



An
Bord
Pleanála

Inspector's Report PL29S.248534

Development Pedestrian access to rear garden owned by and in charge to Dublin City Council, and to raised wall at end of lane by 1m
68 Brighton Road, Rathgar

Planning Authority	Dublin City Council
Planning Authority Reg. Ref.	2428/17
Applicant(s)	Mary Carty
Type of Application	Permission
Planning Authority Decision	GRANT with conditions
Type of Appeal	3no. Third Party
Appellant(s)	Paul Pollock; Pauline McHale Pollock; Alice and Edmund O'Neill
Observer(s)	Emily King
Date of Site Inspection	16/08/17
Inspector	John Desmond

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1.0 Site Location and Description

- 1.1. The application site, no.68 Brighton Road, is located in southern Dublin city, within an old suburban residential area, c.500m northeast of Terenure village (crossroads) and c.1km southwest of Rathmines village.
- 1.2. The application relates to the site of 2-storey, semi-detached redbrick dwelling dating probably from the later 19th century period. There are similar dwellings in various styles along Brighton Road. To the south west there is extensive early 20th century housing (probably Council / state housing) between the site and Terenure Road.
- 1.3. There is a mews lane to the rear of the line of dwellings on Brighton Road, south of the application site. The northern end of the lane is terminated at the side (south) boundary to the rear garden of the subject dwelling. The section of lane concern is between the application site's southern (side) boundary and St. Enda's Road to the south, which provides access to Terenure Road. The subject section of lane is c.28m (or c.38m if the section bounding St Enda's Road is included), bounded to the west by of No.25 St Enda's Road and to the east by the rear of nos.65-67 Brighton Road. The lane is generally less than 4m width and is finished in poured concrete. St Enda's Road is generally finished in tarmacadam. The mews lane continues south of St Enda's but is of insufficient width and unsuitable horizontal alignment to carry a car.
- 1.4. The height of the boundary wall to the lane is only c.1.2m above the finished lane level, but c.2m above the ground level of the rear garden to the site. No.25 St Enda's Road and no.63-67 Brighton Road have access onto the lane, either vehicular or pedestrian. The applicant site has no existing access onto the lane.

2.0 Proposed Development

- 2.1. It is proposed to open a pedestrian access from the rear garden onto the adjacent mews lane and to rear the existing boundary wall to the lane by 1m.
- 2.2. Supporting documentation
 - Architectural Heritage Impact Assessment by Mac Donald Vagge

- Letter of confirmation from Terrence O’Keefe, Law Agent, Dublin City Council (21/01/15) that the laneway is owned by Dublin City Council and register on Folio DN3226

3.0 Planning Authority Decision

3.1. Decision

To **GRANT** permission subject to 7no. standard conditions. Condition no.2 relates to the control of works to a protected structure; condition no.3 addresses the requirements of the City Archaeologist.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Council’s Planning Officer considered the proposed development would not seriously injure the amenities of the area and would not adversely affect the character and setting of a Protected Structure and to be accordance with the provision of the Development Plan 2016-2022 and recommended that permission be granted subject to 7no. conditions which were attached to the grant of permission.

3.2.2. Other Technical Reports

City Archaeologist (02/05/17) – Noted the site was within the Zone of Archaeological Constraint pertaining to RM DU022-080 (Windmill) subject of statutory protection under the National Monuments (Amendment) Act 1994 and recommended three standard type conditions be attached.

Drainage Division (04/04/17) – No objection subject to standard condition.

3.3. Prescribed Bodies

None

3.4. Third Party Observations

Letters of observation were received to the application from Paul Pollock of no.65 Brighton Road c/o Dr Diarmuid Ó’Gráda, Pauline McHale Pollock of no.65 Brighton

Road, Edmund and Alice O'Neill of no.25 St Enda's Road, Joe Ryan of no.22 St Enda's Road and Ruth McQuaid of no.66 Brighton Road. The main points raised are repeated in the grounds of appeal.

4.0 Planning History

On site

PL29S.243931 / reg.ref.1033/14: Permission **GRANTED** by the Planning Authority for the demolition of extension, etc., and construction of new rear extension and other alterations to existing dwelling (a protected structure) at 68 Brighton Road, Rathgar, Dublin 6. The appeal related to conditions and was treated under s.139 of the Act, in which decision the Board removed condition 2(a) (27/01/15).

E0306/15: Enforcement file opened regarding demolition of boundary wall.

