



An  
Bord  
Pleanála

## Inspector's Report ABP304679-19

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<b>Development</b>	Retention of planning permission for 2 dwellings and permission for ancillary works.
<b>Location</b>	1-2 Merton Court, Kilkee, County Clare.
<b>Planning Authority</b>	Clare County Council.
<b>Planning Authority Reg. Ref.</b>	P19/8.
<b>Applicant(s)</b>	Kenrite Construction Limited.
<b>Type of Application</b>	Retention of Planning Permission.
<b>Planning Authority Decision</b>	Refuse.
<b>Type of Appeal</b>	First Party -v- Refusal.
<b>Appellant(s)</b>	Kenrite Construction Limited.
<b>Observer(s)</b>	(i) Merton Lodge Management Company Limited (ii) Michael and Catherine Daly (iii) Mr. Tony O'Shea and Others
<b>Date of Site Inspection</b>	6 <sup>th</sup> August, 2019.
<b>Inspector</b>	Paul Caprani.

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## 1.0 Introduction

ABP3204679-19 relates to a first party appeal against the decision of Clare County Council to issue notification to refuse retention of planning permission for the completion of two dwellings and ancillary works at Merton Court, Kilkee, County Clare. Clare County Council issued notification to refuse planning permission on the basis that the locations of the dwellings constructed are materially different than that permitted under the parent permission (Planning Ref. P10/224). As such it is considered that the proposed development would materially contravene Condition No. 1 of the parent permission. A number of observations were submitted supporting the decision of the Planning Authority.

## 2.0 Site Location and Description

- 2.1. The appeal site is located in the western environs of the town of Kilkee in West Clare. It is located within the existing built-up area of the town, relatively close to the town centre (c. 500 metres).
- 2.2. The subject site occupies an area of 0.0858 hectares located centrally within an existing urban block which faces north-eastwards onto the Strand of Kilkee and is bounded to the north-west by Merton Square and to the south-east by Albert Place. The site is located to the rear of two/three-storey block of holiday apartments (formally the Hydro Hotel) which face onto an area of public open space adjacent to the shoreline (Wellington Square). A terrace of two-storey residential dwellings is located to the south and access to the site is provided adjacent to these dwellings. The rear of two and three-storey residential units are located along the north-west boundary of the site facing onto Merton Square. An unfinished dwelling is located to the rear of the subject site while rear gardens associated with residential units fronting onto Albert Place to the south-east back onto the south-eastern boundary of the site.
  - 2.2.1. The site currently accommodates 2 no. two-storey detached dwellings which face north-eastwards onto the rear of the three-storey block facing onto Wellington Square. The dwellings which are the subject of the current application for retention,

are substantially completed are sub and surrounded by temporary metal fences. (See photographs attached). Access to the dwellings is provided adjacent to the row of two-storey residential units to the south, and access is also provided via an archway at ground floor level through the apartment block facing onto Merton Square.

### **3.0 Proposed Development**

Retention of planning permission is sought for the completion of the two residential units as constructed on site.

### **4.0 Planning Authority's Decision**

#### **4.1. Decision**

4.1.1. Clare County Council issued notification to refuse planning permission for a single reason which is set out in full below.

4.1.2. *The Planning Authority considers that the positions in which the houses, the subject of this application, have been constructed are materially different to the locations as permitted under Planning Ref. P10/224. Such works are considered to constitute "development" in accordance with Section 3(1) of the Planning and Development Act 2000, as amended, and are not considered to constitute exempted development. As the development, the subject of the application as originally made to the Planning Authority, does not include for the retention of the altered position of the houses from that as permitted, the Planning Authority considers that the development as proposed would facilitate the continued unauthorised siting of these units. As such, it is considered that the proposed development therefore, would materially contravene Condition No. 1 of Planning Ref. P10/224, and would be contrary to the proper planning and sustainable development of the area.*

#### **4.2. Documentation submitted with the Planning Application**

4.2.1. The planning application was accompanied by a planning application form, public notices, drawings and statutory fee etc. Also submitted was a covering letter which notes that an enforcement notice was served to the applicant on the 19<sup>th</sup> July, 2018

requiring that works relating to the dwellings cease the following day. It is stated that some works had to be completed to ensure structural integrity and Building Regulations compliance. In order to complete the buildings and to achieve full and clear consent from the Planning Authority, an application for retention of planning permission is enclosed. It is stated that the buildings are substantially completed and constructed in accordance with the original permission. However, site works have progressed to a point and there are minor alterations to the boundaries and underground services neither of which, it is argued, have a substantial impact on the nature of development.

