



An
Bord
Pleanála

Inspector's Report ABP-312983-22

Development

Provision of a new two-storey with habitable attic level dwelling house providing 4 bedrooms, 3 en-suites and a family bathroom, new vehicular access and pedestrian gates to Golf Lane, new boundary treatments, garden shed and site development works including surface water and foul drainage works.

Location

Within the South West portion of the gardens of Carreen, Golf Lane, off Westminister Road, Foxrock, Dublin 18

Planning Authority

Dun Laoghaire Rathdown County Council

Planning Authority Reg. Ref.

D21A/0166

Applicant(s)

Thalia Maree & Brendan Rogers

Type of Application

Permission

Planning Authority Decision

Refuse

Type of Appeal

First Party

Appellant(s)	Thalia Maree & Brendan Rogers
Observer(s)	Hugh and Maeve Markey Barry Thornton Niall and Maeve Pelly
Date of Site Inspection	24/11/2022
Inspector	Lorraine Dockery

1.0 Site Location and Description

- 1.1. The subject site, which has a stated area of circa 0.08 hectares, comprises a portion of the garden of an existing house, known as 'Carreen' and a section of Golf Lane at Golf Lane, Foxrock, Dublin 18. The site currently contains a single-storey, detached house, accessed from Golf Lane.

2.0 Proposed Development

- 2.1. Permission is sought for construction of a two-storey dwelling with habitable attic level, new vehicular access and pedestrian gates to Golf Lane, new boundary treatments, garden shed and site development works including surface water and foul drainage works.

3.0 Planning Authority Decision

3.1. Decision

The planning authority REFUSED permission for the following reason:

1. The applicant has failed to demonstrate sufficient legal interest in the area identified on the submitted House A Development Red Line Map entitled Drawing no: 1827-PL-0009 Rev 3 (prepared by Brazil Associates Architects), as the 'Legal Entitlement Area'. The drainage works shown in this area are integral to the scheme as proposed. As such, the planning authority does not consider that the applicant has demonstrated sufficient legal interest in the entirety of the 'red line' site to carry out the proposed development, and that there is a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with any permission issued on foot of this application.

Further Information was requested by the planning authority in relation to submission of Arboricultural Assessment, Landscape Plan and Site Layout Plan; drainage matters relating to who will carry out necessary works along Golf Lane (applicant or Irish Water) and showing all works within red line boundary and legal

interest/entitlement to carry out works and include additional lands within extended red line boundary; vehicular entrance and boundary treatment

Clarification of Further Information was requested by the planning authority in relation to the provision of documentary evidence demonstrating adequate legal entitlement to include these lands within the red line boundary. This may require additional land title details/plans and/or letters of consent from relevant parties. Applicant was requested to illustrate the spatial extent of the relevant consents on a single annotated drawing which shall show alignment of proposed infrastructure.

3.2. **Planning Authority Reports**

3.2.1. Planning Reports

The main points of the planner's report include:

- Principle of the proposed development is generally acceptable at this location
- Significant outstanding matters with respect to sufficient legal interest to develop said proposal, relating specifically to proposed drainage works located within the extended red line boundary along Golf Lane. Not satisfied that the applicant has adequately demonstrated sufficient legal entitlement to carry out the drainage works
- Recommends refusal of permission

3.2.2. Other Technical Reports

Drainage Division- no objections, subject to conditions (report dated 27/10/21)

Transportation Division- no objections, subject to conditions (report dated 04/11/21)

Parks and Landscape Services: refusal recommended (report dated 28/10/21)

4.0 Prescribed Bodies

Irish Water

No objections, subject to condition

5.0 Planning History

Subject Site:

PL06D.306733 (D19A/0638)

Permission REFUSED on appeal for new two-storey dwelling with habitable attic space, to include new vehicle and pedestrian access onto Golf Lane and all ancillary site works (June 2020). The reason for refusal related to the proposal being considered premature by reason of an existing deficiency in the provision of sewerage facilities, pending the upgrade of the existing Irish Water foul drainage network for which there is no defined timeframe.

Adjoining Site (same ownership):

D21A/0112

Application WITHDRAWN for two dwellings and associated site works within the grounds of the existing dwelling 'Carreen'.

PL06D.306740 (D19A/0639)

Permission REFUSED on appeal for two houses and associated site works. The reason for refusal related to the proposal being considered premature by reason of an existing deficiency in the provision of sewerage facilities, pending the upgrade of the existing Irish Water foul drainage network for which there is no defined timeframe.

