



An
Bord
Pleanála

Inspector's Report ABP-302230-18

Type of Appeal	Section 11(3) Appeal against a notice under section 11(1).
Location	Oak Ridge, Ferrybank, Co Kilkenny.
Planning Authority	Kilkenny County Council.
Planning Authority VSL Reg. Ref.	VSR/20.
Site Owner	Finn Properties.
Date of Site Visit	22 October 2018.
Inspector	Stephen Rhys Thomas.

1.0 Introduction

- 1.1. This appeal refers to section 11(1) and (3) notices issued by Kilkenny County Council, stating that the site stands entered on the Vacant Sites Register at lands at Oak Ridge, Ferrybank, Co Kilkenny in accordance with the provisions of section 11(1)(a) of the Urban Regeneration and Housing Act 2015 (as amended).

2.0 Site Location and Description

- 2.1. The appeal site is large and irregular in configuration, located east of Waterford City at Ferrybank in County Kilkenny. The lands abut an existing housing estate, Oak Ridge. The site is readily accessed from a cul-de-sac road and slopes upwards towards rough grazing land. A portion of the overall site itself is not in use for agricultural purposes, being unfenced and not cultivated or managed in any noticeably way. This portion of the site is mostly overgrown with colonising vegetation and shows signs of previous construction activity. There are small heaps of builder's rubble and the site has been cleared and levelled in places, some time ago. The northern-most portion of the site is an agricultural field, in use for livestock grazing.

3.0 Statutory Context

3.1. Urban Regeneration and Housing Act 2015 (as amended).

- 3.1.1. The Notice issued in relation to residential lands and the accompanying reports have assessed the site on the basis of the tests outlined in Section 5(1)(a) of the Act.

3.2. Development Plan Policy

- 3.2.1. The **Ferrybank Belview LAP 2017** is the operative development plan. The site is located on lands that are subject to zoning R3 – Residential. This zoning allows for new residential development and other services incidental to residential development and reflects the densities which exist in existing housing developments at these locations. While housing is the primary use in this zone, childcare facilities and recreation will also be considered.

Section 4.5 Vacant Sites Levy

The Urban Regeneration and Housing Act 2015 introduced a Vacant Sites Levy as a site activation measure to ensure that vacant or underutilised land in urban areas is brought into beneficial use. This Plan will promote, encourage and facilitate the appropriate development of sites and areas in need of development and renewal in order to prevent:

- Adverse effects on existing amenities in such areas, in particular as a result of the ruinous or neglected condition of any land
- Urban blight or decay
- Anti-social behaviour, or
- A shortage of habitable houses or of land suitable for residential use or a mixture of residential and other uses

The levy can be applied on land designated as either “residential” or “regeneration”. For the purposes of implementing the levy, the following zones are designated:

Residential: Residential Arcadian, Residential Low Density, Residential, Protect and Enhance Existing Residential Amenity.

Regeneration: Urban Village, Business Industry and Technology Parks

These zones will be examined to determine if there are sites where the Vacant Site Levy is applicable under the provisions of Urban Housing and Regeneration Act 2015 and all associated regulations and guidance.

4.0 Planning History

4.1. Subject site

No planning history is recorded in the reports submitted by the planning authority.

5.0 Planning Authority Decision

5.1. Planning Authority Reports

- 5.1.1. Register of Vacant Sites Report - The site is zoned Residential (Low – Medium Density) in the Ferrybank Belview Local Area Plan 2009. The site is classified as residential land and has been vacant or idle for the last 12 months.
- 5.1.2. Response to Section 11 Submission Report – The site is zoned for residential purposes in the Ferrybank Belview LAP 2017. Site inspection 4 July 2018. A change of ownership has been noted, until the site is brought into active use, it remains on the register.

5.2. Planning Authority Notice

- 5.2.1. Kilkenny County Council advised the site owner that the subject site (Planning Authority site ref. VSR20) has not been cancelled on the Vacant Sites Register. The notice, issued pursuant to section 11 of the Act and dated 5 July 2018, stated that particulars of the site remain entered on the Vacant Sites Register and that further information can be obtained from the Council website.

6.0 The Appeal

6.1. Grounds of Appeal

- 6.1.1. The landowner has submitted an appeal to the Board, against the decision of Kilkenny County Council to retain the subject site on the Register. The grounds of the appeal can be summarised as follows:
- The appellant states the ownership of the site has changed. The property was formally held by Thornfield Properties Limited in trust for Stephen Finn of Finn Properties Limited. Since his death, 6 July 2008, there have been a number of legal proceedings culminating in agreement between various beneficiaries and a High Court ruling of 8 February 2018.
 - Finn Properties are now free to develop the lands and a planning application is to be lodged soon.
 - The appellant believes they are entitled to avail of section 17(i) of the Act and that the exceptions of section 17(ii) do not apply.