#### **4.3. Observations**

- 4.3.1. A number of observations were submitted to the Planning Authority objecting to the proposed development. The contents of these observations have been read and noted.

#### **4.4. Additional Information Request**

- 4.4.1. The initial planner's report requested additional information in relation to the following issues.
- It is noted that the layout of the houses for which retention is sought is not in accordance with the layout permitted under the parent permission P10/224. The applicant is invited to submit proposals to address this issue.
  - Further information is requested in relation to water and wastewater infrastructure. In this regard it is noted that the water, wastewater and surface water sewer infrastructure at this location has not been taken in charge by the local authority. The applicant is requested to submit written consent of permission from the owner to connect the houses to the surface water sewer.
  - The applicant is also requested to address the issue of the boundary wall adjacent to House No. 1. It is stated that boundary walls shall be reduced to a maximum of 1 metre in height above existing ground levels. A revised site layout plan is requested to be submitted indicating these changes.

#### 4.5. **Additional Information Response**

The response to further information was received from the applicant on 24<sup>th</sup> April, 2019.

- With regard to the first issue raised, it is stated that the relocation of the dwellings in question was unavoidable due to the presence of a large unknown underground land drain and services which are exposed through initial groundworks excavation. It is stated that all alterations to the footprint of the dwellings were kept to a minimum in order to accommodate the underground services.
- In relation to water and wastewater infrastructure serving the dwellings, the applicant has submitted a service map provided by Irish Water which shows the existing adjacent public supply locations. It is stated that this information has been issued and approved by Irish Water. It is further noted that no connection to private infrastructure is sought. Instead it is proposed to make a new connection to the public water supply at Albert Place to the south-east and lay new watermains via a registered right-of-way as per a land transfer. In relation to wastewater it is stated that no connection to private infrastructure is sought. Instead it is proposed to discharge the new wastewater network into an existing foul manhole to the south of the site (see drawing 18077-C10-C). It is proposed to discharge the surface water from each house into an individual soakaway the location of which are indicated on the drawings referred to above. A letter is attached from Irish Water which requires that all infrastructure should be designed and installed in accordance with Irish Water's Code of Practice.
- With regard to boundary walls a revised drawing is submitted which shows the proposed location of the houses and the ancillary boundary walls.

#### 4.6. **Further Assessment by Planning Authority**

- 4.6.1. A subsequent planner's report was prepared on foot of the additional information. The planner's report dated 20<sup>th</sup> May, 2019 notes the additional information submitted but nevertheless recommends that planning permission be refused for the single reason set out above.

## 5.0 Planning History

- 5.1. One appeal file is attached under PL03.233971 An Bord Pleanála upheld the decision of Clare County Council and granted planning permission for three dwellinghouses on the lands that comprised of the entire land which was undeveloped to the rear. The Board granted planning permission subject to 15 conditions in January 2010.
- 5.2. Further details of planning applications are contained in a pouch to the rear of the file.
- 5.3. Under Planning Reg. No. P10/224 Clare County Council granted planning permission on the subject site to erect two dwellings with connection to existing services and carry out associated works on the subject site subject to 22 conditions. Permission was granted on 11<sup>th</sup> June, 2010.
- 5.4. Under P15/270 an extension of planning permission was granted for the two dwellinghouses on 15<sup>th</sup> June, 2015 for a period of c.3 years. The expiry of the extension of permission was 10<sup>th</sup> June, 2018.
- 5.5. Full details of P04/2161 are also contained on file. Under this application planning permission was refused for the construction of three dwellings on the subject site. Permission was refused on the grounds of inadequate open space and the potential for the proposal to create serious traffic congestion.

