



An
Bord
Pleanála

Inspector's Report ABP-302981-18

Type of Appeal	Section 9 Appeal against section 7(3) Notice
Location	Site at Chapelstown, Tullow Road, Carlow.
Planning Authority	Carlow County Council
Planning Authority VSL Reg. Ref.	VS/18/09
Site Owner	Carlow Estates Limited
Planning Authority Decision	Place on Register
Date of Site Visit	22 February 2019
Inspector	Una Crosse

1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by Carlow County Council on 17th October 2018 under Reference VS-18-09, stating their intention to enter the site at Chapelstown, Tullow Road, Co. Carlow on to the Vacant Sites Register (VSR) in accordance with the provisions of section 6(2) of the Urban Regeneration and Housing Act 2015.
- 1.2. The Notice is issued in respect of the provisions of Section 5(1)(a) and 5(2) of the Act.
- 1.3. There appears to be two owners from the folio details included by the PA – Carlow Estates (Folio 29895F) and Patricia McLoughlin (Folio 3131F).

2.0 Site Location and Description

- 2.1. The site comprises an overall area of c.7.3 hectares located on the Tullow Road in Carlow town and comprises a flat area of ground. The site has been disturbed in places to the south of the site. The site is adjoined to the south by the Tullow Road with a number of residential properties fronting the Tullow Road to the southeast, a linear strip of land addressing the Tullow Road to the southwest. To the west there is an existing residential development known as the Paddocks. To the north the site is adjoined by undeveloped lands also zoned residential 2. East of the site there are a number of properties and fields which address the public road to the east.

3.0 Statutory Context

3.1. URH ACT

- 3.1.1. Section 5(1)(a) of the Urban Regeneration and Housing Act 2015 states that in the case of a site consisting of residential land –
- 3.1.2. Section 5(1)(a) of the Act stated that a site is a vacant site if, in the case of a site consisting of residential land:-
 - (i) the site is situated in an area in which there is a need for housing,
 - (ii) the site is suitable for housing, and
 - (iii) the site, or the majority of the site, is vacant or idle.

3.1.3. Section 5(1)(a)(iii) has been amended by Section 63 of the Planning and Development (Amendment) Act 2018 which commenced upon coming into effect of the Act (19 July 2018). This section of the Act amends Section 5 of the Act of 2015 by substituting Section 5(1)(a)(iii) for the following:

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*".

3.2. Development Plan Policy

3.2.1. The site is located on lands zoned 'residential 2' in the Joint Spatial Plan for the Greater Carlow Graiguecullen Urban Area 2012-2018 which incorporates the Carlow Town Development Plan 2012-2018 (as extended). The zoning objective seeks to provide for new residential development, residential services and community facilities within the plan period 2012-2018.

4.0 Planning History

Ref. 18/332 – Permission granted on 8 January 2019 for amendments to Ref. 14/365 to provide 93 units with revised housing mix on site of 3.46 hectares.

Ref. 14/365 – Permission granted for 85 residential units on a 3.46 hectare site area.

Ref. 10/216 – Permission granted to extend Ref. 99/104.

Ref. 08/27 – permission granted to extend Ref. 99/104.

Ref. 99/104 – permission granted for 385 houses.

5.0 Planning Authority Decision

5.1. Planning Authority Reports and Responses

- 5.1.1. An initial report, undated, entitled referral report for internal departments and Irish Water outlines the site location, land use zoning and photographs of the site. This report, it is noted, is attached to an email dated 7 March 2018. A report was received from Irish Water (14/03/18) and notes that the site is serviced by water infrastructure and in terms of wastewater capacity, limited spare capacity available but subject to revision when ongoing feasibility study is completed.
- 5.1.2. A site report which is dated 25 April 2018 outlines the date of inspection (27 February 2018 & 16 April 2018), notes land is residential. It states that the site has been the subject of previous planning applications and is adjoined by residential development. It is stated that the appearance of the site detracts from the character of the area on what is a key approach road to the town, not in use with the existing entrance blocked with large concrete bollards and sections of concrete piping with some stockpiles of rubble and spoil on the site and the lower sections of block work and foundations/floor slabs for incomplete houses also visible.
- 5.1.3. The planning history, zoning, IW observations are outlined and it is stated that from a land registry search Carlow Estates and Patricia McLoughlin are the full owners. In conclusion it is stated that as per the details included in Appendix 1 of the report (Need for Housing on Sites consisting of residential land) that the site is situated in an area where there is a need for housing. In terms of suitability it notes that the site is situated on residentially zoned land and that there is an extant permission on the lands, there is water and wastewater capacity and that the site is vacant and idle. A section 7(1) notice is recommended. Notice dated 30th May 2018 was issued.
- 5.1.4. A response was received from Carlow Estates stating that the Council have not given due regard to local housing need and demand in the area and outlines section 6(4) of the Act. Owner actively developing land bank sequentially as demand arises with development of social housing ongoing in Browneshill which meets housing need requirement of the Act. Site has not been identified as not economically viable to do so as evidenced by lack of demand for houses in private housing market and difficulties in selling houses which have been constructed since 2012. A table of

