



An
Bord
Pleanála

Inspector's Report

ABP-308876

Development	Construction of two-storey four-bedroom house, landscaping + ancillary works to include removal of derelict ruins.
Location	Part of carriageway off Torca Road bounded to south and West by San Elmo (Protected Structure), San Elmo Lodge and the Orchard site, bounded to the east by lands rear of Mount Salus Road and to north by lands adjacent to Torca Road, Dalkey, Co. Dublin.
Planning Authority	Dun Laoghaire Rathdown Co. Council
Planning Authority Reg. Ref.	D20A/0660
Applicant(s)	Alannah Smyth
Type of Application	Permission
Planning Authority Decision	Refuse Permission
Type of Appeal	First-Party
Appellant(s)	Alannah Smyth
Observer(s)	1) Mount Salus Residents Association c/o Reid Associates 2) Joan Hanly c/o Kieran O'Malley,

- 3) Jennifer Dunne
- 4) Dalkey Community Council
- 5) A. McDonnell + S. Gargan
- 6) Marcus + Helen Fogarty
- 7) G. Gilliland + Keith Clarke
- 8) John Moran
- 9) Des Burke-Kennedy
- 10) R.Connor + L. Yurick
- 11) Aideen Rice
- 12) Hugh and Catherine O'Donnell
- 13) Rosalie and Ned Prendergast
- 14) Fionbarr + Margaret Farrell
- 15) Joady Fogarty,
- 16) Margaret Wachtler
- 17) Tanya Delargy
- 18) Rosemary Reilly
- 19) Alyson Carney
- 20) An Taisce

Date of Site Inspection

23rd December 2021 and 21st April 2022

Inspector

Suzanne Kehely

1.0 Site Location and Description

- 1.1. The appeal site of 0.291 ha relates to wooded embankments and an access track extending to a length of about 150m. It is roughly 'P'- shaped with the long narrow portion incorporating the track and embankment of trees which form part of open space/woodland in Torca Hill (as described in the Development Plan Character Appraisal of the ACA but also known as Gorse Hill Park and Dalkey Commons) to the north of the site. The wider rectangular section includes an escarpment/ tree embankment that extends 20-25m from the track and is set behind a granite stone wall which forms part of a former boundary of San Elmo - a Protected Structure (RPS 1622). The San Elmo residence is set in extensive grounds and c.90m to the south with its principal access off Vico Road. San Elmo Lodge – a contemporary replacement of a former lodge house bounds the site to the west and this has vehicular access off the track that runs parallel to the granite wall. The Orchard is a recently constructed dwelling located on a corner site with its vehicular access off Torca Road. To the east, the site is bounded by lands that were previously included with the subject site in a previous application and are similarly set in the original grounds of San Elmo. This includes a Tower (Hayes Tower) in ruins and a pedestrian gate in the original wall.
- 1.2. The boundary with the reduced San Elmo curtilage/grounds is not apparent on the ground and photographs submitted with the objection lodged by the owner illustrate the open woodland nature of the site.
- 1.3. The track is c. 5m wide at its junction with Torca Road and has a tarmac surface . It narrows in the vicinity of the site frontage to c. 2.7m. The house site is bound by old random rubble granite wall that rises about 1.5m above the path. There is an angled old concrete plinth in sections. The boundary wall fronting San Elmo Lodge has been raised and there is a notable step where the sites adjoin. The house site frontage extends c. 50m and curves northwards at its eastern end just before a pedestrian gate. Accordingly there are no openings in the boundary frontage. The path extends in length to c. 300m from Torca Road to an old cattle gate to the North where it forks and is c.100m from Knock-na-cree Road.
- 1.4. There is one vehicular entrance and one pedestrian gate to San Elmo Lodge between the site and Torca Road junction to the west. The Orchard has a pedestrian

entrance only from the path. There are a few other pedestrian gates but no other vehicular accesses.

- 1.5. There are some ruins on the site at the western end and the submitted details include photographs of these.
- 1.6. The proposed house site including the ruins is covered in trees and there is evidence of some tree thinning – there is a variety of species. The woodland to the north notably includes stands of Eucalyptus trees on the Commons side and Gorse and these are visible on the skyline as viewed from distant vantage points such as Sorrento Park.
- 1.7. The path connects Torca Road to Knock-na-cree Road as part of the green infrastructure network between the environs of Killiney Hill and the coast. It has relatively new lampposts.
- 1.8. During my site inspection I inspected the site from along the right of way between Torca Road and Knock-na-cree Road. I also had views of the derelict structures and terrain from the boundary but the photographs are dark. In addition I refer the Board to the photographs in the applicant's reports (Architectural Design Statement, Built Heritage report and Landscape report) and also those photographs as part of the observations by Kieran O'Malley on behalf of the owner of San Elmo of which the site was formerly a part. I also inspected the entire length of right of way from Torca Road to Knock-na-cree Road and the distant views from Sorrento Park and environs.

2.0 Proposed Development

- 2.1. The proposed development comprises the following:
 - Demolition/removal of the ruins
 - Construction of 2 storey flat-roofed house of 373 sq.m. and c.30m store
 - Vehicular access- at first floor level off a raised and widened pathway off Torca Rd.
 - Boundary treatment – raising of granite wall to match existing to the south. Some rebuilding involved and new pedestrian opening at eastern end

- Realignment of existing footpath and relocation of public lighting along frontage the house site. Widening to a width of 3.7m-4.2m (extent reduced in appeal submission) along a distance of 84m and resurfacing/regrading c. 54m in length.
- Associated site works including tree felling, hedgerow removal and landscaping.
- The appeal submission includes modifications to the site layout with a slight shift westwards towards San Elmo Lodge and modified splayed and recessed access, reduced width expansion of the access track with updated visual impact photomontages. Clarification of the Appropriate Assessment screening report is also attached.

2.2. Attachments:

Planning report /overview:

- This report prepared by the applicant's planning consultants sets out the planning history and policy context that has influenced and supports the proposed development.

Architectural Design Statement:

- In this statement it is explained how the proposed dwelling, landscaping and engineering works have been designed to complement and enhance this sensitive location. Elements include:
- Footpath to be widened to 3.7m to allow safe passage of cars and facilitate emergency access. It will be partially regraded to minimise impact on the shallow roots of the Eucalyptus trees to the north and to infill a dip.
- The height of the boundary wall will be increased to match San Elmo [Lodge] and will reduce visual impact and provide privacy.
- The site strategy is based on
 - the need for minimum excavation which is achieved by the raised footpath and clearance for ground level over which the vehicular access and parking platform linking into the first floor level is provided. This avoids a ramped access.
 - Setting back from wall with intervening green zone and use of timber bridging between site and house entrance at upper level use.

- A linear layout that limits protrusion and designed around three bands at entrance level : main living oriented onto the south elevation with coastal views and sunlight and daylight access, a circulation area and buffer zone. The bedroom level below is more compact. While the slender stilt supported terraces project in a 'light-touch' approach.
- A range of sympathetic materials include gabion stone walls, charred timber cladding, rendering and panelling in mute tones, green roofs, hanging greening and shaded glazing.
- A comparative visual image is provided between the proposed development and previously refused development on an overlapping site extend further to the east.

Built Heritage Report (17/9/20):

- This provides a detailed historical context of the settlement pattern in the area. The OS Maps depict a linear cluster of structures original walled off along the south in the 1889 maps but in the 1906-9 maps the alignment along the northern boundary wall along with a footpath is also delineated. The linear footprint appears reduced in the 1935-8 OS map. Demolition is evident in strewn red bricks in undergrowth. The extent of upstanding structures is evident in the series of photographs (plates 7-13 in the report and Images 1-8 in the Appendix). It is concluded that ' while the partial extent of the complex is legible in the field within the existing redbrick walls and from the historic OS maps, the remaining ruined outbuildings have lost their compositional integrity over the years. This is due to the demolition of structures to the east , south and west and the degradation and dereliction of the remaining red brick buildings. In their present state the structures do not contribute to the local character and are in a dilapidated condition.
- In terms of landscaping the design approach is to maintain and minimise the loss of any mature trees within the site and maintain the woodland setting. The terracing of the slope will be maintained and specimen trees, that were planted as part of the site's historic development of these lands during the 1900s and contribute to the character of the area, have been assessed as part of the arborist report . The development will maintain the existing boundary wall to the north and rebuild where necessary. Two breaches will be required – vehicular

and pedestrian - the stoned dismantled and reused and seamlessly connected to adjacent property -San Elmo Lodge.

- The site is outside zone of archaeological potential for Dalkey.

Arboricultural Report

- concludes overall effects quite minimal with the loss of 13 trees subject to specific and confined works. The conservation of the sylvan setting 'carries' issues with light blockage.
- **Landscape and Visual Impact Assessment**
- **Landscape Plans**
- Landscape Plan/Torca Tree Constraint Plan/Torca Tree Impacts Plan/Torca Tree Protection Plan

Civil engineering and Infrastructure Report

- This report provides details of propped connection to water supply and foul sewer. Surface water drainage is managed on site and it is clarified that there is no record of flooding on the site.

Ecological Impact Assessment/Bat survey

- It is clarified that bat survey were carried out in July and September and that no evidence of bats roosting was found within the site or structures.

Outline CEMP.