## 6.0 Grounds of Appeal

- 6.1. The decision of Clare County Council to issue notification to refuse planning permission was appealed on behalf of the applicant (Kenrite Construction Limited) by HRA Planning. The grounds of appeal are outlined below.
  - It is submitted that the applicant has merely sought to regularise the siting of the housing units of the subject application. The Planning Authority specifically raised the issue of the position of the houses by way of further information and specifically requested that the applicant submit proposals to address this issue.

- The applicant responded to the further information by submitting revised plans and details seeking the retention of the houses as constructed.
- Furthermore, it is stated that the applicant re-advertised the development in accordance with statutory requirements in order to adequately inform the public of the amended information.
- It appears that the Planning Authority has had no regard to the fact that the proposed development was re-advertised to include the retention of the altered location of the dwellinghouses under the parent permission.
- Furthermore, it is argued that the surrounding area would benefit from the completion and occupation of the residential units and for this reason it is requested that the decision of Clare County Council be overturned by the Board.
- The grounds of appeal go on to outline the background information associated with the development including the planning history associated with the site. It is noted that the principle of residential development on the subject site was established in 2008 under a decision by An Bord Pleanála (see history above).
- In relation to the extension of planning permission, it is noted that documentation on file suggested that the extension of duration of permission ceased to have effect on the 10<sup>th</sup> June 2018. However, it is noted that this time would not have included 9 additional days afforded under Section 251 of the Planning and Development Act which would have extended the expiration date to the 7<sup>th</sup> July 2018. It is stated that the houses were constructed by the 7<sup>th</sup> July 2018 save for the installation of the windows, weathering and all associated site ancillary works including the construction of boundary walls, retaining walls and the provision of services. An enforcement notice was issued to the applicant on the 19<sup>th</sup> July 2018 instructing that all works cease on site.
- Reference is made to the grounds of appeal to the Planning Authority's further information request. The applicant in his response made it adequately clear the reasons behind the altered locations of the footprint of both dwellinghouses. It was clarified by the applicant that the relocation of the



houses on site was unavoidable due to the presence of a large unknown underground land drain and services which were only exposed following initial groundwork on site. It is stated that revised newspaper notices were published and a new site notice erected to adequately inform the public of the amended location of the houses. It is also stated that it is no longer proposed to discharge surface water to the public system. Instead it is proposed to provide soakaways on site.

- It is not agreed that the development as proposed would facilitate the continued unauthorised sitings of these units. The current application, if permitted, would fully regularise the planning permission. It is contended that the Planning Authority have chosen to completely ignore the revised development description and associated drawings.
- Having regard to the specific provisions of Article 34 of the Regulations, it is considered that the retention of the dwellings as constructed does not require a separate or new planning application.
- It is argued that if the development proposal could not have been amended or the public notices not be re-advertised, then the Planning Authority should not have raised the issue in the first instance. Reference is made to the Development Management Guidelines (June 2007) which states that applicants should not suffer any unnecessary delay or expense if a refusal is likely. It is submitted to the Board that the Planning Authority have failed to reasonably consider the development proposal amended in direct response to a further information request. It is further submitted that there is nothing stated in law or procedure which would have prevented the Planning Authority from considering the information presented before it at additional information stage and granting planning permission accordingly.
- With regard to residential amenities the grounds of appeal go on to detail the development surrounding the site and it is noted that House No. 1 has been relocated approximately 0.5 metres away from the rear boundary wall and therefore has a neutral impact on the residential amenities of the area in the context of what was previously permitted on site.

- House No. 2 has been relocated c.3 metres south-west closer to the rear boundary wall. Even with the relocation of the dwelling in question there is still a separation distance of c.10 metres between the site boundary and the proposed dwellinghouse. It is thus suggested that adequate separation distance still remains and will not result in any adverse impact on residential amenities.
- With regard to water services, it would appear that the Planning Authority did not have regard to the letter of consent on file attached to the applicant's submission dated 18<sup>th</sup> April, 2019. This letter provides consent for the applicant to access the laneway at Albert Place for the purposes of obtaining water services. The new pipework necessary to facilitate a water supply will be laid overland which the applicant has a legal right of way. The applicant therefore has submitted consent to lay services along the laneway. The applicant does not propose to lay wastewater services along the laneway to Albert Place. Rather it is proposed to discharge into an existing combined manhole from where wastewater will discharge into an existing combined sewer that runs along a laneway at Albert Place.

