



An
Bord
Pleanála

Inspector's Report ABP-300593-18

Type of Appeal	Section 9 Appeal against section 7(3) Notice.
Location	Lands at 113 Phibsborough Road, Dublin 7.
Planning Authority	Dublin City Council.
Planning Authority VSL Reg. Ref.	VS-0048.
Site Owner	Bindford Ltd.
Date of Site Visit	26 April 2018.
Inspector	Stephen Rhys Thomas.

1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by Dublin City Council, stating their intention to enter the site at 113 Phibsborough Road, Dublin 7 on to the Vacant Sites Register (VSR) in accordance with the provisions of section 6(2) of the Urban Regeneration and Housing Act 2015.

2.0 Site Location and Description

- 2.1. The appeal site is located at no. 113 Phibsborough Road, Dublin 7, and is a former bakery and mill. The site lies to the north of Phibsborough, about 200 metres from Phibsborough Shopping Centre. The site is situated on the southern side of the Royal Canal between the 5th lock and the 6th lock. A rail line runs parallel to the canal on the northern side of the canal opposite the site.
- 2.2. The site is accessed via a lane that runs for 105 metres from Phibsborough Road. The laneway serves the Cross Gun apartments and there is surface car parking along the southern side of these buildings.
- 2.3. The site contains the buildings associated with the premises of the former bakery and includes a large concrete silo. There are other ancillary industrial buildings. These buildings are in a rundown and dilapidated condition and have been the subject of graffiti and vandalism.
- 2.4. Immediately to the east of the appeal site lies the Cross Guns Mill building which is a protected structure. The Mill with its stone finish is a distinctive building at this canal side location and is currently in residential use. The southern site boundary adjoins the rear gardens of dwellings located along Leinster Street North and Shandon Road. These streets are characterised by two-storey, red brick terraced dwellings. The western boundary of the site adjoins Shandon Mill, a residential development comprising duplex units.

3.0 Planning Authority Decision

- 3.1. **Planning Authority Notice:** Dublin City Council advised the site owner that the subject site (Planning Authority site ref. VS-0048) had been identified as a vacant

site. The notice, issued pursuant to section 7 of the Act and dated 28 November 2017, stated that particulars of the site have been entered on the Vacant Sites Register. The notice was accompanied by a map outlining the site boundary.

- 3.2. **Register of Vacant Sites Report:** The site is zoned under objective Z1. 'To protect, provide and improve residential amenities'. The site is classified as residential land and has been vacant or idle for the last 12 months. The site is in an area where there is a need for housing, is suitable for housing and the majority of the site is vacant/idle. The report is supported by colour photographs, the response of the planning authority to the landowners submission, a report on Housing Need from Dublin City's Chief Valuer and City Planning Officer.

4.0 **Development Plan / Planning History**

- 4.1. The Dublin City Development Plan 2016-2022 is the operative development plan. The site is located on lands that are subject to zoning objective Z1. 'To protect, provide and improve residential amenities'.
- 4.2. One of the key strategies of the Development Plan, as set out in section 4.4 is the creation of a consolidated city, whereby infill sites are sustainably developed and new urban environments are created, by actively promoting active land management, a key component of which is the vacant site levy.
- 4.3. **Section 2.2.8.4** of the plan states that in accordance with the Urban Regeneration and Housing Act 2015, it is a key pillar of the development plan to promote the development and renewal of areas, identified having regard to the core strategy, that are in need of regeneration, in order to prevent: (i) adverse effects on existing amenities in such areas, in particular as a result of the ruinous or neglected condition of any land, (ii) urban blight and decay, (iii) anti-social behaviour or (iv) a shortage of habitable houses or of land suitable for residential use or a mixture of residential and other uses
- 4.4. **Section 14.9** of the City Development Plan 2016-2022 states that the Vacant Sites Levy will apply to lands zoned Z1, Z2, Z3, Z4, Z5, Z6, Z7, Z8, Z10, Z12 and Z14.
- 4.5. **Policy CEE16** states that it is the policy of DCC to: (i) To engage in the 'active land management' of vacant sites and properties including those owned by Dublin City

Council, as set out in the Government's Planning Policy Statement 2015; to engage proactively with land-owners, potential developers and investors with the objective of encouraging the early and high quality re-development of such vacant sites. (ii) To implement the Vacant Land Levy for all vacant development sites in the city and to prepare and make publicly available a Register of Vacant Sites in the city as set out in the Urban Regeneration and Housing Act 2015. (iii) To improve access to information on vacant land in the city including details such as location, area, zoning etc. via appropriate media/online resources and the keeping of a public register as a basis of a public dialogue in the public interest. (iv) To encourage and facilitate the rehabilitation and use of vacant and under-utilised buildings including their upper floors. (v) To promote and facilitate the use, including the temporary use, of vacant commercial space and vacant sites, for a wide range of enterprise including cultural uses, and which would comply with the proper planning and sustainable development of the area and the provisions of the Development Plan.