Drawings/Images include:

- A comprehensive set of plans, sections and elevations.
- Photomontages and drawings illustrating visual impact from a range of vantage points, Drone Images
- A sweep analysis of the proposed access,

2.3. Revised drawings and details: The grounds of appeal include:

- An amended Architectural Drawing Pack and Landscape Masterplan: No landscape works proposed to the laneway. Only localised widening proposed.
- Letter from Conservation architect appended with methodology statements
- CEMP – with further detail incorporating Detailed Design Response

- Letter clarifying AA screening report and ecological impact assessment with reference to CEMP

3.0 Planning Authority Decision

3.1. Decision

3.1.1. The Planning Authority decided to refuse permission for the following reasons:

- The proposed development provides for a new vehicular access which would result in vehicular traffic moving along a narrow public right of way primarily intended for pedestrian/cyclist use. The proposed development would thereby endanger public safety by reason of traffic hazard or obstruction of road users or otherwise. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.
- The proposed development provides for a new vehicular access on a public right of way listed in the DLRCDP 2016-2022. The new vehicular access is also located on lands zoned Objective F whereby it is an objective 'to preserve and provide for open space with ancillary active recreational amenities.' In this regard it is considered that the proposed development has the potential to interfere with the public right of way and would be therefore contrary to Policy LHB14 of the current County Development Plan which states inter alia that it is council policy to 'preserve, protect, and improve for the common good, all existing public rights-of-way which contribute to general amenity.' In addition, the provision of the new vehicular access on lands zoned F also has the potential to contravene that zoning objective. The proposed development would therefore be contrary to the provisions of the DLRCDP 2016-2022 and to the proper planning and sustainable development of the area.
- The proposed development is located within the Vico Road Architectural Conservation Area (ACA). The proposed development by reason of its siting, scale, height, design and distant views would be incongruous with the built heritage and sylvan character of the ACA and would adversely affect the character of the ACA. The proposed development would seriously injure the visual amenities of the area and would materially detract from the character of the laneway by reason of the proposed widening of the road and raising of the

boundary wall. The proposed development would be contrary to Policy AR12(i), (ii) and (iii), would not represent a sensitive design approach contrary to section 8.2.11.3 (i) New Development within an ACA of the DLRCDP 2016-2022. The proposed development would therefore be contrary to the provisions of the DLRCDP 2016-2022 and to the proper planning and sustainable development of the area.

- Given the site context, the scale, size, height and design of the proposed dwelling works to facilitate access to the proposed dwelling and associated landscaping and boundary works, it is considered that the proposed development does not represent small scale sensitive infill development. The proposed development would generate additional traffic volumes which would necessitate widening of the access way. As such the current proposal does not meet the development management criteria as set out under section 8.2.3.4 (viii) for the '0/0' zone of the DLRCDP 2016-2022 and accordingly would be contrary to the '0/0' zoning objective. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

3.2. Planning Authority Reports

3.2.1. Planning Report: The report refers to:

- An extensive planning history in the area and also notes the differences between the sites that partly overlap. –
- Development Plan policy regarding green infrastructure and rights of way, and development standards for infill housing as set out in chapter 8. Specifically sections 8.2.3.1, (residential standards) 8.2.3.2,(quantitative standards) 8.2.3.4(infill development), 8.2.8.4(private open space), 8.2.4.5, (car parking) 8.2.8.6, (Hedgerows) 8.2.4.9,(vehicular entrance), and specific ACA development control criteria,
- The proposed vehicular access over the public right of way would adversely affect the amenities of the area
- The proposed landscaping including perennial plant/grasses and a range of coastal type planting and tidy up is noted and it is considered that the works along the public right of way including the raising of the wall would alter and detract from the character of the right of way and visual amenities of the area

- The concerns of the both the Conservation Office and Transportation Department in respect of impact on character and traffic safety.
- No AA or EIA issues.

3.2.2. Other Technical Reports

- Conservation officer report: refusal of permission recommended
- Drainage Division - Engineering Department - no objection subject to conditions
- Transportation Planning Division – Refusal of permission recommended.

3.3. Prescribed Bodies

- An Taisce: Objected to application and observations also made on appeal.
- Irish Water: No objections subject to conditions.
- The Arts Council, The Heritage Council, Bord Failte and the Department of Culture Heritage and the Gaeltacht were notified by the planning authority but no further submissions are recorded on file.

3.4. Third-Party Observations

- There were over 60 submissions to the planning authority substantially objecting to the proposed development. The substantive issues are further raised in observations on appeal as set out below.

4.0 Planning History

4.1. The site

- 4.1.1. ABP ref PL06D.234289/ **PA Ref: D09/0285** refers to a refusal of permission for the demolition of an existing derelict outbuilding (25 sq.m.) and for the construction of a new two storey 3- bedroom detached house (440 sq.m) with four outside car parking spaces with access from a new vehicular entrance off existing laneway; a new pedestrian entrance off laneway; renovation of existing structure on the site (13 sq.m.) into studio; associated landscaping and site works on the site adjacent to the public right of way, off Torca Road, bounded by "San Elmo" and "San Elmo Lodge".

A first party appeal against the Council's decision was withdrawn. The reasons for refusal related to interference with the public right of way; creation of a traffic hazard for pedestrian users of the public right of way; visual obtrusion and overbearing impact in both near and distant views that would adversely affect the character of the Conservation Area; contravention of the O/O zoning objective; and ownership of the public right of way. Reason 5 states:

The applicants have failed to demonstrate that they have sufficient legal interest to carry out the development required in order to facilitate the vehicular access. The public right of way is within land which is owned by Dun Laoghaire Rathdown county council for which consent in making this application has not been obtained for the Council.

A note to the decision states: The applicants have outlined the public right of way as being in the ownership of the applicant. However the public right of way is in the ownership of DLRCC , the application is not in accordance with section 23(1)(a) of the PDR 2001 as amended. Furthermore the applicants have failed to submit a written consent form from the owner of the public right of way , in this case DLRCC as part of the application, thus the application is not in accordance with Regulations 11(1)(d) of the PDR 2001 as amended. The application is therefore not a valid application.

4.2. Adjacent site (fronting Right of Way)

- 4.2.1. **PA ref. D05/1468** refers to permission for retention of modifications to previously approved plans for the replacement of San Elmo Lodge – bounding the subject appeal site to the west . ABP ref. PL06D.204570 refers t permission (upholding PA decision to grant) to demolish house and construct a one-storey over basement house. San Elmo Lodge, Torca Road

4.3. Other site along right of way/Torca Road

- 4.3.1. **ABP ref PL06D.243877** refers to permission (granted on appeal) for construction of a house with south-facing balcony, new vehicular entrance and off street parking at Torca Road, to the west of Saint Elmo's Lodge. The site also has frontage along the subject right of way. While the PA refused was based in part on a considered

material contravention of the development plan by reference to the O/O objective, in its Order the Board stated that having regard to the zoning objective, the design, scale, layout and location of the proposed development, the planning history of the site and the pattern of development in the area, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the visual amenities of the Architectural Conservation Area or the residential amenity of property in the vicinity, would not interfere with a protected view and would represent sensitive infill development on a suitable site within the O/O zone as designated in the current Dun Laoghaire-Rathdown Development Plan.

In the Board's direction a note states: The Board had regard to the planning history of the site and the proximity of the site to the Killiney Dart Station and concurred with the Inspector that the proposed development would not seriously injure the visual amenities of the Architectural Conservation Area or the residential amenity of property in the vicinity, would not interfere with a protected view and would represent sensitive infill development on a suitable site within the O/O zone as designated in the current Dún Laoghaire Rathdown Development Plan. The Board, therefore, did not consider that the proposed development would contravene materially the O/O objective of the Development Plan.

Previous decision on this site include:

- ABP ref PL06D.237770/ **PA ref: D10A/0430** refers to a refusal of permission for a 2-storey dwelling with balcony and garage with access from Torca Road for reasons relating to the O/O zoning objective; visually obtrusion; overbearing impact and loss of mature trees; insufficient information regarding landscaping; and inadequate drainage proposals. (1st party appeal was withdrawn)
- **ABP ref PL06D.241797/** PA ref. D12A/0531 refers to refusal of permission (upheld in appeal) for the construction of a two-storey dwelling with terrace with access from Torca Road. The reason for refusal stated as follows:

“The site is located within an area where the zoning objective ‘O/O’ as set out in the Dun Laoghaire Rathdown County Development Plan 2010-2016 identifies a number of criteria that are critical to an assessment of planning applications for development within such areas. These criteria include loss of landscaping, impacts on drainage and excavation impacts. The Board is not satisfied on the basis of the information submitted with the application that

arboricultural, landscape and excavation impacts have been properly addressed. Therefore, the proposed development would seriously injure the visual amenities of the area and would be contrary to the proper planning and sustainable development of the area.”