## **7.0 Appeal Responses**

7.1. The Planning Authority submitted the following response to the grounds of appeal.

It is stated that the publication of notices as a response to a request for further information can only occur when the Planning Authority considers that the information received contains a significant additional data. In such instances the Planning Authority is required to inform the applicant that such notices are required to be published. The publication of such notices by the applicant in the absence of a request to do so would be pre-emptive and would not accord with the provisions of Article 35 of the Planning and Development Regulations.

The development description did not include specifically for the retention of the houses in their as constructed positions. The description of the development was confined to that aspect of the development which was undertaken following the expiration of the parent permission. The Planning Authority is satisfied that the works to construct the ground floor level of both houses occurred during the lifetime of the

parent permission and therefore cannot be captured under the development description for which retention of planning permission is sought. As such the Planning Authority was precluded from granting planning permission for the development as proposed and therefore decided to refuse permission. For these reasons An Bord Pleanála are respectfully requested to uphold the decision of the Planning Authority.

## **8.0 Observations**

### **8.1. Observation from Merton Lodge Management Company Limited**

- It is argued that the entire construction is non-compliant with planning permission primarily on the basis that the payment of a predevelopment planning contribution of €15,315 and the payment of a €10,000 bond as required under Conditions Nos. 9 and 22 respectively was never complied with.
- It is stated that on the expiration of planning permission on the 18<sup>th</sup> June 2018 there was neither windows installed nor were there roofs on houses and much of the development had yet to be completed. Photographs are attached purporting to date from the 10<sup>th</sup> June 2018 showing the houses in question at the early stages of construction. It is stated for the planning system to have any credibility, there must be consequences for this level of non-compliance.
- It is stated that the entrance/exit to the proposed development is from Merton Square through a private property owned by Merton Lodge Management Limited. It is also stated that the applicant (Kenrite Holdings Limited) is not the owner of the development site and therefore cannot give right of way through the Merton Lodge property and as such there is no access to/from the development site via Merton Lodge property.
- It is also suggested that the boundary of the site as indicated in red on the maps submitted is incorrect and should be amended accordingly and should not include any right of way which runs along the north-eastern boundary of the site. It is also suggested that part of the Merton Lodge property has been included within the site boundary and this is also an inaccuracy.

- It is also suggested that the proposed access to the site through Merton Lodge is completely unsuitable as it is too low for essential services such as fire brigade, ambulance or maintenance trucks. Furthermore, because of restricted sightlines within the archway, for traffic entering and exiting the site this will result in a significant traffic hazard. It is suggested that two-way traffic is simply impossible through the tunnel/archway at Merton Lodge. Details of emails are attached in the observation highlighting Clare County Council's concerns in relation to the vehicular access arrangements through Merton Lodge.
- It is also suggested that the site is inadequate to provide a turning circle for vehicles to the front of the dwellinghouses.
- It is also suggested that the houses built are suburban in nature and do not reflect the historic character of the area. Many of the recommendations contained in the original planning permission granted by the Board P08/1588 and PL03.233971 were completely ignored.
- The houses built on the subject site do not reflect the historic character of the area and in particular the adjoining Merton Square Architectural Conservation Area.
- Finally, it is argued that the management of the common areas have not been addressed specific mention is made to the issues of maintenance, insurance, street lighting and upkeep of essential services etc.

## 8.2. **Observation from Michael and Catherine Daly**

8.2.1. This observation argues that the proposed development adversely affects the observers' house at No. 3 Merton Square. It objects to the proposal for the following reasons:

- The dwellinghouses are visually obtrusive from the rear of the observers' dwellinghouse.
- The two-storey gable end is very close to the proximity of the common boundary wall.
- The proposal will impact on light penetration into the observers' house and yard.

