



An
Bord
Pleanála

Inspector's Report ABP-300827-18

Type of Appeal	Section 9 Appeal against section 7(3) Notice.
Location	Lands at Ballynacorra, Midleton, County Cork.
Planning Authority	Cork County Council.
Planning Authority VSL Reg. Ref.	VS-0030.
Site Owner	Allan Navratil.
Date of Site Visit	17 May 2018.
Inspector	Stephen Rhys Thomas.

1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by Cork County Council, stating their intention to enter the site at Ballynacorra, Midleton, County Cork 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 in the townland of Ballynacorra, Midleton, County Cork. Ballynacorra or otherwise known as Ballinacurra is an emerging suburb south of Midleton, but also a village in its own right. The site is farmland associated with Ballynacorra House and positioned between the new Maple Woods housing development to the south and Church Road to the north.
- 2.2. The site is extensive and conforms to six large fields currently in use for agricultural purposes, a significant central tree lined avenue and a large stand of mature trees. There are no buildings associated with the site. The site boundaries comprise mature hedgerows and trees.

3.0 Planning Authority Decision

- 3.1. **Planning Authority Notice:** Cork County Council advised the site owner that the subject site (Planning Authority site ref. VS-0030) had been identified as a vacant site. The notice, issued pursuant to section 7 of the Act and dated 9 January 2018, 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 subject to zoning objective R-07 in the Midleton Electoral Area Local Area Plan Second Edition January 2015. Medium A density residential development with provision for some medium B, subject to ground conditions. There is no residential planning history, however, permissions have issued for quarrying activity. The adjoining site has been the subject of large scale residential permissions. The lands are considered to be residential lands for the purpose of the VSL. The site is adequately serviced for residential development. The

lands are located adjacent to the Great Island Channel SAC and Cork Harbour SPA, stormwater attenuation and flood risk assessment necessary. The site is used for agriculture. The site is a vacant site in accordance with section 5(1)(a) and sections 6(4) and 6(5) of the 2015 Act.

The site was visited on the 17 November 2016 and 21 November 2017. The Council's submission is supported by a copy of the section 7(3) Notice, site outline, a copy of the entry on the register including a folio map, a copy of Cork County Council's approach to the implementation of the VSR, the recommendation of entry on the register, land registry details, a copy of the landowner's submission to the section 7(1) Notice, colour photographs and colour zoning maps.

4.0 Development Plan / Planning History

4.1. The Cork County Development Plan 2014 is the operative development plan and the East Cork Municipal District Local Area Plan 2017 is the operative local plan. The site is located on lands that are subject to zoning objective MD-R-07: Medium A density residential development and provision of individual serviced sites, subject to ground conditions. Provision of a new purpose built primary school can also be accommodated on this site, subject to agreement with the Department of Education and Science. Development proposals must provide for sufficient stormwater attenuation and may require the provision of an ecological impact assessment report (Natura Impact Statement) in accordance with the requirements of the Habitats Directive and may only proceed where it can be shown that they will not have significant negative impact on the SAC and SPA.

4.2. Chapter 14 of Development Plan refers to Zoning and Land Use and includes variation number 1 with reference to implementation of the Vacant Site Levy in residential and regeneration areas as follows:

Vacant Sites Levy

It is the intention of Cork County Council to implement the provisions of the Urban Regeneration and Housing Act 2015, through the establishment of a Vacant Sites Register, identifying sites on which a vacant site levy can be applied. The planning authority will proactively engage through the Municipal District sub-county structures,

to identify suitable vacant sites on lands zoned residential and on lands designated as regeneration areas in this plan, which meet the criteria for inclusion in the vacant site register. This will be achieved through a focused application of the levy, facilitating sustainable urban development and bring such vacant sites and buildings in urban areas into beneficial use.

Regeneration Areas

The Urban Regeneration and Housing Act 2015, provides for the inclusion of objectives for the development and renewal of areas identified as being in need of regeneration. As part of the preparation of the Local Area Plans, regeneration sites have been identified in many of our towns. The main objective in identifying Regenerations Areas is to draw attention to the opportunities that exist to redevelop key areas within the towns, where such sites have the potential to contribute to the rejuvenation of the towns, deliver housing, and perhaps act as a catalyst for other developments. In accordance with the provisions of the Urban Regeneration and Housing Act 2015, regeneration areas may, in time, be subject to the Vacant Sites Levy where the regeneration area is vacant or idle and this has adverse effects on the amenities / character of the area.