6.0 Policy and Context

6.1 Development Plan

The Dun Laoghaire County Development Plan 2022-2028 is the operative County Development Plan.

Zoning: The site is zoned 'Objective A' which seeks 'to provide residential development and improve residential amenity while protecting the existing residential amenities'.

Section 12.3.7.5 Corner/Side Garden Sites

6.1. Natural Heritage Designations

The appeal site is not located in or immediately adjacent to a designated European Site, a Natural Heritage Area (NHA) or a proposed NHA.

6.2. EIA Screening

Having regard to the nature and scale of the development proposed, the site location within an established built-up urban area which is served by public infrastructure and outside of any protected site or heritage designation, the nature of the receiving environment and the existing pattern of residential development in the vicinity, and the separation distance from the nearest 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

The main points of the appeal are:

- Refutes reason for refusal

- Sought legal opinion from Robert Beatty, Senior Counsel (included in submission) on their rights of access to water and sewage services on Golf Lane. The Opinion sets out the original leases and their entitlements in chronological order up to the present day. Opinion also deals with various issues raised in submitted observations
- Submits that this Opinion clearly demonstrates that the applicants have full rights to access all services within Golf Lane for their new dwelling house
- Further detail regarding the contents of the Opinion is set out in the main body of my report.

7.2. Planning Authority Response

None

7.3. Observations

Three observations were received- from (i) Niall and Maeve Pelly (ii) Barry Thornton and Clodhna Bourke and (iii) Hugh and Maeve Markey. The concerns raised in observations may be summarised as follows:

Legal Matters- contends that applicants have insufficient legal interest in the area required to carry out the development; would need to construct new sewer across land not in the ownership of the applicants; have right of use but not of development. Until tested by the courts, the applicants submitted legal Opinion remains but an opinion and no weight should be attached to it; contends there are inaccuracies and misinterpretations in legal Opinion, with observers quoted out of context.

References section 5.13 of Development Management Guidelines. Considers that application should be assessed de novo. Considers appeal to be vexatious.

Impacts on residential amenity- application needs to be treated as a three house application and not one single dwelling; overdevelopment of the site

Impacts on visual amenity- Failure to engage with Parks Division of planning authority; loss of trees; and diminishes the aesthetic aura of one of the prettiest laneway walks in old Foxrock.

Traffic/transportation- additional traffic; impacts on safety

Other Matters- Misleading plans submitted

7.4. **Further Responses**

None

8.0 **Assessment**

- 8.1. I have read all the documentation attached to this file including inter alia, the appeal, the report of the Planning Authority and subsequent response, the observations received, in addition to having visited the site. The primary issues, as I consider them, are (i) legal matters (ii) policy context (iii) impact on visual and residential amenities of the area arising from the proposed development (iv) traffic and transport matters and (v) drainage matters and (vi) other matters.

Legal Matters

- 8.2. I highlight to the Board that the sole reason for refusal for this application related to a legal matter- namely the planning authority were of the opinion that the applicant failed to demonstrate sufficient legal interest in the area identified on the submitted House A Development Red Line Map entitled Drawing no: 1827-PL-0009 Rev 3 (prepared by Brazil Associates Architects), as the 'Legal Entitlement Area'. Specifically their concern related to proposed drainage works and they note that the drainage works shown in this area are integral to the scheme as proposed. As such, the planning authority considered that the applicant did not demonstrate sufficient legal interest in the entirety of the 'red line' site to carry out the proposed development, and they considered that there was a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with any permission issued on foot of this application.
- 8.3. The drain in question is referred to as the 'Hope Drain' in the documentation attached to the file and the length of drain in question is approximately 3 metres from the gate at Careen to the Hope manhole. Senior Counsel Opinion, submitted by the applicants as part of the appeal submission, is such that it appears to be the case that all houses on the lane access the Hope Drain under the same easements/rights. The main question therefore is whether the developer of the proposed house is entitled to carry out the installation. It is the Senior Counsel's view that this is allowed

because other houses have done so in the past. It continues by stating that in his view, Carreen has a clear entitlement to connect to the Hope Drain and continue to Westminster Road but also for passage along all of the lane in order that the Carreen lands can be serviced by the Hope Drain. The Opinion concludes that the report of the planning authority appears to suggest that the threat of further action by some observers is a reason to refuse permission. These observers all use Hope Drain. The Opinion states that the planning authority may have been at a disadvantage but that is corrected with further information contained within the legal Opinion. The Opinion concludes that in his view, the planning authority was in error regarding the legal entitlement to connect to Hope Drain.