- The size of the development is out of proportion with the surrounding properties.
- The proposal will adversely affect the value of the observers' property and resale potential.

### 8.3. **Observation on behalf of the Residents Hydrocourt and Others**

- The site in question is totally landlocked with no indication of how it is proposed to access the site. It is stated that the access serving Nos. 3 to 7 Hydro Court is a private road and the applicant has no right to use this road.
- The existing services for foul storm and watermain layout are located on private land and the applicant has no right or consent to connect to these services.
- It is noted in Condition 6(a) of the parent permission that the sewer connection shall be via a concrete pipe to the public sewer at Merton Square. Furthermore, the precise location, condition and current loading and capacity of the existing pipe on Albert's Lane is not known.
- The report from Irish Water submitted in the applicant's response to the additional information notes that water and wastewater connections are feasible along the route of the laneway to Albert Place provided that third party permissions are in place to lay the services. This confirms that third party consent will be required for those connections.
- It is stated that there are no survey maps on file indicating existing invert levels together with sewer levels etc. and no sewer sections have been submitted.
- The development is backland development and overlooks existing properties. There is no public open space proposed. It is also suggested that the parking spaces to be provided are not of sufficient length to allow for parking parallel to the kerb. The extent of proposed roads and paths are not clearly indicated in the drawings submitted nor is any landscaping plans submitted.

## 9.0 Development Plan Provision

- 9.1. The subject site is located in the Kilkee Settlement Plan which is part of the Clare County Development Plan 2017-2023 (see Volume 3(d) – West Clare Municipal District). The subject site is zoned ‘existing residential’ the objective of which is to conserve and enhance the quality and character of the areas, protect residential amenities and to allow small scale infill which is appropriate to the character and pattern of development in the immediate area and uses that enhance existing residential communities. Existing residential zoned land may also provide for small-scale home-based employment uses where the primary residential use will be maintained.
- 9.2. According to the planner’s report the site is also partly within and partly adjacent to the Merton Square Architectural Conservation Area. Objective CDP 15.5 sets out the development plan objective in relation to architectural conservation areas.
- 9.3. It is the objective of the development plan to:
- (a) Ensure that new developments within or adjacent to an ACA respect the context of the area and contribute positively to the ACA in terms of design, scale, setting and material finishes.
  - (b) To protect existing buildings, structures, groups of structures, sites, landscapes and features such as street furniture and paving, which are considered to be intrinsic elements of the special character of the ACA from demolition or removal to non-sympathetic alterations.
  - (c) To ensure that all new signage, lighting, advertising and utilities to buildings within an ACA are designed, constructed and located in a manner that is complementary to the character of the ACA.
  - (d) To ensure that the external colour scheme in ACAs enhance the character and amenities of the area and reflect traditional colour schemes.

## 10.0 Planning Assessment

I have read the entire contents of the file, visited the subject site and its surroundings and have had particular regard to the Planning Authority’s reasons for refusal, the

rebuttal arguments contained in the grounds of appeal and the issues raised in the observations. I consider the pertinent issues in determining the application and appeal before the Board are as follows:

- Procedural Issues
- Residential Amenity Issues
- Access to Water and Wastewater Services

## 10.1. Procedural Issues

### Expiration of permission

10.1.1. The parent permission relating to the subject site was granted under Reg. Ref. P10/224 (on 11<sup>th</sup> June, 2010 subject to 22 conditions). An extension of the appropriate period of this permission was granted for a period of 3 years under Reg. Ref. P15/270. The extension of the appropriate period was granted by Clare County Council on 15<sup>th</sup> June, 2015. It is clear from the enforcement notice served by Clare County Council and the grounds of the first party appeal that works were not completed in respect of the two dwellinghouses at the end of the 3 year extension. The grounds of appeal suggest that the actual expiration date of the extension of planning permission was not the 10<sup>th</sup> June, 2018 but was in fact the 7<sup>th</sup> July, 2018. This argument is put forward on the basis that 9 additional days are afforded under the provision of Section 251 of the Planning and Development Act which states that “*where calculating any appropriate period or any other time limit referred to in this Act or in any Regulation made under this Act the period between the 24<sup>th</sup> day of December and the 1<sup>st</sup> day of January, both days inclusive shall be disregarded*”. It is on this basis, it is argued that the applicant should have been permitted to continue development until 7<sup>th</sup> July, 2018. I would reject the above argument on the basis that planning permission in this instance was not extended for a 3 year period from the date of the order of June, 2015. The extension to the appropriate period is clear and unambiguous in the notification of the decision which clearly states “that the permission will now cease to have effect on the 10<sup>th</sup> June, 2018”. Having regard to the specific date referred to in the notification of the decision, the provisions of Section 261 of the Act are in my view not relevant.