County Development Plan Objective

ZU 5-1 Vacant Site Levy-Residential and Regeneration Areas

Encourage the development and renewal of areas, on lands zoned as residential that meet the criteria as set out in the Urban Regeneration and Housing Act, 2015 and on lands designated as regeneration areas, identified in Municipal District Local Area Plans, 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”.

4.3. Planning History

Subject site: No recent planning permission, however, the planning authority outline historic quarrying activity applications.

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 Cork County Council to enter the subject site on the Register. The grounds of the appeal can be summarised as follows:

- The appellant did not request to have the land zoned for residential purposes, either in the last or current LAP. Other zoned sites in the LAP lands are better placed to provide housing. There are 5 hectares of undeveloped lands adjacent to an unfinished estate to the south east of the appellant's site. In addition, the LAP identifies constraints to developing lands at Ballinacurra in terms of water supply, waste water treatment and a requirement to upgrade the Lakeview Roundabout before any further development in the area.
- The land is and always has been in agricultural use. The lands are adjacent to the appellant's home and form a major part of their income. The appellant challenges the meaning of the term 'vacant or idle', in the absence of a clear definition in the 2015 Act. The appellant cites section 5(1) of the Interpretation Act 2005 and contends that the plain meaning of the words 'vacant or idle' cannot apply to their lands. In addition, circular PL 7/2016 attempts to identify lands in use for agriculture as being vacant or idle, which is clearly not the case. The lands are classed as a Commercial Farm with the Department of Agriculture, Food and the Marine and part of the land is under contract with the Green Low Carbon Agri-Environment Scheme. For clarity, the lands are all in agricultural use and not a mix of green fields and agricultural land as detailed in the planning report. In addition, agriculture constitutes 'Development' for the purposes of the Planning and Development Act.
- The appellant has no plans to develop the land for residential development. There is no extant planning permission for residential development and so the appellant is not holding back the release of key sites.

- In terms of section 6(5) of the 2015 Act, the site is not suitable for housing because of infrastructural deficiencies. Section 3.3.54 of the municipal LAP recognises that a new water supply network will be required to serve Ballinacurra. Section 3.3.56 of the LAP recognises that Irish Water need to upgrade the existing wastewater treatment plant at Midleton to accommodate the development planned. Section 3.3.15 of the LAP improvements to the Lakeview Roundabout are considered to be essential prior to any further development in the Ballinacurra area. The appellant notes that the initial planning report stated that the site was adequately serviced for housing development, objectives in the new LAP suggest otherwise.
- The appellant contends that the updated planning report did not fully pick up on key points contained in their submission, i.e. the lands are farmed by a bona fide farmer, there are no pending planning applications, the lands are important source of income and that the lands are in use for agriculture, considered 'Development' by the PDA 2000.

The appeal is supported by Department of Agriculture, Food and the Marine basic payment scheme documentation and mapping.

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 Council accept that the lands are in agricultural use.
- The lands are zoned for residential purposes and the interpretation and meaning of 'vacant or idle' in the context of Circular letter PL7/2016 is relevant.
- There is no extant residential permission for the site, however, the lands can be serviced subject to detailed design at application stage. With reference to the upgrade to Lakeview Roundabout, a Part 8 application has been prepared. At present, there is sufficient capacity in terms of water services to accommodate development of the subject lands.
- The 'Recommendation Report' adequately addressed all pertinent issues raised by the appellant's submission.

- It is considered that the site satisfies the requirements for entry onto the Vacant Sites Register.

5.3. Further Submissions

- The appellant received information from Cork County Council on foot of a freedom of information request and wishes to add the following: comments in relation to the Implementation of the VSR and Levy prepared by Cork County Council. Specifically, with reference to the interpretation of a Department circular and the inclusion of lands used for agriculture on the register even though the lands may be in agricultural use. The appellant underlines that the Council's own cautionary approach not to include some agriculturally utilised lands on the register has been ignored. This they claim, is evidence of a decision made irrationally and legally flawed. In addition, the appellant has included a correspondence sent to Cork County Council that sets out a complaint that the method by which the site was surveyed completely ignores the use of the site for agriculturally purposes.
- Further correspondence from the appellant discusses definitions in relation to vacant and idle with reference to agricultural land, that the new levy is essentially a new tax and notes that new guidance is soon to issue from the Department with reference to family farms. The correspondence is supported by a letter from Kilkenny County Council and a newspaper article that outlines the removal of farms from the Vacant Sites Register.
- In addition to comments made in earlier submissions, the appellant makes the following salient points: other vacant sites owned by developers in the area have not been placed on the register, the lands in question hold sand and gravel deposits and this has not been explored, there is no need for housing in the Ballinacurra area, the site is not serviced. The letter is supported by a transcript of an exchange between Deputy Tom Neville and Minister Eoghan Murphy, as well letters, newspaper article and a historical background paper already on the file.
- Finally, the appellant has submitted correspondence with Cork County Council with respect to removal of the site following a positive determination by An Bord Pleanála and the relevant section of the 2015 Act.