- 4.6. **Policy QH3** states that it is policy of the Council (i) To secure the implementation of the Dublin City Council Housing Strategy` in accordance with the provision of national legislation. In this regard, 10% of the land zoned for residential uses, or for a mixture of residential and other uses, shall be reserved for the provision of social and/or affordable housing in order to promote tenure diversity and a socially inclusive city. (ii) To engage in active land management including the implementation of the vacant levy on all vacant residential and regeneration lands as set out in the Urban Regeneration and Housing Act 2015.

4.7. **Planning History**

Subject site:

PA reference **2402/14** and An Bord Pleánála reference **PL 29N.243444**. Permission for demolition of existing buildings and construct 20 houses, 8 apartments and 2 commercial units. October 2014.

Three other planning applications for residential schemes lodged in 2006 and 2007 were refused permission, An Bord Pleanála reference PL29N.231198, PA reference 1745/07 and 4033/06 refer.

5.0 The Appeal

5.1. Grounds of Appeal

5.1.1. The landowner has submitted an appeal to the Board, against the decision of Dublin City Council to enter the subject site on the Register. The grounds of the appeal can be summarised as follows:

- The appellant disputes the date of the site visit, 28 November 2016, no evidence for a site visit taking place.
- The appellant cites legal difficulties which have led to a delay in the implementation of an extant permission. Full ownership of the site has only been finalised since June 2017. The Council have not taken into account all legal difficulties regarding the site which have made the site unsuitable and unavailable for housing. Therefore, the site does not satisfy the requirements of section 5(1)(a)(i) of the 2015 Act, as the site was not suitable for housing. The appellant claims that owing to a defect in legal title the land should be deemed unsuitable for housing.
- The appellant raises the issue of housing need in the context of all aspects of section 6(4) of the 2015 Act. The Council have not provided evidence that a specific housing need assessment for the site was carried out.
- With reference to section 6(6)(c) of the 2015 Act, the appellant quotes – ‘whether there was any thing affecting the physical condition of the land comprising the site which might affect the provision of housing’. The site is not suitable for the provision of housing because of the presence of asbestos and other deleterious material which means the site is unsuitable at present.
- The subject site has an established industrial use. The residential zoning provides the mechanism to provide housing but it does not limit the ongoing use of the site for industry.
- The site has the benefit of an extant low density residential planning permission. Given, the legal complexities, the applicant was unable to implement the permission and the future of the proposal is in doubt given government policy changes in relation to housing density.

- The appellant states that uncertainty with regard to the statutory planning framework for the area and national guidance, delayed a revised development proposal. Detailed information is submitted demonstrating how the new apartment guidelines change design parameters for higher density residential schemes. The site is undergoing planning and design changes to ascertain market viability and investigations concerning finance, the site is not idle. The appellant also includes an assessment of apartment viability and claims the addition of a Vacant Sites Levy would further undermine a development proposal for the site.
- The site is in development transition, from industry/bakery to housing. The site has never been used for residential purposes. The site is well managed, secured and building openings blocked up. The character of the site has not changed since it was in use as a mill and bakery. There has been no reduction in the number of people living in the area arising from the site in transition.
- The determination of the site value is challenged and the appellant states an intention to undertake an appeal to the Tribunal.

The appellant supports the appeal with an Irish Times newspaper article, a copy of a presentation by Minister Eoghan Murphy to the Irish Planning Institute, an extract from the draft Apartment Guidelines, an email from a solicitor confirming the date of ownership, and a project schedule set out by Aecom.

5.2. Planning Authority Response

5.2.1. The Planning Authority responded to the appeal, requesting that the following observations be noted by the Board:

- The reasoning for the placement of the site on the register are set out in the planning authority's response to the landowner's submission.
- As of the 30 January 2018, no active construction has taken place on site and no additional planning application has been lodged.
- A site investigation took place on 19 May 2016, the site was found to satisfy the requirements for a vacant site at the time.

- The Property and Title Research Section of the City Council, stated on 12 January 2017 that the site was not registered in the Land Registry. Ownership details were received from the Registry of Deeds.
- The Council is not required to undertake site specific housing need assessments by the 2015 Act. A study was carried out, that concluded that there is a housing need in the functional area of the planning authority.
- No mention was made by the appellant of deleterious material prior to the placement of the site on the register. No site investigations were conducted and so the existence or not of such material couldn't be used to reach a conclusion that the site is unsuitable for housing.
- The site is zoned Z1 in the current development plan and is suitable for housing, any previous use, such as industry would not affect the decision to place the site on the register.
- The existence or not of a local area plan or changes in national guidance does not restrict the lodgement of a planning application.
- The financial viability of a housing project does not form part of the 2015 Act and so cannot be used as a reason not to develop the site.