4.4. Sites in vicinity

4.4.1. **ABP ref. 309079** /PA ref. D20A/0726 refers to a refusal of permission (overturning grant on appeal) for a 5 bedroom split level flat roofed house at the end of Torca Road southwest of the site in the curtilage of St. Germain’s for the following reason:

- Having regard to the provisions of the Dún Laoighre-Rathdown County Development Plan 2016-2022, in particular the policy objective LHB6: Views and Prospects, which seeks to preserve views, to the location of the proposed development within a 0/0 zone on Torca Road, and within the Vico Road Architectural Conservation Area, and to the planning history of the site, it is considered, that the proposed development by reason of its roof level relative to Torca Road, its visibility within a preserved view area, and the extend of excavation required to facilitate the proposed development would detract from the character of the Vico Road Architectural Conservation Area. It is considered, therefore, that the proposed development would seriously injure visual and residential amenities in the area and would be contrary to the proper planning and sustainable development of the area.

The inspector’s report also refers to other previous PA decision relevant to this site: PA refs. D17A/0995 and D15A/730 refer to permissions for a house.

Notably ABP ref 313161 /PA ref D21A/0931 refers to a current appeal against a grant for dwelling within curtilage of St. Germain’s with new entrance off Torca Rd.

4.5. A more comprehensive planning history is provided in the planning authority report.

Other cases:

4.5.1. **ABP ref. 308897** refers to refusal of permission for a vehicular entrance for an existing dwelling with no on-street parking at Rockfort Avenue for the following reason:

Having regard to the extent of boundary removal, the existing streetscape character and proximity to Dalkey Village Architectural Conservation Area, it is considered that the proposed development would be detrimental to the visual amenities and would detract from the character of the streetscape. It is considered that the proposed development fails to accord the provisions of Section 8.2.4.9 'Vehicular Entrances and Hardstanding Areas' (ii) 'Visual and Physical Impacts', in the Dun Laoghaire-Rathdown County Development Plan, 2016-2022, and would set an undesirable precedent for future development in the area. It is considered that the proposed development would seriously injure visual and residential amenities in the area and would therefore be contrary to the proper planning and sustainable development of the area.

5.0 Policy & Context

5.1. Development Plan 2016-2022 (at time of application and lodgement of appeal)

- 5.1.1. The site straddles two different zones. The objective for the house site is 'To protect and/or improve residential amenities.' (Zone A) Part of the site which includes the pathway from Torca Road and ground on the northern side of the pathway is part of a large tract of open space subject of objective F to preserve and provide for open space and ancillary active recreational amenities.
- 5.1.2. The site is located within the Vico Road Architectural Conservation Area (ACA) and within the former grounds of 'San Elmo', a Protected Structure.
- 5.1.3. Chapter 4 sets out Landscape Heritage and Biodiversity policy and objectives: Policy LHB14 states It is Council policy to:
- Preserve, protect, promote and improve for the common good all existing public rights-of-way which contribute to general amenity.
 - Create new rights-of-way or extend or enhance existing rights-of-way either by agreement with landowners or through the use of compulsory powers in the interest of ensuring access to amenities, including the coast, upland areas, river banks, heritage sites and National Monuments.
 - Create rights-of-way to provide linkages from the built up areas to the countryside and the coast.

- Prohibit development and keep free from obstruction existing rights-of-way, and to take legal action if necessary, to prevent any attempt to close them off.
- Prohibit development which would prejudice public access to existing rights-of-way, unless the level of amenity is maintained by the right of way, footpath, or bridleway being diverted by the minimum practical distance and the route continues to be segregated from vehicular traffic.
- Consider favourably planning applications which include proposals to improve the condition and appearance of existing rights-of-way.

5.1.4. Other relevant sections policies include: Policy AR1- Record of Protected Structures Policy AR12: Architectural Conservation Areas Policy LHB6: Views and Prospects Section 8.2.3.4 (vii) Infill Development Section 8.2.3.4 (viii) O/O Zone Section 8.2.11.3 Architectural Conservation Areas Guidance for the Vico Road ACA is set out in the Vico Road Conservation Area Character Appraisal.

5.2. Development Plan 2022-2028

5.2.1. In this plan the site remains subject of Zone A objective ‘To provide residential development and improve residential amenity while protecting the existing residential amenities) and Zone F objective, ‘To preserve and provide for open space with ancillary active recreational amenities’ and is also within an Architectural Conservation Area.

5.2.2. Specific Local Objectives (Chapter 14 and Maps 4 and 10):

- objective 130 provides for criteria based development control framework and aims ‘to ensure that development in this area does not (i) have a significant negative impact on the environmental sensitives in the area including those identified in the SEA Environmental Report and/or (ii) does not significantly detract from the character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements.
- The site is located within Vico Road ACA. Policy Objective HER13 refers. It is policy objective to:

- i. Protect the character and special interest of an area which has been designated as an Architectural Conservation Area (ACA). Please refer to Appendix 4 for a full list of ACAs.
 - ii. Ensure that all development proposals within an ACA be appropriate to the character of the area having regard to the Character Appraisals for each area.
 - iii. Ensure that any new development or alteration of a building within an ACA or immediately adjoining an ACA is appropriate in terms of the proposed design, including scale, height, mass, density, building lines and materials.
 - iv. Seek a high quality, sensitive design for any new development(s) that are complementary and/or sympathetic to their context and scale whilst simultaneously encouraging contemporary design which is in harmony with the area. Direction can also be taken from using traditional forms that are then expressed in a contemporary manner rather than a replica of a historic building style.
 - v. Ensure street furniture is kept to a minimum, is of good design and any redundant street furniture removed.
 - vi. Seek the retention of all features that contribute to the character of an ACA including boundary walls, railings, soft landscaping, traditional paving and street furniture
- Section 11.4.2.2 - Policy Objective HER14: Demolition within an ACA: It is a Policy Objective to prohibit the demolition of a structure(s) that positively contributes to the character of the ACA
 - Part the site is traversed by a section of the Public Right of Way named as Knocknacree Road to Torca Road as delineated on Map 4.
 - Section 8.6.3 includes Policy Objective GIB14: Public Rights-of-Way. It is a Policy Objective to:
 - i. Preserve, protect, promote, and improve for the common good all existing public rights-of-way which contribute to general amenity
 - ii. Extend or enhance existing rights-of-way either by agreement with landowners or using compulsory powers in the interest of ensuring access

to amenities, including the coast, upland areas, riverbanks, heritage sites, geological sites and National Monuments.

- iii. Prohibit development and keep free from obstruction existing rights-of-way, and to take legal action if necessary, to prevent any attempt to close them off.
- iv. Prohibit development which would prejudice public access to existing rights-of-way, unless the level of amenity is maintained by the right of way, footpath, or bridleway being diverted by the minimum practical distance and the route continues to be segregated from vehicular traffic.
- v. Consider favourably planning applications which include proposals to improve the condition and appearance of existing rights-of-way

5.2.3. The Minister of State at the Department of the Housing, Local Government and Heritage, consequent to a recommendation made to him by the Office of the Planning Regulator under section 31AM(8) of the Planning and Development Act 2000 (as amended), has notified Dún Laoghaire-Rathdown County Council of his intention to issue a Direction to the Dún Laoghaire-Rathdown County Development Plan 2022-2028.

5.2.4. In accordance with Section 31(4) of the Planning and Development Act 2000, those parts of the Dún Laoghaire-Rathdown County Development Plan 2022 – 2028 referred to in the notice shall be taken not to have not come into effect, been made or amended; namely:

- The 0/0 zone objective “*No increase in the number of buildings permissible*” as set out on Land Use Zoning Maps 3, 4, 7 and 10.
- The policy section on ‘Notable Character Area Exclusions’ under section 4.3.1.1 of Chapter 4 (pg. 84) of the Written Statement.¹

¹ Notable Character Area Exclusions: There are significant parts of Dalkey and Killiney characterised by low density development. Some of these areas have been identified as areas where no increase in the number of residential buildings will normally be permitted (i.e. the ‘0/0’ zone). However, much of this area lies close to the DART line where higher densities would, in normal circumstances, be encouraged. Sensitive infill development will, however, be considered on suitable sites as determined by the Planning Authority. Such sites should: 1) Be located within a 10 minute walk of a DART station (refer to Car Parking Zone 2 Area, Map T2). 2) Development shall not detract from the unique character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements (refer also to Section 12.3.7.8).

- Section 12.3.7.8 '0/0 Zone' of Chapter 12 (pg. 246-248) of the Written Statement.

5.3. Architectural Heritage Protection, Guidelines for Planning Authorities, DoEHLG, 2011.

- 5.3.1. Section 13.8 refers to Development affecting the Setting of a Protected Structure or an Architectural Conservation Area.

5.4. Natural Heritage Designations

- 5.4.1. Rockabill to Dalkey Island, SAC Site Code 003000 is c. 700m to the east and Dalkey Island SPA, Site Code 004172 is c.600m to the east. The railway line and housing along Vico Road intervene between the grounds of San Elmo and the coast.

6.0 Environmental Impact Assessment - Preliminary Examination

- 6.1.1. Having regard to the limited nature and scale of the proposed development, the conclusion of the ecological impact assessment report and the absence of any connectivity to any sensitive location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded at preliminary examination and a screening determination is not required.

7.0 The Appeal

7.1. Grounds of Appeal

- 7.1.1. A first-party appeal has been lodged by Tom Phillips Associates (see folder at back of file) on behalf of the applicant on the basis that the proposal has been subject to a comprehensive design process in a manner that is consistent with development plan objectives and pattern of development, would not constitute a traffic hazard and should accordingly be permitted. This is supported by

- A letter/report by David Slattery Historic Building Consultants which includes a details statement regarding trees, assessment based on visual images as part of

a Landscape Visual Impact Assessment, an analysis of the architectural and landscape character and how the proposal recognises this. A undue level of constraint is being applied by the planning authority for the nature of the proposal.