The appeal is supported by a copy of the section 11(1) Notice, a copy of the submission letter regarding the Council Notice stating an intention to retain the site on the register, the response of the Council and a counter response from the appellant, and the section 11(3) Notice dated 5 July 2018.

6.2. Planning Authority Response

The appeal appears to relate solely to a change of ownership and the provisions of section 17 of the 2015 Act. The appellant has received correspondence to the effect that the Council believe that the site fails to fall within the criteria of section 17(2) of the Act and would continue to be liable for the levy. Additional documentation to support the appellant's claim have been requested by the Council but not yet received.

6.3. Further Responses

The appellant has responded to the Council's submission by submitting a Shareholders Report that demonstrates that Thornfield Properties Limited and Finn Properties Limited are not 'associated companies'. In addition, the appellant has produced a number of legal documents to support their claim that the provisions of section 17(2)(b) and (c) of the 2015 Act do not apply. The appellant is not trying to avoid the levy and is actively making efforts to develop the site.

7.0 Assessment

7.1. Introduction

- 7.1.1. An appeal under section 11 of the Act, requires that the burden of showing that the site is no longer a vacant site is on the owner of the site. Section 11(5) of the Act states that the Board shall determine whether the site was no longer a vacant site. The subject site stands entered on the Kilkenny County Council VSR dated 14 December 2017. It is the purpose of a section 11 appeal to determine if a site is no longer a vacant site. It therefore follows, that the original reasons and considerations for the placement of the site on the register are not subject to the appeal. Consequently, my assessment is limited to the tests for a vacant site outlined by the 2015 Act, for the time period between the date of entry on the register and the date of the relevant notice.

- 7.1.2. By reference to the planning authority notice of 5 July 2018 it is stated that the subject site is entered on the Vacant Sites Register. The subject site is located in an area zoned R3 – Residential. Section 4.5 of the LAP sets out to promote the redevelopment and renewal of areas that are in need of regeneration, in order to prevent a combination of impacts including a shortage of habitable houses or of land suitable for residential use or a mixture of residential and other uses. This assessment takes into account the characteristics of the site in the context of Section 5(1)(a) residential land.
- 7.1.3. The appellant states that due to a change in ownership the levy should not apply. The new owner of the site is actively making efforts to lodge a planning application. The planning authority's response is that they believe that the change of ownership has occurred between associated companies and so therefore the levy can apply. In any case, the planning authority make the point that the site is still vacant and should remain on the register.
- 7.1.4. In the interests of clarity, section 11(1) of the 2015 Act, instructs the planning authority to give written notice to the owner of any site that stands entered on the register, outlining the following:
- (a) stating that the site stands entered on the register,*
 - (b) setting out such matters as are entered in the register in respect of the site,*
 - (c) stating that there shall be charged and levied for each year beginning with 2018 in respect of each vacant site in relation to which a market value has been determined and that stands entered on the register a levy in accordance with section 15, and*
 - (d) informing the owner that he or she may make submissions in respect of the entry to the planning authority in writing within 28 days after the date of such notice.*

The Notice shall be issued no later than the 1 November 2018, Circular letter PL 06/2018 refers, a notice was issued on the 29 May 2018 and subsequent notice was served on the 5 July 2018. The land owner can appeal the decision of the planning authority, sections 11(4) and (5), state the following:

(4) On an appeal under this section the burden of showing that the site, or a majority of the site, is no longer a vacant site shall be on the owner of the site.

(5) Where the Board determines that a site is no longer a vacant site it shall give written notice to the planning authority who shall cancel the entry on the register in respect of that site.

Thus, the purpose of a section 11 appeal is to determine if the status of the site in question, is still a vacant site or is no longer a vacant site.

7.2. Change of Ownership

7.2.1. The appellant's principle issue is that the appeal site has changed hands and the levy should not apply. Both the appellant and the planning authority quote extensively from section 17 of the 2015 Act and the appellant has submitted a large amount of legal documentation to demonstrate their case.

7.2.2. Section 17 of the 2015 Act deals with the matter of Death or Change of Ownership and whether the levy should be charged on the vacant site. A change of ownership and the actual charging of the levy is a matter to be determined between the parties concerned, i.e. the planning authority and the owner of the vacant site. It is not a matter for this appeal, the purpose of which is to determine that a site is no longer a vacant site and give notice to the planning authority. In this instance, though the ownership of the site has consequences for the rate of levy, it has no impact upon the assessment of whether the site is no longer a vacant site.