6.0 **Assessment**

- 6.1. An appeal under section 9 of the Act, requires that the burden of showing that the site or a majority of the site was not vacant or idle for the 12 months preceding the date of entry on the Register is on the owner of the site. Section 9(3) of the Act states that the Board shall determine whether the site was vacant or idle for the duration of the 12 months concerned or was no longer a vacant site on the date on which the site was entered on the register. The subject site was entered onto the Dublin City Council VSR on the 28 November 2017.
- 6.2. By reference to the planning authority notice, it is stated that the subject site comprises residential land for the purposes of the Vacant Site Levy. The subject site is located in an area zoned Z1 'To protect, provide and improve residential amenities' in the current City Development Plan. Policy QH3 states that it is policy of the Council to engage in active land management including the implementation of the vacant levy on all vacant residential and regeneration lands as set out in the

Urban Regeneration and Housing Act 2015. This assessment takes into account the characteristics of the site in the context of Section 5(1)(a) residential land.

- 6.3. The appellant states that the site has been the subject of legal difficulties and that ownership was only finalised in June 2017. It is claimed that legal difficulties made the site unsuitable for housing. A specific housing need for the site was not carried out by the Council in accordance with section 6(4) of the 2015 Act. There is asbestos and other deleterious material that might affect the provision of housing, section 6(6)(c) of the 2015 Act is cited, the appellant may actually mean section 6(5)(c) of the Act. The site could be used for industrial purposes and so the site has not limited the number of housing in the area. The site has always been in industrial use and has not reduced the number of houses or people living in the area. The appellant states that the site has an extant permission for a low density housing scheme. This could not be implemented for legal reasons but also states that the changing planning environment with respect to higher residential densities has stalled a fresh planning proposal. The appellant states that activity is ongoing to secure finance and explore revised proposals that would make the site viable in the current housing market.
- 6.4. In response, I note that the Council provide a detailed rebuttal of the appellants grounds of appeal. The Council reiterate their earlier assessment of the site in the context of section 5(1)(a) of the 2015 Act and provide a chronology of events with regard to site inspection and land title research, amongst other things.
- 6.5. Taking each issue in the order presented in the grounds of appeal, it is stated that that the site was subject to complex legal issues and it was not practical to undertake development of the site. In addition, the appellant makes the point that ownership issues rendered the site unsuitable for housing. The case made by the appellant in relation to legal issues on this site are outside the scope of the 2015 Act in terms of an appeal against entry on the register. I also note the Council's correspondence, in which they set out their approach to clarifying the ownership of the site. Whilst ownership is relevant to the charging of a vacant site levy, it is, in my opinion, outside the narrow focus of the Board's role in relation to Section 9 Appeals. Section 9(3) of the 2015 Act clearly states that the Board's role is to determine whether or not a site was vacant or idle for the relevant period. Ownership matters are therefore not relevant to the status of the site in the context of the 2015 Act.

6.6. Moreover, the appellant states that ownership of the site has only recently been finalised, June 2017. The 'owner' of a site is included in the definitions set out in section 3 of the 2015 Act, owner means as follows:

(a) in relation to land that is registered land within the meaning of the Registration of Title Act 1964 , the registered owner, and

(b) in relation to all other land, a person, other than a mortgagee not in possession, who, whether in his or her own right or as trustee or agent for any other person, is entitled to receive the rack rent of the land or, where the land is not let at a rack rent, would be so entitled if it were so let;

Ownership has no impact upon the assessment of whether a site should be included on the register or not. Section 17 of the 2015 Act, sets out procedures in relation to the charging of the levy, change of ownership is relevant in that instance.

Irrespective of any change or confirmation of ownership within the meaning of the 2015 Act, the burden of demonstrating whether a site is vacant or not lies with the owner of the site, as set out in Section 9(2) of the 2015 Act.

Ownership issues and legal difficulties do not constitute a planning reason for considering that a site is not suitable for the provision of housing. If the site complies with the requirements of section 6(5) of the 2015 Act, then it is suitable for housing irrespective of legal matters.

6.7. I note the appellants comments in referring to the planning process and awaiting the outcome of local and national planning policies and guidance as actions that should render the site active. However, the 2015 Act does not indicate that administrative activity in relation to a site, such as obtaining planning permission, awaiting the publication of local and national planning guidance, clarifying legal title or negotiating finance, should be considered to deem a site not vacant or idle. I do not consider that the activities listed by the appellant comprise either works or a permitted and ongoing use of the lands.