- A Detailed Design Response by a multi disciplinary design team. This is supported by a set of drawings and images with a modified design to the entrance (now splayed and recessed) omission of landscaping along the pathway and details of site access and construction.

7.1.2. By way of background:

- It is clarified that the ruins are independent of the Protected Structure and that the site is brownfield in nature.
- It is acknowledged that there was previous uncertainty about ownership of the carriageway and it is confirmed that part of it is in the ownership of the Sonhos Ltd who consent to the application. The legal opinion for James Dwyer BL indicates that the applicant has entitlement to use the right of way as required to access her property. This was not disputed by DLRCC.
- The principle of development is supported by way of residential zoning and the proximity of the site to amenities of Dalkey village - a 12minute walk from the DART station. The form is informed by the low density and unique styles.

7.1.3. The more specific grounds of appeal are set by out in respect of each reason.

7.1.4. **Protection of Right of Way:** The reasons for refusal in this regard are refuted on the following grounds:

- The proposal complies with the right of way objective in that public access will not be obstructed either during construction or on an on-going basis. While policies restrict development in relation to public rights of way policy LHB14 states DLRCC shall consider favourably planning applications which includes a proposal to improve the conditions and appearance of the right of way. It is submitted the proposed design and upgrades complies with this.
- The potential for contravention of Zoning objective F 'to preserve and provide for open space...' is disputed. The laneway and associated right of way already exist and there will be no cessation of these rights. In any event there are a number of

examples where accesses are in zone F. Incidental vehicular access on zone F land is established. E.g Glenalua Rd. – obstruction of right of way not an issue

7.1.5. **Traffic Generation and Safety:** The reasons for refusal in this regard are addressed through design modification and accordingly refuted on the following grounds:

- The laneway has limited vehicular activity associated with the dwellings and maintenance of laneway and is not solely restricted to use by pedestrians and cyclists.
- It is a low-speed environment with ample sightlines. The Detailed Design Response demonstrates this in that the narrow road bound by vegetation and the wall together with the slight curved alignment encourages very low speeds.
- The development plan requires laneways of 3.7m in width to provide access for up to 6 dwellings along mews lane/backland development.
- The entrance has been revised to a recessed and splayed gate formation so as to better engage with road users. Sightlines as amended exceed those for San Elmo Lodge.

7.1.6. **Visual Impact and impact on character of area.** The reasons for refusal in this regard are refuted on the basis of :

- Minimal loss of mature trees and vegetation
- Design approach is consistent with contemporary precedents and accords with the ACA Character Appraisal in that the ACA allows for eclectic architectural expression. It is a 'modern structure standing amongst historic counterparts and PA ref. D15/0730 is an example of modern structure permitted in the grounds of a protected structure in the same ACA. It is similar in siting, scale, height and design. A Conservation Architect has provided a detailed analysis of the visual impact and concludes that : "The reasons for refusal have failed to take account of the subject site's negligible contextual characteristics and have inappropriately and unevenly applies policy in relation to mews style development. The proposed development is entirely consistent with the existing contemporary character and forms as well as those permitted to the south and certainly could not be considered as 'a visually obtrusive and dominant form of development.' "
- The risk of the proposal being visually obtrusive is nullified on the basis that :

- Limited visibility of proposed dwelling from surrounding area. A digital surface mapping exercise demonstrates this showing views from within the surrounding landscape and consequently from surrounding visual receptors.
- The laneway visual impacts were considered to be of slight imperceptible significance in the application LVIA and are to remain slight imperceptible of the updated design. (ref fig 5,5 of DSM exercise in detailed design response)

7.1.7. The **design approach and compliance with 0/0 objective** is evident by way of :

- Minimal visual impact in the sensitive wooded site on the basis that the wooded character of the site and the retention of trees coverage (although of little arboriculturally value) and supplementary planting (informed by an arboricultural survey and plan). The proposed development would therefore be generally screened. Landscape impact would be slight and very localised and only from the immediate context of the laneway. This is supported by a Landscape and Visual Impact Assessment.
- 0/0 objective allows for small scale sensitive development. The scale is moderate but appropriate to the site and context and should be assessed on the basis of its impact on the receiving environment. As the visual impact is minimal this should not be problematic. The roof would only be visible above the boundary wall from close viewpoints.
- The positive attributes have been disregarded by the planning authority.

7.1.8. This conservation architect's letter is appended with an outline Conservation Specification for Works to be Carried out to Boundary Wall .

7.1.9. The appeal also includes a letter clarifying that the Appropriate Assessment screening concludes there is no direct or indirect pathway from the site to watercourse or the marine environment that could act as potential vectors for impact on the Natura 2000 sites. Run-off had been erroneously seen as a potential pathway in the AA Screening Report. No Natura 2000 site are in the zone of influence.

7.1.10. It is further clarified that the CEMP has been prepared and no significant environmental impacts are likely in relation to construction or operation. These amendments do not materially alter the conclusions.

7.2. Planning Authority Response

7.2.1. The planning authority has no further comments.

7.3. Observations by Proscribed bodies

7.3.1. **An Taisce:** This body is opposed to development on the following grounds:

- Gorse Hill is a valuable amenity park in terms of its use as open space, woodland character and biodiversity – development on part of this is a material contravention as supported in the case of Heather Hill Development v An Bord Pleanála wherein the High Court upheld the decision to refuse permission for a large extension to Sorrento Cottage on grounds of impact on amenities of the area. This is governed by the same development control objectives.
- The development would detract from the character of the ACA and would appear visually obtrusive when viewed from higher ground, the immediate woodlands and open space. The raising of the historic granite wall is unwelcome. Visual links within the ACA and surrounding area need to be maintained.
- The historic visual amenity is expressed by George Bernard Shaw who lived in Torca Cottage overlooking the Right of Way... 'I lived on a hill top with the most beautiful view in the world. I had only to open my eyes to see such pictures as no painter could make for me.'
- The construction works would obstruct a right of way
- The terms 'carriageway' by the applicant in the notices and documentation is misleading as it implies a road which it is not as evident in historic maps which illustrate a scenic walking route. Path widening would result in a loss of open space in the F zone and is incompatible.
- Traffic hazard and deficient car parking

- Loss of trees and woodland: The eucalyptus trees are vulnerable due to the root system in shallow soil and the extent and nature of works among this.
- Wildlife: The site is near Killiney Hill and pNHA and is an integral wildlife corridor. The woodland is home to several species of bats where trees are used for roosting sites. Light disturbance would also be unwelcome. The Biodiversity Officer should comment.
- The people of Dalkey and Killiney purchased land between Vico Road in 1889 so as to protect a natural resource for the enjoyment of the common good and which is now protected by development control strategies.
- Materially contravenes Development Plan objective which states there should be no increase in the number of buildings on the area where the house is proposed.

7.4. Observations

- 7.4.1. **Mount Salus Residents Owners Management Company Ltd.** The decision to refuse permission is supported. The grounds for this are expressed by an agent, Reid Associates and are based on the following points:

Principle of house with vehicular access

- Failure to address the egregiousness of the **principle of opening a vehicular access onto a pedestrian amenity path** which with associated works is submitted to individually and cumulatively amount to **material contravention of objectives for Zones A and F and policy LBH14 re public rights of way.**
- There is **no relevant precedent** derived from St. Elmo's lodge as it was a replacement dwelling. Other examples in the appeal are not comparable as those sites had road frontage.

Impact on Traffic and Character

- The absence of traffic as referred to be applicant is due to the pedestrian nature.
- There is a fundamental **conflict between cars and walkers** on the path – the proposal **amounts to a change of use of a public pedestrian path whereby it would be a shared carriageway** where walkers would have to be constantly vigilant of cars to avoid hazards. This undermines the zoning objective F for and

policies regarding public rights of way and associated segregation of walkers and cars.

- The existing pathway fronting the site allows for walkers and very occasional public light maintenance.
- Access to San Elmo Lodge is near the entrance and is clearly understood to be the final limit to car access.
- The removal of trees and hedges for the provision of sightlines – an issue of concern – is unwarranted and submitted to be illegal.
- The path is part of the **‘unique landscape, natural heritage and physical fabric protected by the Development Plan**. This is by virtue of its connectivity with both place and nature and its role in defining a sense of place. Its protection as public right of way through development plan objectives secures its retention of character. This is in the **interest of common good**.
- The proposed house is justified without full consideration of the impact on the public right of way and woodland and number of policies to protect same.
- The visual Impact assessment doesn't sufficiently rebuff reason 3 regarding **impact on the character of an ACA**. It is reiterated that there is a public right of way through the and the views and sensory experiences is part of its character.
- Furthermore the arborist's report signals possible radical alteration post construction to the sylvan setting as was evidenced with San Elmo Lodge and the Orchard. The proposed **services and changes to levels, foundations and excavation etc. all undermine tree protection**. Raising and retaining walls would have a significant impact.
- There are inadequate details contiguous elevation and sections to determine the impact of the foundations and works on extent of visual exposure. The wilderness environment will be replaced by a concrete urban form dominating the walkway.
- Extent of works breach 0/0 objective. Widening of a public right of way to facilitate a material change of use cannot be permitted.
- The public notices are misleading by the term carriageway and with no reference to a material change of use of a pedestrian footpath. The site outline doesn't extend to Torca rd despite notices.
- The public works carried out to the right of way provided a new surface for a 1.5m footpath for amenity use.