10.1.2.

## Public Notices

10.1.3. With regard to the public notices published in respect of the current application the Board will note that the public notices seek:

*“Retention permission for works undertaken following the expiration of planning permission P10/224 as extended under P15/270.”*

10.1.4. The public notice goes on to state that “such works include window installation, weathering and construction of boundary walls and ancillary works”. Planning permission is also sought for the completion of works to include downpipes, drainage, boundary wall, retaining walls, driveway, footpaths and ancillary works at the same address.

10.1.5. The revised public notices submitted with the additional information and published in the Clare Champion on the 5<sup>th</sup> April, 2019 states that:

*“Significant further information and revised plans in relation to the application has been furnished to the Planning Authority”... “The revised plans and significant further information seeks retention of the altered location of the houses as constructed on site granted planning permission under P10/224 and extended under P15/270”.*

10.1.6. Thus, the revised public notices make specific reference to the retention of the altered location of the houses as constructed on site.

10.1.7. It is noted that the Planning Authority in its request for further information was made pursuant to Article 33(1) and Article 34 of the Planning and Development Regulations 2001. The request for further information also states the following in the second last paragraph.

*“You will be required to give notice in an approved newspaper and erect a site notice under Article 35 of the Planning and Development Regulations, as amended, if the further information received is considered to contain significant additional data.*

*Please do not publish a notice in an approved newspaper unless requested to do so by the Planning Authority (my emphasis).”*

10.1.8. Article 35(1) of the Planning and Development Regulations 2001 states that “*where a Planning Authority receives further information or evidence following a request under Article 33 or revised plans, drawings or particulars following a request under Article 34, or otherwise receives further information, evidence, revised plans, drawings or*



*particulars in relation to the application, and it considers that the information, evidence, revised plans, drawings or particulars received as appropriate contain significant additional data, including information in relation to the effects on the environment the applicant shall:*

*(a) Require the applicant, within a specified period to publish a notice in an approved newspaper containing as a heading the name of the Planning Authority marked further information or “revised plans as appropriate”.*

10.1.9. It appears therefore under a strict interpretation of the Regulations, it is at the discretion of the Planning Authority and not the applicant to request the publication of revised notices. It would in my opinion have been appropriate for the Planning Authority to request the applicant to submit revised notices specifically on the basis that the revised notices refer to the relocation of the footprint of the dwellings in question. However, I note from the information on file, that it was the applicant that determined that it was appropriate that revised notices be published and not the Planning Authority. The publishing of revised notices in this instance was not strictly in accordance with the planning legislation and therefore procedurally the planning application and the submission of further information, which specifically makes reference to the relocation of the said dwellings, is at variance with the law.

10.1.10. In my view it would be inappropriate for the Board to grant planning permission for the proposed development having regard to the procedures adopted by the applicant in the case of the current application and at the very least if the Board are minded to grant planning permission in this instance, it should formally request that the applicant submit new public notices specifically stating in detail the aspects associated with the proposed development for which retention of planning permission is sought including, and most importantly in my opinion, reference to the relocation of the footprint of the dwellings in question.

10.1.11. However, it would be more appropriate in my view that the Board should consider refusing planning permission for the application and appeal before it and the applicant should be required to submit a new application clearly detailing the nature and extent of development for which retention of planning permission is sought and Clare County Council can adjudicate on the application in accordance with

appropriate legal procedure and in accordance with the proper planning and sustainable development of the area.