7.3. Site development

7.3.1. The appellant has stated that now the ownership of the site has been agreed, efforts are afoot to lodge a planning application. The planning authority have made no comments in relation to such efforts and there is no information on the file to demonstrate to me that a planning application has been lodged. Irrespective of an imminent planning application, the Act is clear: the test for inclusion is the past condition of the site from the date of entry on the Register. I refer to Circular Letter PL7/2016, Appendix 3, that states: "where a vacant site has an extant planning permission associated with it, this should not be a consideration in determining whether to apply the levy. If such a site meets the criteria for a vacant site in respect of either residential or regeneration land, then the levy may be applied". In any case, clarity of ownership has no bearing on the making of a planning application other

than the requirement for the usual consents which may or may not be forthcoming. Should the site meet the criteria for inclusion or to remain on the VSR, the existence of an extant planning permission has no part to play in this instance.

7.4. Vacant Site

7.5. As I have already outlined the purpose of a section 11 appeal is to determine if a site is no longer a vacant site. I note that there is no record of a section 9 appeal with respect to the placement of the site on the register and I must assume that the owner made no such appeal and accepted the planning authority's decision. It is however, important to briefly examine the present condition of the site in the context of its placement on the register and the requirement for three criteria to be fulfilled under section 5(1)(a)(i), (ii) and (iii) of the 2015 Act (as amended):

(i) the site is situated in an area in which there is a need for housing,

(ii) the site is suitable for the provision of housing, and

(iii) the site, or the majority of the site is—

(I) vacant or idle, or

(II) being used for a purpose that does not consist solely or primarily of the provision of housing or the development of the site for the purpose of such provision, provided that the most recent purchase of the site occurred—

(A) after it became residential land, and

(B) before, on or after the commencement of section 63 of the Planning and Development (Amendment) Act 2018.

The applicant does not set out any grounds that the site is not in an area in need of housing or that the site is not suitable for housing. The appeal before me contains very little in the way of information to support the planning authority's decision to place the site on the register. However, the site is zoned for residential purposes and this indicates both a need for housing and the suitability of the site for housing. Sections 5(1)(a)(i) and (ii) are therefore met. I would however, note that in order to comply with Section 5(1)(a) a site must meet all of the three sections.

7.5.1. The overall site comprises the former disturbed ground (approximately 2.4 Hectares) associated with the construction of housing to the south and also a portion of

agricultural land to the north (approximately 2.8 Hectares). My observations of the smaller portion of the site found it to be largely overgrown and showing all the characteristics of lack of use over a long period of time. Grasses were long in length, colonising shrubs and trees were growing vigorously and the remnants of former construction activity were overgrown with vegetation. In my opinion, that portion of the site has performed no practical use or otherwise since it was placed on the register and it is most likely its condition has remained unchanged since and before the planning authority made its investigations in October 2017 and July 2018. However, the larger portion of the site, is fenced and in use for grazing, though I did not observe livestock on the day.

- 7.5.2. This is important because the majority of the site is in use for a purpose that does not consist solely or primarily of the provision of housing or the development of the site for the purpose of such provision. In this case the majority of the lands are in use for agriculture and are exempt from the levy. According to section 63 of the Planning and Development (Amendment) Act 2018, this is provided that the most recent purchase of the site occurred after it became residential land and before, on or after the commencement of section 63. In this instance, the land has been transferred, though not sold, after the land became residential land and before the commencement of section 63. In my view, though the majority of the land is in use for agriculture, the fact that the land has recently been transferred and such transfer occurred after the lands were zoned for residential purposes, must mean that the lands can be subject to the levy. I should point out to the Board that section 63 of 2018 Act, refers specifically to 'purchase' as opposed to 'transfer'. In my mind, the outcome of either purchase or transfer are the same and it is the intention of the amendment to address a situation whereby developers/builders could hoard lands and avoid the levy.
- 7.5.3. I am satisfied that the site is a vacant site in accordance with the terms of the provisions of section 5(1)(a)(iii)(II)(A) and (B) the 2015 Act. The site should remain on the register as a vacant site as defined by the entirety of section 5(1)(a) of the 2015 Act (as amended).

8.0 Recommendation

- 8.1. I recommend that in accordance with section 11(5) of the Urban Regeneration and Housing Act 2015 (as amended), the Board should give written notice to the planning authority that states the site stands on the register in respect of the lands at Oak Ridge, Ferrybank, County Kilkenny as the site remains a vacant site. Therefore, the entry on the Vacant Sites Register on the 14 December 2017 shall remain.

9.0 Reasons and Considerations

Having regard to

- (a) The information placed before the Board by the Planning Authority in relation to the site that stands entered on the Vacant Sites Register,
- (b) The grounds of appeal submitted by the appellant,
- (c) The report of the Planning Inspector and
- (d) That while the majority of the site is being used for a purpose that does not consist solely or primarily of the provision of housing or the development of the site for the purpose of such provision, the most recent purchase of the site occurred after it became residential land, and before, on or after the commencement of section 63 of the Planning and Development (Amendment) Act, 2018,

the Board considered that it is appropriate that a notice be issued to the planning authority to confirm that the site shall remain entered on the Vacant Sites Register.

Stephen Rhys Thomas
Planning Inspector

December 2018