- 8.4. The three observations received all focus primarily on this legal matter and refute many of the details contained within the Opinion; consider that there are inaccuracies contained therein and that previous correspondence is taken out of context. They request that the decision of the planning authority be withheld in this instance.
- 8.5. I am of the opinion that this is more of a legal matter than a planning matter and I would question if this is the correct forum to solve the dispute. It is clearly a contentious issue between all parties. I refer the Board to section 5.13 of the Development Management Guidelines 2007, which acknowledge that the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In addition, I also note section 34(13) of the Planning Act, which states that a person shall not be entitled solely by reason of a permission to carry out any development.
- 8.6. The question which arises, and which is of most relevance to this planning appeal, in my mind, is whether the applicants have demonstrated sufficient legal interest to make the application. Section 5.13 of the aforementioned Guidelines continues by stating that if, however, the terms of the application itself, or a submission made by a third party, or information which may otherwise reach the authority, raise doubts as to the sufficiency of the legal interest, further information may have to be sought under Article 33 of the Regulations. I note that the planning authority requested both Further Information and Clarification of Further Information in relation to this matter. The Guidelines continue by stating that only where it is clear from the response that the applicant does not have sufficient legal interest should permission be refused on

that basis. If notwithstanding the further information, some doubt still remains, the planning authority may decide to grant permission. However such a grant of permission is subject to the provisions of section 34(13) of the Act, referred to above. As noted above, the planning authority ultimately refused permission for the said development as they did not consider that the applicant demonstrated sufficient legal interest in the entirety of the 'red line' site to carry out the proposed development.

- 8.7. I have examined all of the information before me in relation to this matter and notwithstanding the concerns raised by the planning authority and the observers, and using the language of the Guidelines, it is not clear from the information that the applicant does not have sufficient legal interest. I am therefore of the opinion that the applicant, based primarily on the legal Opinion submitted with the appeal documentation, has demonstrated sufficient legal interest to make this application. It is a matter for the courts to deal with further legal matters, if necessary, and I am noting both section 5.13 of the Development Management Guidelines and section 34(13) of the Act in coming to this conclusion. If the Board is disposed towards a grant of permission, I recommend that a note be attached to any such grant noting that a person is not be entitled solely by reason of a permission to carry out any development.
- 8.8. A second legal matter raised is the assertion by one of the observers (Niall Pelly and Maeve Pelly), that this is a vexatious appeal. I am of the opinion that the applicants have adequate planning grounds to make the appeal and do not consider it to be vexatious in nature.
- 8.9. Finally, under this section, some of the observers contend that this appeal should be assessed as a three dwelling development and not as an application for a single dwelling, as proposed in this current appeal. The rationale for this is that, as noted above, the applicants applied most recently under Reg. Ref. D21A/0112 for two additional dwellings and associated site works within the grounds of the existing dwelling 'Carreen'. This application was subsequently withdrawn. They previously applied and were refused permission on appeal (PL06D.306740) for a similar type development. The reason for refusal related to the proposal being considered premature by reason of an existing deficiency in the provision of sewerage facilities, pending the upgrade of the

existing Irish Water foul drainage network for which there is no defined timeframe. Notwithstanding the planning history pertaining to the overall site, I can only assess the proposal before me, as provided for in the public notices, which is for one dwelling with new vehicular access, pedestrian gates and site development works. Any subsequent application on these overall lands will be assessed on its own merits.

Policy Context

- 8.10. The site, which forms part of the front garden area of an existing dwelling, is zoned 'Objective A' which seeks to 'to provide residential development and improve residential amenity while protecting the existing residential amenities'. I consider the proposed development to be in accordance with the zoning objective for the site. The planning authority state that they are generally satisfied with the principle of a dwelling on this site.
- 8.11. Section 12.3.7.5 'Corner/Side Garden Sites' of the operative County Development Plan sets a generally favourable policy towards development on corner/side garden sites, subject to compliance with normal planning criteria. I consider the proposal to be substantially in compliance with this section of the operative County Development Plan.

Visual Amenity

- 8.12. In terms of visual amenity, I am generally satisfied with the design approach put forward in this instance. I consider that the subject site has the capacity to accommodate a development of the nature and scale proposed, without detriment to the amenities of the area. I do not consider the proposal to be out of character with existing development in the vicinity nor does it represent over-development of the site. Dwellings of varying styles, materials and eras are evident along the laneway. The planning authority have not raised concern in this regard. While I acknowledge the concerns of the Parks Division in relation to the loss of trees on site, I note that this did not form a reason for refusal in the decision which issued from the planning authority. I consider that this matter is not so great as to warrant a refusal of permission and consider that if the Board is disposed towards a grant of permission that the matter of landscaping and compensatory planting could be adequately dealt

with by means of condition. I am satisfied that the proposed development is generally in accordance with the operative County Development Plan in this regard.