#### Compliance with Financial Contribution Condition

- 10.1.12. A number of other procedural issues were raised in the observation submitted to the Planning Authority. One of the observations states that the proposed development is unauthorised on the basis that the applicant failed to comply with planning condition no. 9 which relates to financial contribution. Any issues in relation to compliance with financial contribution conditions are enforcement conditions associated with the Planning Authority and not a matter for An Bord Pleanála. If the Board however, are minded to grant planning permission in this instance it would in my view be appropriate that a general financial contribution condition be attached at any such decision as it can be enforced by the Planning Authority as part of the implementation of the permission.<sup>1</sup>

#### Land Ownership and Rights of Way Issues

- 10.1.13. The observation submitted by Merton Lodge Management Company also makes reference to inconsistencies and inaccuracies in depicting the boundary of the site and provisions of rights of way through the site. Issues in relation to landownership and right of way are civil matters between the parties concerned and cannot be adjudicated upon by An Bord Pleanála. The Development Management Guidelines prepared by the Department of the Environment, Heritage and Local Government in June, 2007 at Section 5.13 are clear and unambiguous in stating that *“the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land. These are ultimately matters for resolution in the Courts”*. In this regard reference is made to Section 34(13) of the Planning Act which states that a person is not entitled solely by reason of a permission to carry out any development. With this in mind, if the Board are minded to grant planning permission in this instance any disputes over boundaries or rights of way should not impede a grant of planning permission.

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<sup>1</sup> The observation submitted indicated that the financial contribution condition amounted to €15,315. However, the original permission makes reference to a financial contribution of €13,823.

## 10.2. Residential Amenity Issues

- 10.2.1. In relation to residential amenity, the Board will note that the principle of development at the subject site for housing development has already been established under the Board's decision PL03.233971, P10/244 and P15/270. It is not in my view appropriate that the Board would reassess the proposed development in the first instance having regard to the planning history relating to the site and the decision of both the Board and the Planning Authority that the subject site is suitable to accommodate two dwellinghouses. Rather the Board should restrict its deliberations as to whether or not the alterations in the footprint of the building would give rise to significant or material amenity issues for surrounding residences.
- 10.2.2. The alterations in the footprint of the building were predicated upon detailed site investigation which unearthed a drain/soakaway running through the site which necessitated a slight alteration in the footprint of the building in the case of Unit 2 and a more substantial alteration in the footprint of Unit 1. Unit 2 was moved slightly forward within the site a distance of less than 1 metre. In the case of Unit No. 1, the footprint was setback c.3 metres within the site resulting in a more pronounced staggered layout in the footprints of the unit. Whether or not the alterations in the footprint of the building have any material impact on surrounding residential amenity is briefly assessed below.
- 10.2.3. One of the observations submitted argues that the proposal does not permit adequate parking and circulation within the layout. The setting back of Unit No. 1 as constructed in fact provides more circulatory space for car parking to the front of the building. The impact in terms of the slight relocation of Unit No. 2 will have a negligible effect on vehicular circulation.
- 10.2.4. With regard to vehicular access issues, the observations submitted by Merton Lodge Management Company Limited states that the entrance/exit to the proposed development is from Merton Square only and that no access is permitted via Albert Place. The Board will note that the parent permission P10/224 makes no specific reference in any of the conditions restricting the access to the archway/tunnel onto Merton Square. An alternative access is available to serve the development from Albert Place. Any of the arguments put forward in the observation with regard to restricted sightlines, restriction in heights for emergency vehicles and access over

private lands from Merton Square would not in my opinion preclude the Board from granting planning permission in this instance. Furthermore, as already stated the principle of developing the subject site including access arrangements has already been established and it would be inappropriate in my view that the Board would refuse retention of planning permission for the works undertaken on the basis of unsuitable access arrangements having regard to the planning history of the site.