Legal ownership of the right of way

- This is in dispute as there is evidence (on file ref. D09A/0285) that the freehold public right of way is owned by the council who have asserted this right through improvement works in 2005. This is reinforced in the designation in the development as a public right of way and in the refusal in 2009(D09A/0285). Whereas the applicant is reliant solely on a legal opinion stating a leasehold interest by the applicant and his intention to construct a dwelling on land not affected by the public right of way. There is no letter of consent. The application is invalid by reference to Art 22(2)(g) an Art 26.

It is further asserted that there is an over reliance on the rights of way by St. Elmo lodge although it is suggested that such are likely to have their origins in rights predating the 1903 lease which included the right of way.

- It is noted that the traffic report refers to removal of trees outside boundary to improve sightlines and the legitimacy of this is questioned.

Other ownership declaration and procedural issues

- Ownership of other lands is not clear and there is concern about lands that were subject of application by the applicant's father and which now partly overlap the subject site but are not outlined in blue. The concern relates to precedence. The application form raises further questions of title. The form indicates a leasehold interest by Sohnos and the applicant is indicated as occupier notwithstanding that there is no occupation of the site. the applicant is a director of Sohnos..
- S.97 of Act requires declaration as part of Part V compliance .
- Regarding additional plans lodged - the Board is precluded from accepting further plans that would preclude public comment.
- There are inadequate details (of contiguous buildings and below ground works) and the application should be invalidated on this basis. The rock breaking and fixing of foundations will have further impact on tree retention. There will be post-decision design and this is contrary to the approach in the Balscadden case wherein sheet piling details were necessary at the outset and contributed to the Board's decision being quashed rather than having the case remitted. There is in this case a need to assess impacts of excavation on soil erosion or undermining retaining walls which has impacts on the ACA, San Elmo, properties on Mount Salus Road and the right of way.

- The removal of 13 trees is confirmed but the sustainability of the remaining is questionable e.g. Construction plant and works is not in the CEMP. Nor are issues of access, noise, dust or visual incongruity addressed. The working footprint is not feasible.
- Material contravention: The material change of use has not been adequately described. The change in character is defined by the impact on the pedestrian. The Board has no authority to permit development for which permission has not been expressly sought.
- The nature of works and resultant use in effect obliterates the pedestrian nature and character. It is not an improvement.
- The use of pedestrian right of way and associated works must be assessed in the context of the primary use which is residential development and therefore material contravention of Zone F. Such a contravention has not been addressed. Such works cannot be considered in isolation.
- Conflict with policy LHB 14 for rights of way underlines the extent of material contravention of the development plan objectives focused on preservation of existing rights of way for the common good. Segregation of vehicular and pedestrian traffic is central to the objectives in this regard.

Visual impact:

- Insufficient consideration of the visual impact of the development along the footpath. the splayed entrance will dominate the character of right of way. The glimpsed sea views will be blocked by the raising of the wall.
- Retention of trees not realistic – crown spread
- Views from Killiney hill

7.4.2. **Joan Hanley, San Elmo**, is represented by Kieran O'Malley & Co. and the following observations are made.

Errors and uncertainty about tree felling and impacts and boundary treatment

- The subject site is part of the original grounds of San Elmo and there is no clear demarcation on the ground. An old ribbon remains in part. It is pointed that tree 1624 is incorrectly shown to be within the site as this tree is within her ownership and it is requested that clarity of this subject of a condition in the event of permission. In light of this error there is concern that trees along the common

boundary would be felled. It also pointed out that the house would be very dark with felling of a lot of trees and as such suggests the site is unsuitable for residential development.

- While 16 are to be removed there is concern that the remaining 17 would also be vulnerable. The soil is thin and there is risk of erosion and landslide posing a hazard risk to grounds of San Elmo as well as loss of amenity.
- Absence of boundary detail with San Elmo is unsatisfactory.

Legal restriction on height and use

- Concerned about a domino effect along boundary particularly in absence of declaration of interest in land and control of same in a planning permission.
- Clients deeds are attached which refer to 'on foot only' in respect of the pedestrian right of way.
- The applicant's legal opinion merely asserts an entitlement to apply for planning permission but does not address the legal pedestrian only restriction.
- The proposed development at heights of 95.195-96.62m breaches the height restriction of 310.7 feet above sea level [94.7m OD] included as a restrictive covenant in the Indenture for the purchase of the land.

No existing building to be replaced

- It is noted that the application form states NA in respect of gross floor space of existing buildings. Objective 0/0 cannot be complied with.

Overlooking

- concerns due wall of glazing, elevated terraces combine with the topography and loss of trees would result in a material invasion of privacy.
- Visual impact
- Visual impact Assessment is not entirely representative. E.g. Compare artists impression with photos on page 7 of observation. (photo nos. 3 and 4 and appendix images)

Accessibility

- The distance to the DART is 1.1km and via quiet, partly unlit and hilly walking route. It is not suitable daily walk.
- The term carriage is misleading as it is pedestrian right of way. The bollard holes which have been used in the past are evidence of the intended vehicular restriction consistent with the Indenture.

Construction Impact

- There is concern about lack of specific works to protect San Elmo from site clearance and construction works in the Construction Management Plan.

- 7.4.3. **Dalkey Community Council** raise concerns about the proposed development on grounds of material contravention of the DLR CDP, serious injury to amenities, the natural environment and ambiance of Gorse Hill Park and unacceptable precedent. It is disputed that the house will disappear from views by virtue of design features. – it will be highly visible and a visual intrusion in the landscape and will altering the sylvan aspect. Ultimately Objective 0/0 cannot be complied with . Furthermore it is not near the Dart, it would detract from the character of the area and there is no evidence of domestic use of the structures on site. such structures were ancillary to San Elmo and within its grounds. E.g. cold frames. Pig sties shed.
- 7.4.4. **Jennifer Dunne**, Mount Salus, refers to the restrictive development plan policies and objectives, traffic safety if cars on narrow road, excessive size and height and loss of trees in terms of CO2, biodiversity and erosion and construction nuisance. The amenity value of the eucalyptus forest is emphasised
- 7.4.5. **Aoife Mc Donnell + Stephen Garden**, Dublin, object to the proposal on grounds already raised in relation to principle, scale and impact on popular walking route.
- 7.4.6. **Des Burke Kennedy**, Knocknacree Rd, refers to inaccuracies in address and description – the site does not adjoin Mount Salus road property, technical difficulties having regard to landslide history and underlying granite and the issue of precedence which further destruct a magnificent scenic setting.
- 7.4.7. **Robert Connor + Loretta Yurick**, Sorrento Heights, raise similar issue regarding accuracy of site description, submitted interests and entitlements and conflict with the development plan . It is emphasised that this a parkland amenity and the only vehicle free route from the Sorrento Rd end of Dalkey to Killiney/Dalkey Hill park. Numerous unsuccessful application date back to 1980.
- 7.4.8. **Gail Gilliland + Keith Clarke**, Killiney, refer to the public right of way as a prized pedestrian greenway that they have enjoyed for over 30 years . Its widening for two passing cars together with the loss of woodlands and scale of house and restriction of use do not support it. Ownership issues also raised.

- 7.4.9. **John Moran**, the Orchard, raises concerns about the impact on the right of way, the eucalyptus trees and woodland, traffic and errors in description of right of way.
- 7.4.10. **Aideen Rice**, Knock-na-cree Road highlights that the entitlement to a vehicular access is not supported by maps and that apart from a short portion of the right of way providing access into St. Elmo Lodge as granted in the 1903 lease, the right of way is a pathway in its entirety. It is part of the Killiney Way used by locals and tourists and walking groups. Given the scale and nature, setting and associated roadworks the circumstance of permission for the Orchard is not comparable. The spacing of the properties may facilitate further 'sensitive infill' development.
- 7.4.11. **Hugh + Catherine O'Donnell**, Knock-na-cree Rd, wholly support and agree with grounds of refusal and that the proposal will completely alter and detract from the character of the area. They also make the points that the site is greenfield and not brownfield and that no design can address the fundamental issue of widening a footpath for vehicular access. The site is not comparable to backland mews development. The proposal is more visually obtrusive than development along Torca Road. The issue of legal entitlement is also raised.
- 7.4.12. **Rosalie + Ned Prendergast**, Ardeevin Road, raise the conflict with development plan objectives and also question the lawfulness of development by reference inter alia, to the root of title in the indenture of Lease made between the Sir Patrick Coll and Richard Hayes- the applicant's predecessor in title and cites it, 'that those parts of lands of Torca Hill running parallel with the boundary wall of San Elmo and measuring 30ft for the said wall...forever subject to the right of way of the public in general on foot only along the path way shown on said map and to any other rights of way existing over said premises...'
- 7.4.13. **Finbarr and Margaret Farrell**, Coliemore Road strongly object to the development primarily on grounds of impact on a public amenity enjoyed by local families. The interference would run counter to the efforts of the Council in developing facilities for cyclists and pedestrians.
- 7.4.14. **Marcus + Helen Fogarty**, Castlepark Road, makes particular reference inter alia, to legal restrictions by virtue of the lease and requests to the Bord to investigate this and the validity of the application. It is also pointed out that the tower in the adjoining lands and boundary gate have been in various states of disrepair – this has resulted in

the loss of landmark – this is understood to be owned by parties in common with the current landowners. In the event of permission construction hours are requested such as no works on Saturday. They clarify that access to the derelict outbuildings were access via paths in the San Elmo grounds of which they were part until 1959. They also state it is a 17minute walk from the Dart station uphill and not 12 minutes. They make points already made regarding zoning, impact on ACA, land sliding (two previous incidents in recent years) and precedence .