housing sales is outlined. Works commenced on subject site in 2006 with considerable sums expended but due to lack of demand had to cease works in 2009 and private housing market has not recovered which is due to lack of population growth, employment and availability of finance. Houses in Browneshill Wood sold to Council due to lack of demand in private market. Given considerable experience in provision of housing in Carlow town well placed to assess economic viability. Owner outlines the capacity of the lands in question which based on current sales would exceed private housing demand for next 31 years. They state that the permission granted on the site for 85 units is subject to agreement with Carlow County Council and Tuath Housing Association and subject to agreement, intention to begin once works on site PL17/154 are complete as wish to develop lands sequentially. Currently assisting in meeting the housing needs of Council housing list. Noted that 3 of the 5 active construction sites in Carlow are for social and affordable housing with requirement in section 6(4) requiring house prices and cost of rental are examined with houses prices in the area at a lower level than cost of construction. Site forms part of a larger area where Ref. 99/104 permitted and part completed.

- 5.1.5. A report entitled Site Report No. 2 dated 10 August and co-signed on 14 August 2018 outlines some of information in first report but also noted that a further inspection was undertaken on 8th August 2018. The response received from the owner to the Section 7(1) Notice is outlined and summarised which it is stated has been considered. Stated that site continues to be vacant as has been so for the preceding 12-month period, appearance of site detracts, site subject of extant permission and is serviced. Reference is made to core strategy requirement for 1434 units. Case that site is part of larger holding is not relevant as the land bank is at separate locations at a remove from the subject site.
- 5.1.6. Conclusion and recommendation outlined is as per the conclusion and recommendation for the Section 7(1) notice outlined above with recommendation that site included on the Register and a Section 7(3) notice is issued with a note to state that the Section 7(3) Notice should be issued for residential land.

5.2. Planning Authority Notice

- 5.2.1. A Section 7(3) notice was issued by Carlow County Council on 17th October 2018, stating their intention to enter the site at Chapelstown, Tullow Road, Carlow on to the

Vacant Sites Register (VSR) in accordance with the provisions of section 6(2) of the Urban Regeneration and Housing Act 2015. The Notice of entry states that the site is being entered on the Register in accordance with Section 5(1)(a) and 5(2) of the Act.

6.0 The Appeal

6.1. Grounds of Appeal

The grounds of appeal are summarised as follows:

- Notice not served on all Registered owners and served on persons not registered (Sean & Niall McLoughlin) with entire basis of procedure based on fundamental mistake;
- Site ownership can be easily identified and Council have powers to request information but have chosen not to do so with no Notice served on Patricia McLoughlin or her personal representatives as required and fundamentally unfair and contrary to the scheme of the Act and Constitutional and property rights with Notice not properly served.
- Noted Lostwell Limited beneficial owners of lands included in the Notice which continue to be registered in the name of Patricia McLoughlin, now deceased.
- Site should not be entered on the VSR;
- Legislation requires housing need analysis must be referable to the area in which the land is located and not appropriate nor relevant to refer to broad general statements as is the case with references to house prices rising and cost of renting increasing not synonymous with housing need.
- Broad general statements the source of which has not been provided and undermines the basis of the Notice served.
- Study appears to cover the whole of Carlow town and its environs which is not specific enough as the study must focus on the specific as any analysis if carried out in the manner described in PA report will always identify a house need but defeats the whole purpose of the study which is fundamental to the Act which seeks to identify certain areas where there is a housing need and identify land within same.