- 10.2.5. Concerns in relation to visual impact and overshadowing are not material issues in my view having regard to the extant permission for dwellings on the site and the alterations for retention sought under the current application. The alterations of the footprints of the building particularly in relation to Unit No. 2, which is the closest dwelling to the observer's home at no.3 Merton Square are relatively minor in nature and will have no material impact from an overshadowing or visual perspective.
- 10.2.6. A similar conclusion can be reached with regard to the potential impact of the current application on the setting and context of the adjoining Architectural Conservation Area at Merton Square. The existing units are not visible from Merton Square and therefore will have no impact on the setting and historic context of the square.
- 10.2.7. While concerns are raised in relation to maintenance and services for the two dwellings in question, I would reiterate that the dwellings in question already received the benefit of planning permission under the parent permissions. The principle of development has already been established on site and these issues should not be revisited for the purposes of the appeal. Furthermore, I consider that these issues can be adequately dealt with by way of condition should the Board deem it appropriate to grant planning permission.

### **10.3. Access to Water and Wastewater Services**

- 10.3.1. As previously referred to in my report, the principle of development has already been established on site and access to such services were deemed to be acceptable by both An Bord Pleanála and the Planning Authority in granting planning permission previously.
- 10.3.2. While reference is made in the observations submitted and in the Planning Authority's request for additional information, to the fact that access to water and wastewater infrastructure relates to lands owned by third parties, this does not in itself preclude either the Planning Authority or An Bord Pleanála from granting

planning permission. The observation from Irish Water to the Planning Authority does not recommend a refusal of planning permission on this basis but rather requires that the applicant “shall seek permission in writing from the third party to allow connection to the water supply main and the foul sewer”. Any issue with regard to third party consent if required, is a matter between the parties concerned and should not in itself justify a refusal of planning permission in its own right, particularly having regard to the planning history relating to the site.

- 10.3.3. As a separate matter however, I would have concerns with regard to the provision of private soakpits on the subject site. Any surface water drainage should as in the case of water supply and foul sewage be connected to public infrastructure as the subject site is situate in an urban area. Therefore, if the Board are minded to grant planning permission, it would be appropriate in my view to address this issue by way of condition.

## **11.0 Appropriate Assessment**

Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, 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.

## **12.0 Recommendation**

- 12.1. Arising from my assessment above therefore I consider that the principle of development is acceptable on site and that the alterations and completion of the development would generally be acceptable and in accordance with the proper planning and sustainable development of the area. However, there are procedural and legal issues pertaining to a grant of planning permission in this instance. The original application for retention made no reference to the fact that the footprint of the dwellinghouse had been altered from that granted from the original permission. The alterations particularly in relation to dwelling no. 1 are of a material nature and in my opinion and should have been referenced in the public notices. While the applicant

submitted revised public notices making reference to the alterations to the footprint of the buildings, the applicant did so in the absence of a specific request by the Planning Authority. It is the legal prerogative of the Planning Authority to request the revised public notices under the provisions of Article 35(1) of the Planning and Development Regulations. It is not at the discretion of the applicant to publish such notices. On this basis I would consider it appropriate that the applicant be required to submit a new application, regularising the notices in relation to the nature and extent of development and specifically detailing the works for which retention of planning permission is sought and that any such application would be adjudicated on its merits. On this basis I recommend that the Board uphold the decision of the Planning Authority and refuse planning permission for the single reason set out below.

### **13.0 Reasons and Considerations**

The public notices originally submitted to the Planning Authority did not specifically refer to the fact that the location of the dwellinghouse for which retention of planning permission is being sought are materially different from that permitted under Reg. Ref. P10/224 and P15/270. While it is acknowledged that the applicant made reference to the retention of the revised location of the dwellinghouses in revised public notices submitted to the Planning Authority on 24<sup>th</sup> April, 2019, the Planning Authority in its request for additional information on 5<sup>th</sup> March, 2019 specifically requested the applicant not to publish a notice in an approved newspaper unless requested to do so by the Planning Authority. It is the legal prerogative of the Planning Authority only to request new public notices under the provisions of Article 35(1) of the Planning and Development Regulations (as amended). The applicant in publishing new notices in the absence of a specific request to do so by the Planning Authority has acted ultra vires and the proposed development therefore does not comply with the procedures set out in the Planning and Development Regulations and is therefore contrary to the proper planning and sustainable development of the area.

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Paul Caprani,  
Senior Planning Inspector.  
19th September, 2019.