- 7.4.15. **Joady Fogarty**, Glenageary, objects to the development and refers, inter alia, to concerns about precedent and developing the Tower site and generation of vehicular traffic in this peaceful wildlife area.
- 7.4.16. **Margaret Watchler** Sorrento Heights, objects to the development by reference to the legality and impact on pathway and destruction of wooded hillside.
- 7.4.17. **Tanya Delargy**, Sorrento Road, objects to the development on grounds already summarised and notably emphasis the unique character of the pathway border by eucalyptus on one side an old granite wall on the other and that Green spaces such as this are more important now for health and well being and should be preserved.
- 7.4.18. **Rosemary Reilly**, Knock-na-cree Road, object to the development on grounds already stated with notably emphasis on the ancillary residential nature of the vehicular access and conflict with Zone F objective. The reliance on examples of developing entrances in open space by the applicant is not relevant as this relates to cases that predate the High Court decision in Heather Hill Management Company GLC v An Bord Pleanála [2019] IEHC 450.
- 7.4.19. **Alyson Carney**, Rockfort Avenue, objects to the development on grounds already stated and asserts that it is an audacious attempt to unlock access to a valuable parcel of land that is undevelopable due to restriction on access/right of way and preserved woodland. The eucalyptus forest is part of a distinct skyline.

8.0 Assessment

8.1. Issues

8.2. This appeal relates to a proposal for a dwelling house on a site formerly part of the extensive grounds of a Protected Structure and at location where the grounds border public amenity space. It is in an elevated and scenic location. From my inspection and review of the file, the key issues centre on:

- Principle of development
- Impact on Right of Way
- Impact on Architectural Heritage
- Visual Amenity
- Residential Amenity: Overlooking, overshadowing/overbearing
- Ecology
- Legal interest
- Validity, Address (does not adjoining Mount Salus, is not a carriageway, material change of use.

Appropriate Assessment is also a required consideration.

8.3. Principle

8.3.1. The site is located in a sensitive setting governed by multiple development plan objectives seeking to protect the character of the area that is derived from a rich tapestry of natural and built heritage.

8.3.2. While the site is located in a residential zone, at the time of the application, it was governed by objective O/O where, at a very basic level, the addition of a house was generally not permitted. However this particular development control measure in the recently adopted Development Plan 2022-2028 is the subject of direction by the Minister in the Draft Ministerial Guidance which states that such an objective and directly related policy measures are taken to have not come into effect. Specific Local Objective 130 (chapter 14/Map 10) however appears to remain as a development control measure and is criteria based. On this basis and having regard to national housing policy which seeks to consolidate housing in serviced urban

areas, I consider the principle of a house is open for consideration, permission being predicated on the impacts of the development on the character of the area.

- 8.3.3. A key element in this case is the principle of a vehicular access and ancillary works to the pathway which are substantially within the F Zone where it is an objective 'to preserve and provide for open space with ancillary active recreational amenities'. While the works are arguably relatively minor, as amended and do not wholly block access, I consider in terms of zoning, as the development is ancillary to residential use, it is in this way in conflict with the open space zoning. The restrictive approach to development on open space areas is supported in policy LHB14/GIB14 (previous/current development plan) which specifically states that residential access through open space will not be permitted. The applicant however makes the case that the right of way will not be impeded and that the works will enhance the carriageway by way of space, safety and landscaping and in this way, the development is potentially acceptable in principle. I consider this is the overriding critical issue and is addressed in more detail below.

8.4. Impact on Right of Way

- 8.4.1. There is some disagreement as to the description of the existing pathway. On the one hand the applicant describes it in what I consider an engineering term as a 'carriageway', whereas the third parties describe it as a footpath. I note that the present situation is that there is a hard surfaced pathway that arcs around a woodland while running parallel to the boundary wall of properties to the south south/ east between Torca Road and Knock-na-cree Road terminating at a pinch point – an old 'kissing gate' and where the path forks – also continuing north up steps inside the gate. The path is wider near the junction with Torca Road from where it provides vehicular access to San Elmo Lodge. This wider stretch (greater than 3m) could I accept be described as a carriageway or laneway. I note there are a number of gates and one wide one closer to Knock-na-cree Road which does not appear in use as a vehicular access. I also note the street lamps and tarmac and that clearly machinery plant has been brought in but I would not describe it as a vehicular road. While I note it provides vehicular access to the adjacent dwelling San Elmo Lodge I am satisfied that that is the only vehicular access c. 50m off Torca Road which I note is associated with an established replacement residence. The

hard surfaced path is notably less than 3m for the most part and while driveways are narrower than 3m, I consider the nature and use of the path is pedestrian.

- 8.4.2. In terms of its visual character, the pathway is enclosed by a mature woodland and gorse on the northern side Torca Hill/Gorse Park Hill and by mature stands of trees set behind an old random rubble granite wall associated with the existing and former grounds of San Elmo. The pattern of development is marked by low density houses of individual style not visually apparent from the pathway at c. 50m off Torca Road. I would not describe it as a mews lane having regard to the pattern of development and woodland character.
- 8.4.3. The use of the path as an amenity dates back to over 100 years and is now part of a green network which includes Killiney Way and the Cat's Ladder - a coastal pedestrian access to the south which together provide a network of walks for both the locals and visitors. It is an important resource particularly as the wider area densifies.
- 8.4.4. The proposed vehicular access would by itself generate traffic and in this way, in my judgement, fundamentally conflict with the character, safety and enjoyment of use of the established right of way. While it is only one access, it amounts to a doubling of vehicular traffic and perhaps even more as San Elmo Lodge has the benefit of proximity to Torca Road where there is some on-street parking. I note the transportation comments on the application 'that the resultant intensification of traffic on the access laneway due to the proposed development is likely to cause a traffic hazard to pedestrians and cyclist users. There are serious concerns in relation to the suitability of the access laneway'. Visibility and opening widths are also raised. The grounds of appeal endeavour to address these concerns by dismissing the impact as minimal both in terms of its use and character and dispute the traffic impact. As a further safeguard the amended plans seeks to further modify the proposal to reduce impacts such as by providing a narrower but splayed entrance. It is also argued that the alignment promotes slow speeds.
- 8.4.5. There is some discrepancy in the path widths as I measured sections that were clearly less than 3m. It is proposed to increase it to up to over 4m in parts e.g. at proposed entrance. The reduction in extent of this is an improvement in visual/character terms from the original proposal which also included landscaping.

The proposed alterations would ultimately permit ease of use of a popular pathway as a vehicular access for multiple cars to park on site, including the possibility of visitor parking in the revised splayed entrance if this were to be permitted. I consider any widening particularly for the purpose of accommodating vehicular traffic would contribute to an urbanisation of the woodland path, would materially alter the character of this public right way both in terms of its use and amenity and thereby conflict with policies for protecting this pedestrian right of way .

- 8.4.6. The proposal also seeks to regrade the footpath to effectively raise the level along the frontage. The works accordingly involve realigning the footpath both vertically and horizontally so as tie in with the proposed vehicular entrance and deck under which there is c. 3m clearance for storage etc. The applicant has also incorporated some removal of hedges and repositioning of trees although this has been minimised in revised plans. The realignment is argued to be of benefit in terms of permitting safe/emergency access to the site during both, construction and continued residential use alongside its amenity use as a pedestrian amenity. These works are stated to have benefits in terms of minimising excavation in the house site while allowing height clearance for a store/ground level beneath.
- 8.4.7. This realignment would considerably alter the relationship with the distinctive granite boundary wall and contribute to the need for it to be raised for privacy reasons and visual assimilation. Given the terrain and steep escarpment on the other side, it may pose a risk to the entire structural integrity of the wall. The proposed raising of the height further increases the likelihood, in my opinion, that a significant extent of, if not, the entire wall would need to be rebuilt. Even re-using and matching the style and character and notwithstanding the conservation architect's method statement (appended to appeal), I consider this to be a significant and material impact on an integral feature contributing to the character of the ACA. Primarily this will alter views along and from the path. By way of comparison, I note the Board refused permission for a modest vehicular opening in Rockfort Avenue for an established occupied residence without on street parking, on grounds of impact on the granite wall and impact on an ACA. This was in an area adjacent to, but, not within an ACA.
- 8.4.8. I do not consider the proposed matching of the San Elmo Lodge boundary wall to be comparable as that was in the case of a replacement of an established dwelling use.