- Completely unacceptable that PA have adopted approach they have which is generalised vague and ill-defined completely inconsistent with the Scheme.
- If correct approach undertaken would show history of housing provision in the area, above all other areas in Carlow, has been provided with significant amounts of housing including social housing.
- Council have not given due consideration to the local housing need and demand within the area.
- Site not developed as not economically viable to so, evidenced by lack of demand for houses in private housing market and difficulties encountered in selling houses constructed on part of the overall holding in the area since 2012;
- Site within Notice was part of overall holding granted permission under Ref.'s PD3698 & 99/104 construction of 810 houses at Brownshill/Chapelstown with an analysis of sales on foot of the permissions outlined and noted 331 units built from 2003-2011 and since 2016 six units sold to private market and 10 to the Council.
- Private market has not recovered with industry experts advising this is due to lack of population growth, lack of well paid employment and lack of available finance;
- Cost of construction has substantially increased since 2015 and not economically viable to commence work on their site for provision of private housing.
- Remaining part of lands has potential to accommodate c.255 units which based on sales figures for the site would suffice for 31 years.
- On expiration of 99/104, four new permissions granted for different portions of the land bank with many sold to Council/Housing Association for social housing with works on the subject site due to commence when Ref. 17/154 completed.
- Permission sought (now granted) Ref. 18/332 for 93 houses for social housing on the site amending Ref. 14/365.
- Figures provided outline lack of demand for private housing in the area.
- Three of four active housing sites in Carlow are for social housing with house prices at a lower level than cost of construction and if insist on placing site on VSR then request zero rate applied with Council report failing to assess whether there is a viable private market in the area.

- Site is not vacant as valid extant permission on the lands with extant permission Ref. 14/365 expressly incorporating earlier 99/104 permission which has been implemented with Council report referring to blockwork and foundations with approach of Council completely inconsistent with scheme of the Act;
- Council formed view that site was vacant for 12 months preceding from 30th May 2018 which was date on which the date of proposed entry was signed with report of Planner of 10th August 2018 referring site is vacant for preceding 12 month period although period not defined with report replete with unsubstantiated findings.
- Given site is part of larger holding with implemented permission (Ref. 99/104) Council have failed to show site has been vacant for minimum of 12 months prior to proposed entry given considerable development that has already taken place.
- Reference in report to appearance of site detracting from character of the area with Council relying on land being characterised as a regeneration area as this is the only basis where such an analysis is relevant.
- Council have sought to rely on works implementing permission on the site as detracting from the visual appearance of the area with 2 years remaining on the extant permission which amended the original implemented permission.

6.2. Planning Authority Response

The response from the Planning Authority to the Appeal Submission is summarised as follows:

- PA carried out a land registry search to confirm Carlow Estates and Patricia McLoughlin as registered owners of the land comprising the site with a company search also carried out to confirm directors of Carlow Estates with notices issued on this basis.
- No notice was issued to Patricia McLoughlin in the knowledge that she was deceased;
- Section 7(1) Notice responded to by Sean McLoughlin of Carlow Estates with no valid basis in the appeal to question the procedures applied with requirements of Act in relation to giving written notice of proposed entry fulfilled.
- Housing need analysis prepared by the PA identified a housing need in Carlow Town based on core strategy in current development plan, house prices and cost

of renting with reference to daft.ie and PRTB, social housing waiting list and additional more detailed area specific housing need analysis would not be warranted nor it is considered a requirement of the Act.

- Matter of whether it is economically viable to develop the site is an issue addressed by the housing need analysis prepared by the PA;
- Existence of extant permission not a valid consideration where the site continues to be vacant or idle as per Circular PL7/2016.
- Appeal refers to consideration of appearance of site in planners report but conclusion and recommendation not grounded on issue of appearance of the site or in relation to regeneration land but based on Section 5(1)(a).
- Opinion of PA that site was vacant or idle for 12 months preceding the issuing of the Notice with aerial photography and google street view images substantiating same.

6.3. Appellant Response to Planning Authority Response to Appeal

The response from the Appellant to the Planning Authority's Response to the Appeal Submission is summarised as follows:

- Not instructed by Estate of late Patricia McLoughlin and understand Grant of Probate issued to her Estate with names of her Executors a matter of public record with no Notice served on same,
- Obtained copy of Carlow County Council's housing analysis report (attached as appendix A) and note as previously detailed housing need analysis must be referable to the area in which the site is located and not appropriate or relevant to refer to broad general statements as is the case as detail provided does not fulfil analysis required;
- Study covers whole of Carlow Town and environs and does not specifically deal with the area in which the land is located with rental and house prices for County Carlow and not categorised by town or area and not relevant;
- Fundamental to implementation of the Act that analysis is detailed, scientifically based and sociological study must be completed for each area within an urban area with the figures provided not analysed in any way with the detail presented

vague, poorly researched, inappropriately focused and not in accordance with obligations;