Residential Amenity

- 8.13. In terms of impacts on residential amenity, I am cognisant of the relationship of the proposed development to neighbouring properties. In my opinion, separation distances typical of what would normally be anticipated within such an established, urban area are proposed with existing properties. This will ensure that any impacts are in line with what might be expected in an area such as this. The proposed house would not unduly overbear, overlook or overshadow adjoining properties, and would not seriously injure the amenities of property in the vicinity of the site. I am satisfied that impacts on privacy would not be so great as to warrant a refusal of permission. As a precautionary measure, I recommend that the windows to bathroom and dressing room at first floor level and those to attic level be permanently comprised of obscure glazing and be unopenable. This matter could be adequately dealt with by means of condition.
- 8.14. In terms of impacts on daylight and sunlight, I note the submission of a Shadow Diagram. I am conscious that in designing a new development, it is important to safeguard the daylight to nearby buildings. BRE guidance given is intended for rooms in adjoining dwellings where daylight is required, including living rooms, kitchens, and bedrooms. I have had regard to the guidance documents referred to in the Ministerial Guidelines and the Dun Laoghaire Rathdown County Development Plan to assist in identifying where potential issues/impacts may arise. I consider any potential impacts to be reasonable, having regard to the need to provide additional accommodation within an urban area identified for residential development, to the existing pattern and scale of development within the area and to the overall scale of the development proposed. I consider that the potential impact on existing residents is not significantly adverse and is mitigated insofar as is reasonable and practical. I am satisfied in this regard.
- 8.15. There is an acknowledged housing crisis and this is a serviceable site, in an established city area, where there are adequate public transport links, services, facilities and employment in close proximity. I have no information before me to believe that the proposal would lead to the setting of precedent for other similar

developments in the vicinity. In any event each application is assessed on its own merits. In addition, I have no information before me to believe that the proposed development, if permitted would lead to the depreciation of property values in the vicinity.

- 8.16. Adequate private open space is proposed for both the existing and proposed dwellings, to comply with Development Plan standards. I note that the proposed dwelling substantially complies with the operative Development Plan in terms in internal standards.

Traffic and Transport Matters

- 8.17. I note the concerns raised in the observations with regards to this matter. I am not unduly concerned in this regard. Given the limited scale of the proposed development (one single dwelling), I would not anticipate it to lead to the generation of significant volumes of traffic. In-curtilage parking is proposed. The proposal is substantially in compliance with Development Plan standards in this regard. I note that the Transportation Division of the planning authority have no objections to the proposal, subject to conditions. Matters relating to construction traffic could be adequately dealt with by means of condition, if the Board is disposed towards a grant of permission.
- 8.18. I am generally satisfied in this regard and have no information before me to believe the proposal would lead to the creation of a traffic hazard or obstruction of road users.

Drainage Matters

- 8.19. I note the previous appeal to An Bord Pleanála, PL06D.306733 (D19A/0638), whereby permission was refused on appeal for a two-storey dwelling with habitable attic space, to include new vehicle and pedestrian access onto Golf Lane and all ancillary site works (June 2020). The reason for refusal related to the proposal being considered premature by reason of an existing deficiency in the provision of sewerage facilities, pending the upgrade of the existing Irish Water foul drainage network for which there is no defined timeframe.

- 8.20. It is considered that the matter the subject to the previous refusal, namely the deficiency in the provision of sewerage facilities, pending the upgrade of the existing Irish Water foul drainage network has been addressed in the interim and Irish Water, in their report to the planning authority dated 19/03/2021 states that having reviewed the proposed development, have no objection in principal to the development proposal and has issued a confirmation of feasibility for connection(s). They continue by stating that based upon the details provided by the applicants as part of a pre-connection enquiry and on the capacity currently available in the network(s), as assessed by Irish Water, subject to a valid connection agreement being put in place, the proposed connection to the Irish Water network(s) can be facilitated. Conditions have been attached which include for water that local upgrade works are required to extend the length of the Irish Water network by approximately 60m. The applicant will be required to fund this network extension. The costs for which to be agreed at connection application stage. In terms of wastewater, upgrade works are required to the Irish Water sewer network. The existing 100mm sewer would need to be upsized to 150mm to accommodate this connection. The applicant will be required to fund this network extension, the costs for which to be agreed at connection application stage.
- 8.21. Furthermore, Irish Water states that the development must incorporate SuDS/attenuation in the management of stormwater and to reduce surface water inflow into the receiving sewer. Full details of these requirements to be agreed with the planning authority.
- 8.22. While the Drainage Division of the planning authority notes that permission may be required to connect to private drains, they state that they have no objections to the proposal, subject to conditions.
- 8.23. Having regard to the information before me, notwithstanding the legal matters dealt with above, I consider the proposed drainage arrangements to be acceptable, subject to condition and to agreement with both the planning authority and Irish Water and I consider that the reason for refusal in the previous appeal (PL06D.306733) has been overcome. I am generally satisfied in this regard, subject to condition.