- 8.4.9. While I note the applicant's endeavours to make the pathway safe by its widening and landscaping and to keep it free from obstruction, I do not consider the works which provide for intensification of vehicular use to be compatible with its preservation, promotion or improvement as a right of way for the common good. The proposed development would therefore detract from the general amenity.
- 8.4.10. While I accept that pedestrians and cyclists could technically pass, the generation of vehicular traffic and its introduction further along the existing path could, not unreasonably, amount to an obstruction and could also be likely to be prejudicial to public safety and enjoyment. I disagree with the assertion that it could be considered to 'improve the condition and appearance of existing rights-of-way'. Accordingly, I consider the proposed development would seriously conflict with the Policy Objective GIB14 in respect of public rights of way in the current development plan which is similar to that policy used to assess the proposal by the planning authority.
- 8.4.11. The proposal would also conflict with SLO 130 (which 'aims to ensure that development in this area does not significantly detract from the character of the area either visually or by generating traffic volumes which would necessitate road widening or other significant improvements'). I note the wording is the same as that in criteria for assessing development in Zone O/O which is considered omitted in the Draft Ministerial Direction which refers to criteria in the Notable Character Area Exclusions and so SLO130 could be interpreted to be similarly excluded. It is however in a different context not specifically referenced. While I consider the proposal to conflict with this local objective and accordingly could be used in a reason for refusal the Board may wish to give this further consideration in light of the content and intentions of the Ministerial Direction.

8.5. Impact on Architectural Heritage

Impact on San Elmo

- 8.5.1. Based on the documents and submissions including that from the owner of San Elmo, there is little dispute that the subject site was formerly part of the grounds of San Elmo from which it was subdivided in 1950s. No boundary structures reflect this subdivision. The ruins appear to relate to historically ancillary structures to a

larger estate or possibly to the adjacent lodge. The OS maps trace a distinct clustering of structures in a holding albeit part of a larger holding. I am satisfied that the proposed site is independent of San Elmo and is not part of the Protected Structure, although, impact is a relevant consideration more particularly, I consider, in the context of an Architectural Conservation Area. The impacts on the dwelling are more appropriately addressed in the following section under 'residential amenity'.

- 8.5.2. In the words of the development plan, an ACA may consist of groupings of buildings and streetscapes and associated open spaces. It also states that designation is an aid to guide rather than prevent development. In this case, the character is derived from an enclosed woodland setting and path defined by mature woodland including distinctive stands of eucalyptus trees which contribute to the 'exotic character' and the granite boundary wall which is part of the built heritage.
- 8.5.3. I note the content of the Built Heritage Report and letter from a Conservation Architect as submitted by the applicant/appellant and I am satisfied that the ruins do not demonstrably contribute to the character of the ACA in that they are of no architectural note, they are ruinous and out of sight and clearly beyond any viable repair and accordingly serve little function other than reference to former activity on the site.
- 8.5.4. In terms of physical intervention with built fabric, I consider the alterations to the original granite wall, with the possibility of extensive replacement, to significantly detract from the unique character of this pathway which is identified in the Character Appraisal for the Vico Road Architectural Conservation area.

Impact of proposed dwelling.

- 8.5.5. The proposed dwelling amounts to c. 370sq.m. of accommodation with an additional store, decked parking and bridges.
- 8.5.6. The design team, informed by conservation architect James Slattery, in preparation for the appeal submission, further addresses architectural heritage impact. The site and context is stated to have been fully evaluated in terms of associated special architectural and historic character. The case is made that the site has very limited value in this regard with the main character elements derived from the trees and rubble wall. It is also highlighted by way of maps, that development has historically existed along this laneway.

- 8.5.7. In efforts to respect the character, the arboriculture report notes that the proposed works have been tailored specifically to maintain the maximum number of trees and to limit the works to little more than the footprint of the proposed primary structure. A further 7 trees would be removed across the site to facilitate these works. The extent of tree removal in the amended plans remains the same and the landscape proposal has been designed to create a woodland type landscape with deciduous trees that will create dramatic effects all year round. It is further submitted that the tight integration of architectural landscaping proposals, the selective use of natural materials and the incorporation of existing landscaping features into the design works will substantially minimise any visual impact. The sedum roof further minimises impact with the benefit of biodiversity.
- 8.5.8. While I accept the design has many merits in its form and relationship with the terrain and woodland, I consider there are more fundamental issues that cannot be readily addressed in this application.
- 8.5.9. Siting: The ruinous elements are dismissed as being removed yet the dwelling is sited at the other end of the site. A justification for developing amid mature woodland, albeit in a residential zone, is that it is a 'brownfield' site, yet the dwelling is essentially in a 'greenfield' part of the site that requires removal of more established trees. It would seem less injurious to carry out construction work on previously levelled ground that would also only require removal of more recent vegetation. There is also some merit in re-interpreting the historic footprint of previous development while enhancing the established woodland part of the site.
- 8.5.10. Height and scale: The ground levels proposed for the house and car park appear to rely on raising the footpath and wall which I consider are, as already noted, integral elements of the ACA. It is proposed to raise the wall to a height of over 2m. Behind this, at a distance of c. 1.3m the parapet level would be a further 1.42m higher (c. 3.5m above finished footpath level) than the raised wall and would extend some 25m (c. 16m near the wall and the balance stepped back) in length alongside the boundaries. The car deck is alongside this. By way of mitigation, planting is proposed in the intervening space together with a sedum roof which slopes upwards and away from the boundary wall to 4.3m above the finished footpath level. This provides panoramic windows and views to the south.

- 8.5.11. While the design in itself is attractively modelled and modest in height for a two-storey house where it is nearest the boundary, the sheer massing and extent of development above the raised wall would considerably urbanise this stretch of a woodland pathway. The raised heights and solidity would completely alter the views and ambiance of the area by structures and the combined loss of woodland views and glimpsed seaward views. In this way, the proposed development would alter the character of a key amenity within this designated ACA. For this reason I do not agree with the applicant's assertion that the laneway visual impacts can be described as being of 'slight imperceptible significance'. Nor do I consider that the updated design adequately addresses this matter. In this regard, I concur with the conservation assessment by the planning authority.
- 8.5.12. In terms of the wider visual impact and distant views, I note the photomontages are from a comprehensive range of views and consider that in a wider panoramic setting that the site, subject to tree maintenance and planting could be somewhat assimilated into the hill side setting. In this regard I note that the skyline (and notably the eucalyptus skyline) is maintained and that the ridge height is below the tree canopy height to the south/down gradient. The main source of impact would be from the light emitting from the expansive glazing, terraces and decking particularly in winter months if deciduous trees form part of the screening. However, the site is to a certain extent reliant on woodland within the grounds of San Elmo and its protection is therefore outside the control of the applicant. In such circumstances, I do not consider that the Board can be reasonably satisfied that visual impact would not arise from distant views. A shallower and considerably smaller structure would allow for more screening and buffering.
- 8.5.13. In conclusion, I consider the scale and nature of development that is reliant on a material alteration to integral features of the ACA that contribute to its character as identified in the Character Appraisal would have an adverse impact and would be contrary to Policy Objective HER13 to protect such areas.

8.6. Residential Amenity

- 8.6.1. The residents of San Elmo raise concerns about boundary treatment in relation to accuracy, loss of tress, lack of detail and ultimately overlooking and loss of privacy.

- 8.6.2. In the applicant's Built Heritage Report the boundary wall height is estimated at ranging from 1.2m to 1.8m, the higher being typical of the area. It is acknowledged there is no boundary wall to the south. The notional boundary to the south with San Elmo is described as being densely planted and the proposed development is to be screened from the gardens of San Elmo with existing tree cover and planting.
- 8.6.3. I accept that this is somewhat vague and particularly given the steep terrain and nature of site works and construction there is a risk of additional tree loss. The underlying granite and rock outcropping with thin soil coverage I accept presents a possibility of contributing to a risk of land sliding in heavy rainfall. This could be addressed by further specialist engineering reports. The depth of the site for the scale of development ultimately lacks adequate buffering and is somewhat reliant on the private grounds of San Elmo to provide such. This fundamentally is an issue with the scale of the development which has been addressed in the previous section.
- 8.6.4. In terms of overlooking there is a separation of 90m between the proposed house and existing house. This together with the terrain and planting will not cause undue overlooking. There will however be some diminution of amenity in the event of further tree loss.
- 8.6.5. These issues could be addressed by more engineering and landscaping details. The issue of correct delineation of the boundary is a matter between the parties. Accordingly I do not consider these matters to constitute grounds for refusal.
- 8.6.6. On balance, subject to detailed conditions of boundary treatment, tree retention and protection of privacy, I do not consider the proposed development would be unduly intrusive or injurious to residential amenity of adjacent properties.

8.7. **Ecological Impact**

- 8.7.1. An Taisce and some of the third party submission raise concerns about the impact on the biodiversity through the loss of trees and landscaping works. There are also concerns about impacts on bat roosting. As part of the application the applicant has submitted a comprehensive range of material addressing these matters. With respect to bats, I note the survey work conducted on two occasions and the absence of a significant presence of bats.