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 Cork County Council VSR on the 9 January 2018.
- 6.2. By reference to the planning authority notice and accompanying maps, 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 MD-R-07: Medium A density residential development, in the current Local Area Plan. Objective ZU 5-1 Vacant Site Levy-Residential and Regeneration Areas of the County Development Plan to encourage the development and renewal of areas, on lands zoned as residential that meet the criteria as set out in the Urban Regeneration and Housing Act, 2015 and on lands designated as regeneration areas, identified in Municipal District Local Area Plans. This assessment takes into account the characteristics of the site in the context of Section 5(1)(a) residential land.
- 6.3. The principal claim made by the appellant is that the site is in full agricultural use and references are made to whether or not farmland should be included on the register. In addition, it is stated that there is not a need for housing in the area as there are a number of unfinished housing estates and extant planning permissions in the area. The appellant's lands cannot be serviced without the provision of essential infrastructure so the site is not suitable for housing. Finally, the appellant questions the validity of the definitions for vacant and idle in the 2015 Act, the implementation of the Vacant Site Register by the Council and wide-ranging and general criticism of the 2015 Act.
- 6.4. The Council defend their implementation of the establishment of the register as being in accordance with the 2015 Act, they state the appellant's submissions were adequately addressed. The lands may be in agricultural use but their inclusion is allowed by the circular letter. The lands can be serviced, there are Part 8 plans to upgrade the Lakeview roundabout and there is water services capacity in the area.

- 6.5. The main issues as they relate to the appellant's lands are as follows: whether there is a need for housing in the area, whether the site is suitable for housing and whether the site is vacant or idle. The appellant has questioned each element of a vacant site as it relates to residential land. It is logical to address each issue under the relevant sections of the 2015 Act.
- 6.6. Section 5(1)(a)(i) – **Housing Need.**

The 2015 Act sets out the detailed information that will assist in determining if a site is in an area where there is a housing need, section 6(4) states as follows:

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.

In this instance, the planning authority have prepared a detailed implementation document that provides the information and research carried out in order to establish the register. The 2015 research includes tabular data that details house prices, rental prices, social housing support and the percentage of housing stock for sale. The data leads the planning authority to conclude that there is a need for housing in the Cork Metropolitan area. In addition, the planning authority's core strategy identifies the need for housing and the subject lands are zoned for such use. This leads me to conclude that the planning authority have satisfactorily demonstrated that there is a housing need in the area. The appellant's perception of a lack of housing need due to unfinished housing estates and extant planning permissions in the area contrasts with the planning authority's position. However, without compelling information to the

contrary from the appellant I cannot construct a logical counter argument to the evidence based research carried out by the planning authority. I am satisfied therefore, that there is a housing need in the area and the site conforms to all requirements of section 6(4) of the Act.

6.7. Section 5(1)(a)(ii) – **Site suitable for housing**

The 2015 Act sets out the detailed information that will assist in determining if a site is suitable for housing, 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.

Firstly, the core strategy of the planning authority has identified the suitability of the site for housing by the residential land use zoning in the local area plan and a target housing yield of 5,255 units over 186 Hectares. The LAP states that short term road improvements can be made to accommodate local growth and these are essential prior to further development in the area. In addition, as pointed out by the applicant there are extant planning permissions in the wider area. The planning authority have stated that the site can be serviced subject to detailed design proposals at an application stage. There are no water service infrastructural and capacity constraints in the area at present, such that a development could not be progressed. Finally, road infrastructure deficiencies, primarily in relation to the Lakeview roundabout have been noted and addressed by a Part 8 planning proposal and objectives in the local area plan.

The appellant has raised issues in terms of infrastructural deficiencies, however, in my view all of these issues can or will be addressed. According to the planning authority there are no infrastructural hold ups to development of this site. However, I

do note that the LAP warns that infrastructural upgrades must be complete to achieve the target population growth for the area. This specific site is in my mind adequately served by public infrastructure to enable housing to be provided and serviced, as the planning authority put it 'subject to detailed design being undertaken at planning stage'. Interestingly and at a macro level, the appellant has highlighted the significant mineral resource below ground, i.e. sand and gravel. Though this may be the case, the existence or otherwise of sand and gravel deposits would not by itself comprise a thing that might affect the provision of housing. In the absence of information to the contrary I am satisfied that the subject lands are suitable for housing within the meaning of section 6(5) of the 2015 Act.