In vicinity

PL29S.244040 / Reg.ref.3234/14: Permission **GRANTED** by the Planning Authority for the demolition of modern return, etc., alterations and new extension to rear of existing dwelling (a protected structure) at no.69 Brighton Road, Rathgar, Dublin 6. The appeal related to conditions and was treated under s.139 of the Act, in which decision the Board removed condition 2(a) (27/01/15).

5.0 Policy Context

5.1. Development Plan

Dublin City Development Plan 2016-2022

Land use zoning objective Z2 to protect and / or improve the amenities of residential conservation areas

No.68 Brighton Road is a Protected Structure

Site of Archaeological Interest (Recorded Monument DU022-080 Windmill)

Zone of Archaeological Interest

Chapter 11 Built Heritage and Culture - Policy CHC2

5.2. Natural Heritage Designations

South Dublin Bay SAC Site Code 000210 c.5km to the east.

South Dublin Bay and River Tolka Estuary SPA Site Code 004024 c.5km to the east.

6.0 The Appeal

6.1. Grounds of Appeal

6.1.1. The main grounds of the third party appeal by Mr Paul Pollock of no.65 Brighton Road may be summarised as follows:

- Architectural conservation / visual – concerned to protect the physical fabric of the protected structures on Brighton Road
 - Visually impact - Intrusive entrance terminating end of lane and impacting on neighbouring residential amenities;
 - Would substantially detract from the setting of protected structures (precedent for refusal PL29S.21299 [sic] / reg.ref.4762/04).
- Insufficient legal title to carry out development on private lane
 - Letter from Ronnie Hamilton, Senior Technician, Roads Department, Dublin City Council (attached) states '*Note: the laneway to the rear of Nos.65, 66 & 67 Brighton Road and side of no.25 St Enda's Road is 'not in charge' of Dublin City Council i.e. a 'private lane'*';
 - Letter of consent is required from the legal landowner to make the application;
 - Unauthorised taking over part of lane through erection of temporary fence;
 - Issue not properly addressed by Council (Frascati Estates vs. Walker [1975] I.R. 177 is relevant);
 - 7no. board cases cited where the Board considered insufficient legal interest to carry out the development was demonstrated.
- Lane not suitable to carry pedestrian and vehicular traffic due to narrow width, pinch points and lack of public lighting, in addition to the level difference with

the site necessitating works which affect the character of the protected structure.

6.1.2. The main grounds of the third party appeal by Pauline McHale Pollock of no.65 Brighton Road may be summarised as follows:

- Architectural conservation / visual –
 - Visual impact - Objects to wall height preventing the appellant's view down the lane;
 - Boundary wall to lane removed without permission, but since reinstated;
 - Height of back garden already raised;
- Insufficient legal title to carry out development on private lane
 - Part of the lane has been established as in the appellant's ownership (by c.1.6m) over which she, as advised by Mr. Michael Hourican BL, is entitled to prohibit all 3rd parties;
 - Unauthorised taking over part of lane through erection of temporary fence;
 - There is no inconsistency between the Council's title and that of the appellants as the former is freehold and is subject to the latter being a leasehold;
 - DCC has been unable to furnish the appellant with proof that the lane was taken in charge and the copy of works provided by the DCC law department does not correspond to the section of lane concerned;
 - Affidavits attached from long-time local residents that they do not recall the said lane ever having been tarmacadammed by DCC;
 - Maps from DCC archives show the lane was not included in Sir Robert Shaw's estate lands vested to DCC in the 1920's.
 - Also refers to the letter from Ronnie Hamilton of DCC concerning lane not having been taken in charge, refers to maps (attached) from DCC Roads Maintenance Division indicating that the lane is not in-charge;
 - Provides copy of letter from Terrence O'Keefe, Law Agent, Dublin City Council (18/02/15) subsequent to that which issued 21/01/15 (copy of

which was submitted with the application) confirming that the laneway is owned by Dublin City Council under register on Folio DN3226 but is not 'in charge' or maintained by DCC;

- Councillor Mary Frehill motion (June 2015) to take the cul-de-sac in charge was deferred *sine die* by the Council due to ongoing legal dispute;
- The failure of DCC to maintain the lane or provide other 'in charge' features indicates that DCC de facto abandoned title to the lane;
- The lane is closed in nature and provides access only to a limited number of properties and could not become subject of a public right of way;

6.1.3. The main grounds of the third party appeal by Alice O'Neill and Edmund O'Neill of no.25 St Enda's Road may be summarised as follows:

- Architectural conservation / visual –

The boundary wall is a protected structure;

Concern that the shed level will be raised with the garden level, above that permitted under reg.ref.3033/14;

Condition survey of the wall required under reg.ref.3033/14 does not appear to have been carried out contrary to a condition to the permission;

DCC did not grant the applicant permission to demolish the wall and the applicant was obliged to reinstate the wall by December 2016.