8.7.2. With respect to the woodland impact, the critical elements of protecting the shallow root system of the trees, notably those of the eucalyptus trees in the footpath, is addressed in the design and method statements informed by arboriculture surveys and reports. The raising of the footpath will for example add a layer of root protection – however the omission of vehicular traffic in the first instance would, I consider, better serve the protection of the trees. The landscape approach is to minimise the loss of the trees and replant. While the loss of trees is undesirable in terms of protecting the woodland landscape and biodiversity, given the context of the site and that it will remain substantially surrounded by woodland, the loss of some trees is unlikely to have an adverse impact on a continuous wildlife corridor and could I consider be absorbed from an ecological perspective.

8.8. Legal Interest and Compliance with the Planning and Development Regulations

8.8.1. It is submitted that the application is invalid as the applicant has:

- Failed to demonstrate sufficient legal interest in other lands
- Not declared land interest
- Incorrectly described the site location and used misleading terminology.

Legal Interest

8.8.2. It is submitted by a number of parties that the applicant has insufficient legal interest to carry out the development and that the application therefore comprises a material and fundamental breach of the Planning and Development Regulations as amended. The case is made by reference to the freehold ownership of the right of way which also forms part of the site and the previous decision by the council in 2009 which referred to lack of sufficient title in its decisions. The applicant's agent asserts that the applicant as owner/ with consent of the owner of the lands has sufficient legal interest and this is supported by a written legal opinion from James Dwyer BL which states that in his judgement the applicant has entitlement to use the right of way as required to access her property. This is interpreted from the terms of the Indenture and ownership. I note that the planning authority in its assessment does not dispute this title nor does it use this as a basis for refusing permission. Notably, the rights of way over the lands are not disputed by the applicant and this

would appear to be the basis for which the council has asserted its rights and duties in providing safe passage.

8.8.3. While there is clearly a difference of opinion on the entitlements of the owner regarding nature of access and vehicular use, it is not the Board's role to determine such disputes. In this regard I refer the Board to Section 5.13 of the Development Management Guidelines (2020) which outline that the planning system is not designed to resolve disputes about title to land and even if there is doubt in relation to the legal title, the planning authority may still decide to grant permission. Such permission is subject to the terms of Section 34(13) of the Planning and Development Act 2000, as amended, which states that 'a person shall not be entitled solely by reason of permission under this section to carry out any development'. Notwithstanding, the applicant has endeavoured to clarify legal ownership and rights as part of the grounds of appeal despite the planning's authority silence on this matter. Accordingly I do not consider there is a reasonable basis to refuse permission on grounds of insufficient title.

8.8.4. The owner of San Elmo refers to boundary delineation issues – for example the location of a tree is disputed as being in the applicant's ownership. Disputes with respect to party boundaries are addressed under the Land and Conveyancing Law Reform Act 2009 and not the Planning and Development Act 2000, as amended. While there may be some doubt regarding the delineation by the appellant of the disputed boundary, thereby not requiring consent, I note the issue relates to a delineation rather than any significant swathe of land over which the applicant is reliant on to construct the proposed dwelling. Notwithstanding, I am satisfied that, again, as per the Development Management Guidelines, it would not be reasonable to refuse planning permission in this case on the basis of the legal interest of the appellant in respect of the boundary. Should the Board decide to grant planning permission, the onus is on the appellant to ensure adequate legal interest to carry out the proposed development and an advice note to this effect should be attached in the event of a grant of permission.

Undeclared land interests

8.8.5. The observing parties dispute the validity of the application by reference to the omission of a declaration of interest in adjoining lands by the applicant. In this case

the applicant is Alannah Smyth and has the consent of the landowner Sonhos Ltd. The land is outlined in red and the right of way is shown but there is no further information on lands.

- 8.8.6. The application was accordingly validated by the planning authority. The planning report makes it clear that the site is not the same as that made previously by Noel Smyth and which partly overlaps the subject site.
- 8.8.7. Art 22 (2) (b) of the Planning and development Regulation 2001 as amended states that the following shall accompany the application – ‘copies of a location map of sufficient size and containing details of features in the vicinity such as to permit the identification of the site to which the application relates,’ and this purpose has been clearly achieved.
- 8.8.8. Subsection 22(b) (ii) further requires that drawings be marked so as to clearly identify ‘any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant or the person who owns the land which is the subject of the application in blue.’ There is no such information.
- 8.8.9. The Development Management Guidelines state in section 3.8 that ‘ The maps, plans and drawings required by Article 22 must comply with the requirements of Article 23’ and these requirements appear to have been substantially met. The Guidelines further state that ‘In relation to the other mandatory documentation under Article 22, planning authorities should take a reasonable approach in validating such documentation.’
- 8.8.10. If it so happens that Sonhos Ltd or indeed the applicant has an interest in other property adjoining the subject site, then the full terms of Art 22(b) (ii) have not been fully complied with. I note however that the planning history and interactive map in the planning search clearly delineates the adjacent site.
- 8.8.11. It may be that the agent was of the understanding that the site was larger in that there is reference to a pedestrian gate in the frontage which in fact would make sense if the site included part of the former application site but this is speculation.
- 8.8.12. While it is open to the Board to declare the application invalid, were it established that the owner had adjoining land interests, I am not satisfied that there is sufficient documentary evidence to invalidate the application on grounds of non-compliance with Art.22 and the information provided by the applicant has to be accepted as bona

vide. I consider there is potential to possibly consider the omission if any to be a minor breach of the Regulations as the key purpose of the Art 22 has been met in identifying the site. The reference to the adjacent lands in the observation and objection refer primarily to concerns regarding precedence and the protection of the ruined Hayes Tower – the development of which would be likely to be subject to a planning application. Ultimately however, in view of the substantive grounds for refusal as recommended in this report I see little merit in seeking further information or invalidating the application on this basis.

Public Notices

8.8.13. The validity of the descriptions and terminology in the public notices are also questioned by the third parties. The term ‘carriageway’ is considered misleading. I have addressed this already in this report and consider the term carriageway to be acceptable. With respect to site location, the reference to the site being adjoined by undeveloped lands to the rear of Mount Salus Road is considered by third parties inaccurate and misleading. I note that the description describes the lands as being ‘generally’ bounded to the south and west by San Elmo , San Elmo Lodge and the Orchard and the site is bounded to the east by undeveloped lands to the rear of Mount Salus Road and to the North by undeveloped lands adjacent to Torca Road. I accept that this would be more accurately described as being bounded to the east by undeveloped lands also bounding San Elmo although it is not entirely incorrect to state that such lands are generally west of Mount Salus Road as such properties also extend to the pathway north/northeast of the site. I also consider it would be more accurate to refer to the adjacent woodland – while it is technically undeveloped, it is subject of Zone F and part of an established amenity – it is not obviously a development site – I say this without prejudice. On balance, I consider the description has reasonably identified the site location and reasonably met with the provisions of Planning and Development Regulations 2002-2022 and new notices are not in my opinion warranted or required.

8.9. Appropriate Assessment

8.9.1. The application documentation includes an Appropriate Assessment Screening Report. It lists all the Natura 2000 within a 15km catchment and concludes that in this case, in the absence of any connectivity that the potential for significant impacts

by the proposed development does not arise. The nearest sites I note are in the Irish sea. Having regard to the nature and scale of the proposed development, nature of the receiving environment and proximity to the nearest European site, I am satisfied 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.

9.0 Recommendation

- 9.1.1. I recommend that planning permission for the proposed development be refused based on the following reasons and considerations.

10.0 Reasons and Considerations

- 1) The proposed development provides for a new vehicular access which would result in vehicular traffic moving along a narrow public right of way primarily used by and intended for pedestrian/cyclist use. The proposed development would thereby endanger public safety by reason of traffic hazard or obstruction of road users or otherwise. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.
- 2) The proposed development provides for a new vehicular access and associated works on a public right of way that is listed in the both the Dun Laoghaire Rathdown County Development Plan 2016-2022 and the current Dun Laoghaire Rathdown County Development Plan 2022-2028. In this regard it is considered that the proposed development which seeks to provide for an intensification of vehicular traffic would significantly detract from the character and amenity of the public right of way and would be therefore contrary to Policy Objective GIB14 of the current County Development Plan which states, inter alia, that it is council policy to 'preserve, protect, and improve for the common good, all existing public rights-of-way which contribute to general amenity.' In addition, it is considered the proposed development would be contrary to objective 130 which 'aims to ensure that development in this area does not significantly detract from the character of the area either visually or by generating traffic volumes which would

necessitate road widening or other significant improvements'. The proposed development which relies on a new vehicular access through land for which it is objective 'To preserve and provide for open space with ancillary active recreational amenities,' (Zone F) would accordingly contravene the development plan. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

- 3) The proposed development is located within the Vico Road Architectural Conservation Area (ACA) as described in Appendix 4 of the Dun Laoghaire Rathdown County Development Plan 2022-28 . The proposed dwelling by reason of its siting, scale, height, and visibility along a designated right of way together with the associated vehicular entrance and boundary works, would be incongruous with the built heritage and sylvan character of the ACA and would adversely affect its character. The proposed development would therefore be contrary to Policy Objective HER13 (i) (ii) (iii) regarding the protection of Architectural Conservation Areas, as contained in the Dun Laoghaire Rathdown County Development Plan 2022-28. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

Suzanne Kehely

Senior Planning Inspector

20th June 2022