6.8. In relation to the possible existence of asbestos and other deleterious materials, that the appellant claims affect the physical condition of the site so as to affect the provision of housing. The 2015 Act does not specify what any thing might be in the context of section 6(5)(c), the entirety of section 6(5) states as follows:

A planning authority, or the Board on appeal, shall determine whether or not a site was suitable for the provision of housing for the purposes of this Part by reference to—

(a) the core strategy,

(b) whether the site was served by the public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) necessary to enable housing to be provided and serviced, and

(c) whether there was any thing affecting the physical condition of the land comprising the site which might affect the provision of housing.

However, given that the site has an extant permission, I am satisfied that there is no thing affecting the physical condition of the land that might affect the provision of housing. In addition, the site is suitable for the provision of housing as demonstrated by the core strategy and land use zoning of the Development Plan. The site is also served by public infrastructure. The site is therefore consistent with all aspects of section 6(5) of the 2015 Act and consequently accords with section 5(1)(a)(ii) – the site is suitable for the provision of housing.

- 6.9. The appellant has stated that the Council failed to carry out a site specific housing need assessment and therefore failed to comply with all aspects of section 6(4) of the 2015 Act. Section 6(4) states the following:

A planning authority, or the Board on appeal, shall determine whether or not there was a need for housing in an area within the planning authority's functional area for the purposes of this Part by reference to—

(a) the housing strategy and the core strategy of the planning authority,

(b) house prices and the cost of renting houses in the area,

(c) the number of households qualified for social housing support in accordance with section 20 of the Housing (Miscellaneous Provisions) Act 2009 that have specified the area as an area of choice for the receipt of such support and any changes to that number since the adoption of the planning authority's development plan, and

(d) whether the number of habitable houses available for purchase or rent was less than 5 per cent of the total number of houses in the area.

- 6.10. Firstly, I note that the planning authority submitted a detailed assessment of the status of the Housing Strategy in the context of the City Development Plan Core Strategy, dated 28 February 2017. The report concludes that there is a need for housing with reference to the housing strategy and the core strategy of the planning authority. A report prepared by the City Valuer, dated 24 February 2017, tackles house prices, the cost of renting, the number of persons registered on the City's housing list and confirmation that the number of houses for lease/rent was less than 5% of habitable houses in the area. The appellant has not prepared any information to convincingly counter any of these statements by the Council and I am satisfied that there is a need for housing in the area, as required by section 5(1)(a)(i) and further clarified by section 6(4) of the 2015 Act.
- 6.11. With respect to the definition of a Vacant Site as set out in section 5(1)(a)(iii) of the 2015 Act, according to my observations the condition of the site can be characterised as vacant and idle. The site comprises the run down buildings associated with the former bakery and a small proportion of the site provides an access laneway from Phibsborough Road. The buildings are in a neglected state and some are ruinous. There is evidence of graffiti and vandalism within and on the boundary of the site. The majority of the site is not in use and the buildings and grounds require significant works to become productive and useful. It would appear to me that the vacant and idle state of the site has been that way for some time and my observations would agree with the findings of the planning authority for the twelve months concerned. The majority of the site is both vacant and idle and therefore accords with the requirements of the 2015 Act.
- 6.12. On a technical point, the appellant states that the site has an established industrial use and can be used as such; the site has never provided residential uses and has not contributed to a reduction in the number of people living in the area. The continuation of industrial uses on the site is a matter for the landowner and any relevant consents that may be required. Any reactivation of the site for such purposes would then be a matter for the landowner to confirm with the planning authority and request removal from the register, as outlined by section 10 of the 2015 Act. In relation to a change in character of the area and the reduction or not of people living in the area, this is a requirement for regeneration lands, not residential lands and so has no bearing on the appeal.

7.0 Recommendation

7.1. I recommend that, in accordance with section 9(5) of the Urban Regeneration and Housing Act 2015, the Board should confirm that the site at 113 Phibsborough Road, Dublin 7 was vacant or idle for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 28 November 2017 shall be deemed to have effect from that date.

8.0 Reasons and Considerations

Having regard to

- a) The information placed before the Board by the Planning Authority in relation to the entry of the site on the Vacant Sites Register,
- b) The grounds of appeal submitted by the appellant,
- c) The report of the Inspector,
- d) The need for housing in the area, that the site is suitable for housing and that insufficient reason is put forward to cancel entry on the Vacant Sites Register,

the Board is satisfied that the site was vacant or idle for the relevant period.

Stephen Rhys Thomas
Planning Inspector

8 May 2018