- Insufficient legal title to carry out development on private lane.
 - DCC did not have the right to grant the developer access over the cul-de-sac for the purpose of carrying out construction;
- Inaccurate drawings – the rear garden levels were 1.0-1.5m below lane level.
- Concern that the shed on site will be used for commercial purposes and the lane used for access for same.
- Consequential loss of privacy, overlooking, loss of security and impact on character of the lane.

6.2. Applicant Response

The main points of Mary Carty's (applicant) response, c/o MacDonald Vagge (19/06/17), may be summarised as follows:

- Architectural conservation / visual
 - The rebuilt wall is of much improved condition and the hardwood gate will improve the lane, removing the dead end feel (photographs of wall prior to alteration attached);
 - The lane is characterised as secondary space to the grander houses on Brighton Road. The applicant will provide an arched door should the Board require;
 - The applicants are fully aware of the responsibilities imposed on owners of historic properties;
 - Notes the zoning objective Z2 and provisions of S.17.10 of the Development Plan concerning Protected Structures;
 - The insertion of a single gate and increase in height of the granite walls will enhance the rear garden enclosure to the protected structure;
 - The simple gate is in line with the tradition of a rear lane;
 - Permission reg.ref.3033/14 is decided, cannot be revisited and is not relevant to this appeal;
 - The development will be carried out in accordance with good conservation practice and principles and will secure for the future the key elements of the curtilage of the protected structure.
- Legal title to carry out development
 - Letter (12/01/15) from Rochford Brady Group which found the subject lane to be registered (Land Registry) to The Lord Mayor Aldermen and Burgesses of Dublin and South Dublin County Council;
 - Letter (19/06/15) from Dublin City Law Agent indicating the subject lane is in charge of the City Council and is a public thoroughfare;

- Letter (19/06/15) informing Mr and Mrs Pollock of no.65 Brighton Road (3rd party appellants) that the subject lane is in charge and that the letter of 27/01/15 from the Roads and Traffic Department was incorrect;
- Email (18/06/15) from solicitor at DCC Law Department confirming the subject lane is in the ownership of the subject land and that it has been in charge since 1968 and is deemed to be a public road.
- Letter from Murphy English & Co. (18/08/15) noting that is it not unusual, especially in the Country, for a boundary to go to the middle of the public road. The fact that you have title to the land does not prevent the laneway / road being taken in charge. It is a public roadway.
- Suitability of lane to carry pedestrian and vehicular traffic
 - Pedestrian traffic generated by four people will be very light.
 - The lane already carries pedestrian traffic and vehicular parking by some of those concerned.

6.3. Planning Authority Response

None

6.4. Observations

The main points of the observation by Emily King (09/06/17) may be summarised as follows:

- DCC failed to address the issues raised in the observations, made absolutely no assessment of the merits of those points and granted permission based on manifestly incorrect drawings.

6.5. Further Responses

6.5.1. In the further response by Paul Pollock c/o Dr Diarmuid Ó'Gráda (16/06/17), in addition to points already made, it is submitted that:

- The applicant has not established adequate legal interest in the lane;

- Site notice must be displayed where the public street begins and the applicant is therefore non-compliant.

6.5.2. In the further response by Pauline McHale Pollock (20/06/17), in addition to points already made, it is submitted that:

- Increase in height of wall will damage the architectural and historical context;
- Reiterates that the lane has been abandoned by DCC for a period of 12 years;
- Site notice invalid as it was erected within the curtilage of a private cul-de-sac.

6.5.3. In the further response by Mary Carty (applicant), c/o MacDonald Vagge (23/06/17), in addition to points already made, it is submitted that:

- Attached copy of letter from applicant to Dublin City Council (26/04/17) referring to error on submitted plans (PL03, PL04 and PL05) concerning incorrect garden levels and attaching revised layouts PL03A, PL04A and PL05A to be considered as part of the application documentation to replace the previous mentioned drawings (partial copies of replacement drawings attached).
- The revised drawings submitted as unsolicited information to rectify the error with garden levels in the original drawings (and circulated to the relevant neighbours) were returned.
- Raised garden levels concerned provision of an access ramp from the lane for development of the extension for a period of 5-6 months and were confirmed as lowered to its original level on inspection by James Cosgrove from Planning Enforcement DCC on 03/07/15.
- Consultation with the relevant neighbours in advance regarding access was not successful.
- It is the applicants' intention to return the garden levels to the original level and raise the level with the lane solely in the immediate landing;
- The shed is a domestic shed and no amendments in use or height proposed;

- Demolition of the wall was temporary;
- Disputes the issue of reduced security of lane;
- Height of wall will be similar to previous wall and hedge and not obstruct view.