6.8. Section 5(1)(a)(iii) – Site **vacant or idle**

The 2015 Act states that a vacant site has the meaning given to it by section 5 of the Act. With regard to residential sites and section 5 of the Act, a number of criteria must be satisfied in order to classify lands as a vacant site. The last criteria that must be satisfied in relation to residential land is that the site, or the majority of the site, is vacant or idle. In this context, the Act fails to provide the meaning or definition of vacant or idle. The appellant has articulated with thoroughness what in their opinion should be construed as to the meaning of vacant and idle. In essence, it is the appellant's contention that the ordinary meaning and common usage of the term vacant or idle should be used. In relation to the appellant's lands, they emphatically state that their lands are in full and productive agricultural use, not vacant or idle. I fully agree that the lands are in full and productive use, with this fact there is no disagreement between the planning authority, the appellant or myself.

In this context the Board should note that there are a number of concurrent appeals in Cork County Council's functional area that relate to agricultural lands and the VSR. The relevant file reference numbers are as follows: ABP-300844-18, ABP-300837-18 and ABP-300842-18.

The appellant has raised the question as to the inclusion of agricultural lands that are in use on the VSR. In this respect, the appellant has challenged the legal status and importance of the circular letter and warns the Board about relying on it as a basis to form a decision and suggests legal opinion be sought. In addition, the appellant has questioned the helpfulness of the circular letter when it states that in relation to

farmland and residential zoning, the levy may be applied. This, in the mind of the appellant suggests that the planning authority can exercise discretion in the application of the levy and this is not fair or transparent. The appellant is also frustrated that the planning authority did not follow its own implementation procedures when it was apparent that the site was neither vacant or idle, but in agricultural use. The information provided by the appellant in relation to agricultural land, its use and the contradictory advice provided by circular letter is noteworthy. I also note the submission of a transcript between a TD and the Minister for Housing, Planning and Local Government, press clippings and local authority correspondence all of which highlight the issue of farmland and the vacant site levy.

Nevertheless, the site as outlined by the planning authority is in agricultural use and has been placed on the register. The use of the fields for agricultural purposes does not necessarily protect the overall site from entry on the register. Circular Letter PL 7/2016 sets out guidance in relation to the implementation of the Vacant Site Levy as provided for in the 2015 Act. Specifically, appendix 3 of the circular letter sets out practical matters to note when identifying vacant sites, the following paragraph refers:

Sites may be in areas where the land is zoned for a particular purpose, e.g. residential. However, pending development appropriate to its zoning, the land may currently or on an interim basis have an agricultural use. Given the purpose of the levy, particularly in the context of the provision of housing, in such cases the levy may be applied, as the site concerned is not being used for the purpose for which it was zoned.

This is the case with the appellant's land; it is in agricultural use and it is zoned for residential purposes. The planning authority's 'Implementation of the Vacant Sites Register and Levy' document states the following:

However, a question might arise as to whether a site located on lands actively in use for agriculture could legitimately be considered vacant or idle. It might be prudent to exclude such sites from the register if there is evidence of the active use of such lands for such purpose.

The planning authority note the use of a majority of the site for agriculture, but include the appellant's land on the register. The planning authority offer no

explanation for the inclusion of the lands. This casts doubt on the approach and transparency of the implementation policy devised by the Council, with respect to agricultural lands. Neither the Board nor Local Authorities have received new advice from the Department of Housing, Planning and Local Government that concerns amendments to the 2015 Act with reference to farmland and the vacant site register. In the absence of any new information in this regard, I am bound by the Act and any supporting information issued by the Department. Even though the site is in agricultural use, this may not necessarily be a factor to restrict inclusion on the register. In accordance with the circular letter, the ongoing agricultural use has no part to play in this instance.

- 6.9. The subject site, is in an area in need of housing and the site is suitable for housing, in accordance with section 5(1)(a)(i) and (ii) of the Act. In addition, given that the majority of the site is not in use for the purpose for which it was zoned, it is vacant or idle for the purposes of section 5(1)(a)(iii) of the 2015 Act. I am satisfied that the entry of the subject site on the Vacant Sites Register of Cork County Council should be confirmed.

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 Ballynacorra, Midleton, County Cork was vacant or idle for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 9 January 2018 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

25 June 2018