note that the planning authority's decision on the said declaration was not appealed to the Board. As such the decision stands. Thus the status of the rear garden area is not subject to review at this juncture. The nature and extent of the development subject of this appeal is, therefore, as described, namely the retention of the landscaping works and panel fencing erected along the boundary to the appellant's property with permission being sought to lower the panel fence.

The enclosed garden area subject of the appeal is roughly L-shaped and effectively wraps around the rear of the appellant's property which is served by a small yard c. 5.5 metres in depth. Due to the differential in ground levels of in the region of 7 metres between the rear of the dwelling and the southern boundary wall the rear garden is laid out in a terraced arrangement accessed via steps. The 2nd level is approx. the same as the 1st floor level of the dwellings. A c. 1.5 metre high steel decorative fence has been erected along the boundary to the appellant's property.

Whilst permission is being sought to retain the alterations to the site landscaping the actual extent of the said works over what originally pertained on the site is unclear. From the difference in ground levels between the rear of the house and the estate road to the south it is reasonable to conclude that the grounds rose steeply and in that respect the provision of a terraced layout to provide for access is not unacceptable. The substantive issue is whether the ground levels were altered along the boundary to the appellant's property. No details are provided with the application and in this regard the information provided in the Section 5 declaration case may provide a useful steer.

The 3rd party in his submission on the said declaration stated that originally there was a door/gap within his boundary wall and the lands to the rear which would have been at a similar threshold level. With the closure of the opening the lands to the rear were filled in. A cross section provided indicates approx. 1.6 metres infilling. The Executive Planner in his report stated that whilst the information on the file is somewhat contradictory, on the balance of evidence, concluded that a certain degree of infilling was undertaken to generate the level surface currently evident and that the landscaping works that occurred exceeded the 1 metre restriction on exemption. It is unclear as to when the infilling works were undertaken. It is reasonable to surmise that the Planning Authority's declaration that the works were not exempted development was adjudged on this assessment. I note that the applicant did not appeal the declaration to the Board. Thus on the balance of evidence I submit that the landscaping works undertaken raised the ground levels adjacent to the appellant's property between 1 and 1.6 metres.

The issues arising as a consequence of these landscaping works ultimately pertains to overlooking and overshadowing. In terms of the former certainly the raised ground levels allow for direct views into both the appellant's property both at ground and 1st floor level. By attempting to counter this issue the erection of the panel

fence exacerbates issues of overshadowing with the fence located to the south of the property. By reason of the height differential between the appellant's rear yard and the top of the fence it would also have an overbearing effect. The lowering of the panel fence by c.0.4 metres, while possibly improving issues in terms of overshadowing, would negate any benefits in terms of overlooking. As proposed therefore, I submit that the works to be retained and proposed would have a material adverse impact on the amenities of the appellant's property and I recommend against a favourable decision.

The agent for the applicant in the appeal submission details an alternative arrangement to which he would be agreeable, namely the setting back of the screen fence by 2 metres from the common boundary with the intervening area planted with low maintenance ground cover species. The applicant in response to the grounds of appeal does not make any comment on same. In view of the unacceptability of the situation as existing and proposed I consider that as proposed to be an acceptable compromise in this instance.

AA – Screening

Having regard to the nature and scale of the development within the village of Rostellan, no appropriate assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect, individually or in combination, with other plans or projects on a European site.

8.0 **RECOMMENDATION**

Having regard to the documentation on file, the grounds of appeal, the response thereto, a site inspection and the assessment above I recommend that retention permission and permission be granted, subject to conditions for the reasons and considerations as set out below.

REASONS AND CONSIDERATIONS

Having regard to the scale and nature of the development to be retained and to the pattern of development in the vicinity, it is considered that, subject to compliance with the conditions set out below, the development would not seriously injure the amenities of the area or of property in the vicinity by reason of overlooking or overshadowing and would, therefore be accordance with the proper planning and sustainable development of the area.

CONDITIONS

1. The development shall be carried out and completed in accordance with the plans and particular lodged with the application, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.

Reason: In the interest of clarity

2. Within three months from the date of this order revised plans and details incorporating the following amendments, including timescale for their implementation and any landscaping to be undertaken shall be submitted to the planning authority for its written agreement:
 - a) The removal of the panel fence erected along the north-eastern site boundary.
 - b) Proposals for demarcation of the boundary
 - c) The erection of a 1 metre high screen fence of suitable

materials at a distance of not less than 2 metres from the said north-eastern boundary

- d) Details of planting to be carried out in the area between the said screen fence and boundary.

Reason: In the interest of protecting the amenities of adjoining residential property

Pauline Fitzpatrick
Inspectorate

September, 2016