6.5.4. In the further response by Paul Pollock (appellant), Dr Diarmuid Ó'Gráda (24/08/17), in addition to points already made, it is submitted that:

- The appellant disagrees with the applicant's position concerning the visual impact of the entrance, the traffic impact and the impact on a protected structure.
- Referring to the copy of the unsolicited information submitted to the Council on 2th April 2017 [but returned to the applicant], the error cited in same is outstanding and is not rectified by any condition attaching to the Council's decision. The appellant invites the Board to hold an oral hearing to fully discuss the matter.

6.5.5. In the further response by Pauline McHale Pollock (appellant) (30/08/17), in addition to points already made, it is submitted that:

- Applicant and builder have not repaired the surface of the lane which is now flooding in parts and have not repaired extensive damage caused to Brighton Road.
- Residents of nos.22-25 St Enda's Road have all taken over the area of ground between their boundary line and the side of no.68 Brighton Road (application site) and the local authority does not have title to allow the applicant to demolish a protected wall.
- The cul-de-sac is not a public thoroughfare under the definition of the 1925 and 1993 Declaration of Public Roads Act, not being a general public utility and the declaration, being a reserved function.
- The local authority has not produced the relevant taking in charge order required under the legislation and the purpose of the documentation provided is unclear and inconsistent and incorrect.

- The PRAI boundary line maps are not conclusive of boundaries and it is the description of the appellant's property on the title deeds, predating the Shaw Estate transfer, providing the exact dimensions, that conclusively establish the property extends into the disputed area.
- Questions the validity of the application on the basis of the corrected drawings submitted as unsolicited information, returned to the applicant.
- Appellant's ownership extends halfway across lane.
- Attached letter and maps from Dublin City Council indicating that the subject lane is not taken in charge (appendix tab 9 of further submission refers).
- Notes advice from the Council's Law Department that the lane is in the ownership the local authority but not in charge.
- The letter (01/06/17) from Ronnie Hamilton of the Roads Department, Dublin City Council, abandons completely from its stated position as set out in correspondence and maps attached to the appeal. The Council is acting ultra vires in furnishing the applicant with a letter slandering the appellant's title and constitutional rights without any new evidence.
- The bollard erected to protect the relevant property owners right was removed, not by the Road and Maintenance Department, but under the instruction of Project and Property Disposals Section of DCC.
- Invites the Board to convene an oral hearing.

7.0 Assessment

The main issues arising in this appeal may be addressed under the following headings:

- 7.1 Architectural conservation / visual
- 7.2 Traffic issues
- 7.3 Other issues
- 7.4 Appropriate Assessment

- 7.1. Architectural conservation / visual
- 7.1.1. The application relates to lands within the curtilage of a protected structure. The works comprise of raising by c.1000mm a c.3400mm length of granite rubble wall terminating a mews lane and inserting a pedestrian entrance gate (c.1200mm wide, not 600mm stated in the Council's Planner's report) in that wall to facilitate access to / from the mews and the property (no.68 Brighton Road) by pedestrians.
- 7.1.2. The City Archaeologist report (02/05/17) notes the site is within the zone of archaeological constraint for Recorded Monument DU022-080 (Windmill) and recommended 3no. standard archaeological preservation conditions be attached, as was attached by the Council's decision (condition no.3). Condition no.2 relates to the control of works to a protected structure, however in my opinion the wording of same is vague, unenforceable and unnecessary.
- 7.1.3. Having inspected the site and the mews lane, I am satisfied that the proposed altered wall will not detract from the character and special interest of the protected structure, will not seriously injure the visual amenities of the surrounding properties or that of the laneway and is consistent with Council Policy CH2 to protect the special interest of protected structures.
- 7.2. Traffic issues
- 7.2.1. On completion, the proposed development will increase pedestrian traffic along this short section of laneway (c.28m), being a cul-de-sac from St Enda's Road. I see no issue with increasing the pedestrian use of this piece of infrastructure. There is no obvious reason why the site would not be suitable to accommodate additional pedestrian traffic as submitted by the appellants. There is no report from the Council's Roads Department.
- 7.3. Other issues
- 7.3.1. The right of the applicants to use the subject lane as an access has been strenuously disputed by the appellants who submit that it is not in the charge of the City Council and / or has been abandoned by the Council in the 12 years previous to the application being made. As noted above, there is no report from the Council's Roads Department and the Planner's report is silent on the matter. Based on the

detailed information submitted by the first party, it would appear that the subject lane is in the ownership and 'in charge' of the Council and is a public lane. However, in this regard, section 34(13) of the Planning and Development Act, 2000, as amended states:

A person shall not be entitled solely by reason of a permission under this section to carry out any development.