Other Matters

- 8.24. I note that some of the observers state that misleading plans have been submitted with the submitted documentation. I have been able to undertake a comprehensive assessment, based on the entirety of the information before me and am generally satisfied in this regard.

Conclusion

- 8.25. Having regard to the limited extent, height and design solution put forward, I am satisfied that the proposed development is in accordance with the zoning objective of the County Development Plan, which seeks 'to provide residential development and improve residential amenity while protecting the existing residential amenities', is in keeping with the pattern of development in the area and is in accordance with the proper planning and sustainable development of the area.

9.0 Appropriate Assessment Screening

- 9.1 Having regard to the nature and scale of the proposed development, the location of the site within an adequately serviced urban area, the physical separation distances to designated European Sites, and the absence of an ecological and/or a hydrological connection, the potential of likely significant effects on European Sites arising from the proposed development, alone or in combination effects, can be reasonably excluded.

10.0 Recommendation

- 10.1. I recommend permission be GRANTED subject to conditions.

11.0 Reasons and Considerations

Having regard to the pattern of development in the area and its residential zoning under the Dun Laoghaire Rathdown County Development Plan 2022-2028, and to the standards for the development of corner/side gardens set out in section 12.3.7.5 of that Plan, it is considered that, subject to compliance with conditions below, the proposed house would not seriously injure the character of the area or the amenities

of property in the vicinity and would be acceptable in terms of traffic safety and convenience. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area

12.0 Conditions

1.	<p>The development shall be carried out in accordance with the plans and particulars lodged with the application, as amended by Further Information received by the planning authority on 14/10/2021 and Clarification of Further Information received by the planning authority on 17/01/2022, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.</p> <p>Reason: In the interest of clarity</p>
2.	<p>Details of the materials, colours and textures of all the external finishes to the proposed dwellings shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.</p> <p>Reason: In the interest of visual amenity.</p>
3.	<p>The windows to bathroom and dressing room at first floor level and those to attic level shall be permanently comprised of obscure glazing and be unopenable.</p> <p>Reason: In the interests of residential amenity</p>
4.	<p>Site development and building works shall be carried out only between the hours of 0800 to 1900 Mondays to Fridays inclusive, between 0900 to 1400 hours on Saturdays and not at all on Sundays and public holidays.</p> <p>Deviation from these times will only be allowed in exceptional circumstances where prior written approval has been received from the planning authority.</p>

	<p>Reason: In order to safeguard the amenities of property in the vicinity.</p>
5.	<p>The site shall be landscaped in accordance with a comprehensive scheme of landscaping, details of which shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.</p> <p>Reason: In the interests of residential and visual amenity</p>
6.	<p>All service cables associated with the proposed development (such as electrical, telecommunications and communal television) shall be located underground.</p> <p>Reason: In the interests of visual and residential amenity.</p>
7.	<p>Water supply and drainage arrangements including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services.</p> <p>Reason: In the interest of public health and surface water management.</p>
8.	<p>Prior to the commencement of development, the developer shall enter into a water and wastewater connection agreement with Irish Water.</p> <p>Reason: In the interests of public health</p>
9.	<p>The developer shall comply with all requirements of the planning authority in relation to transport and traffic matters</p> <p>Reason: In the interests of public safety</p>
10.	<p>The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with the planning authority prior to commencement of development. This plan shall provide details of intended construction practice for the development, including hours of working, noise management measures including noise management measures and off-site disposal of construction/demolition waste.</p> <p>Reason: In the interests of public safety and residential amenity.</p>

11.	<p>The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.</p> <p>Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission</p>
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Note: The applicants are advised to note 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 a permission to carry out any development.

Lorraine Dockery
Senior Planning Inspector

28th November 2022