- 7.3.2. In respect of the concerns raised by appellants about the site notice provided to the mews lane boundary, the provision of a site notice at the main entrance to the site to Brighton Road was in accordance with the provisions of section 19(1)(c) of the Planning and Development Regulations 2001, as amended. The provision of a second notice onto the subject mews lane, where there is no entrance thereto currently, does not conflict with the requirements of the said regulations
- 7.3.3. The applicant accepts that the drawings submitted with the application do not show the correct site levels. It is submitted that it is not intended to increase site levels, including in the location of the permitted domestic shed, above the original site levels, except at the landing (and steps up to same) to the proposed pedestrian entrance to the lane. Revised drawings (PL03A, PL04A and PL05A) submitted as unsolicited further information to the Planning Authority on 26/04/17 to rectify the erroneous site levels were returned by the Council. The drawings submitted in response to the appeal (23/06/17) are only partial copies, although they make clear the dimensions of the access landing and access staircase from garden level. Should the Board decide to grant permission I would advise that this issue can be suitably resolved by condition.

8.0 Recommendation

- 8.1. I recommend that permission be **GRANTED** subject to the conditions set out under section 10.0.

9.0 Reasons and Considerations

Having regard to the zoning objective Z2 to protect and / or improve the amenities of residential conservation areas, to the character of the protected structure subject of

the application for permission, the nature and detail of the works proposed and the context of the works on the boundary wall terminating a mews lane accessed by a number of properties, it is considered that the proposed development would improve the amenities of the residential conservation area, would not seriously injure the amenities of property in the vicinity and would be consistent with the proper planning and sustainable development of the area subject to compliance with the conditions set out under section 10.0, below.

10.0 Conditions

1. The development shall be carried out and completed in accordance with the plans and particulars 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. This decision to grant permission is in respect of the raising of the southern boundary wall to the mews lane by approximately 1000mm, the provision of a pedestrian entrance gate of approximately 1200mm width and the provision of an access landing of approximately 3000mm by 2000mm (not exceeding the finished level of the adjacent mews lane) and access staircase of approximately 1400mm by 1800mm within the site. No other alterations to the finished levels of the rear garden to no.68 Brighton Road shall be authorised on foot of this decision.

Reason: In the interest of clarity.

3. The wall shall be of random granite rubble construction to match that of the existing wall.

Reason: In the interest of visual amenity.

4. The developer shall facilitate the archaeological appraisal of the site and

shall provide for the preservation, recording and protection of archaeological materials or features which may exist within the site. In this regard, the developer shall:

- (a) notify the planning authority in writing at least four weeks prior to the commencement of any site operation (including hydrological and geotechnical investigations) relating to the proposed development, and
- (b) employ a suitably-qualified archaeologist prior to the commencement of development. The archaeologist shall assess the site and monitor all site development works.

The assessment shall address the following issues:

- (i) the nature and location of archaeological material on the site, and
- (ii) the impact of the proposed development on such archaeological material.

A report, containing the results of the assessment, shall be submitted to the planning authority and, arising from this assessment, the developer shall agree in writing with the planning authority details regarding any further archaeological requirements (including, if necessary, archaeological excavation) prior to commencement of construction works.

In default of agreement on any of these requirements, the matter shall be referred to An Bord Pleanála for determination.

Reason: In order to conserve the archaeological heritage of the area and to secure the preservation (in-situ or by record) and protection of any archaeological remains that may exist within the site.

5. During construction and demolition phase the development shall comply with British Standard 5228 'Noise Control on Construction and Open Sites Part 1, Code of Practice for Basic Information and Procedures for Noise Control'.

Reason: In the interest of residential amenity.

6. Site development and building works shall be carried out only between the

hours of 0700 to 1800 Mondays to Fridays inclusive, between 0800 to 1400 hours on Saturdays and not at all on Sundays and public holidays.

Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.

Reason: In order to safeguard the residential amenities of property in the vicinity.

7. Site development and construction works shall be carried out in such a manner as to ensure that the adjoining street(s) are kept clear of debris, soil and other material and, should cleaning works need to be carried out on the adjoining public road arising from the carrying out of the development, the said cleaning works shall be at the expense of the developer.

Reason: To ensure that the adjoining roadways are kept in a clean and safe condition during construction works in the interest of orderly development.

John Desmond
Senior Planning Inspector

11th September 2017