- Analysis is a pre-requisite to the issue of any Notice in respect of land;
- Analysis fails to take into account matters including number of new houses built in Carlow 2017-2018, price achieved, tenure, cost of construction and number of new schemes commenced;
- Given supply is determined by demand this information is most useful in determining whether there is a functioning market;
- Circular PL7/2016 from Department on application of the levy states that in deciding on the application of the levy that LA's should also take account of the viability of developing vacant sites in specific locations with the analysis of the PA not examining viability anywhere in the report with broad statement about increase in house prices provided and while house prices have risen it's from a very low base and not at a level to allow for viable commercial building.
- No analysis undertaken as to the economic viability of constructing houses in the area (nature of costs outlined) with Part V costs for recent application provided indicating average cost of 3-bed semi-det unit €235,000 with Council using daft.ie sales figure of €175,488 with no breakdown of house type or criteria with Q4 Daft.ie House price report indicated average semi-det unit to be €137,000 which is well below cost of construction indicating same not to be viable.
- Acknowledged by Council in recent interview with RTE (19 January 2019) (appendix F) that it is not economically viable to develop land in the County, house prices remain low and private housing market has not recovered in any noticeable post-crash making construction of houses for the private rented market unviable.
- Acknowledged by all parties that there is a continuing demand for social houses in Carlow with limited number of developments commenced with almost twice as many units commencing for social housing.
- Lack of demand for private housing, lack of skilled labour in construction industry and increase in materials continues to present challenges.
- Reference to previous submission and plans for the site outlined with consent of Carlow County Council required for Housing Agency to proceed and informed

consent not forthcoming with decision under review and cannot commence the development until determination on same from Council and if permitted work could commence immediately.

7.0 Assessment

7.1. Process

- 7.1.1. There are two matters of process which I will address. Firstly, inclusion of land for the purposes of the Section 7(3) Notice with no notice issued to the landowner of same and secondly the 12-month period the.

Ownership & Notice

- 7.2. As outlined above there are two owners from the folio details included by the PA – Carlow Estates (Folio 29895F) and Patricia McLoughlin (Folio 3131F). In their response to the appeal the PA state that no notice was issued to Patricia McLoughlin in the knowledge that she was deceased. However the land owned by the late Patricia McLoughlin was nonetheless included within the boundary of the site subject of the Section 7(3) Notice but the owner of same or estate thereof was not notified and therefore had no recourse to appeal the Notice. The site in question comprises the large area of the site addressing the Tullow Road and is stated on the land registry documentation that it is 3.89 hectares in area. The appellants representatives state that it is fundamentally unfair and contrary to the scheme of the Act and contrary to the Constitutional and property rights of the owners for this notice to be considered further in circumstances where it has not been properly served on the appropriate parties.
- 7.3. The appellants also state that Lostwell Limited are the beneficial owners of lands which lands continue to be registered in the name of Patricia McLoughlin now deceased. Therefore the PA issued a Notice relating to lands but did not notify the landowner of same. This I would suggest is completely inappropriate procedurally, and as I state above, they have included the lands within the site subject of the Notice but by failing to issue a Notice have prevented the owner of the land from appealing the inclusion of the land on the Register which is a fundamental provision of the Act. If they were not going to issue a notice to the site owner they should not have included the land owned by this owner within the site boundary. The Board

have no role in amending site boundaries or issuing notices to parties not heretofore notified and in this regard I consider that the Board have no other option but to cancel this Notice for this reason.

12 Month Period

- 7.3.1. While I consider that the Notice should be cancelled for the reason outlined above, there is a further matter of process which I consider requires consideration. This relates to the matter of the 12 month period prior to the placing of the site on the Register as per the Section 7(3) Notice currently appealed. Firstly, in respect of placing a site on the Register, Section 6(2) of the Act is very clear that a planning authority shall enter on the register a description including a map of any site in its functional area which was, in the opinion of the planning authority, a vacant site for the duration of the 12 months preceding the date of entry.
- 7.3.2. The subject site was placed on the Register on 17th October 2018 meaning that the relevant 12 month period would have commenced on 18th October 2017. I note that the PA in their report dated 10 August 2018 state that the site continues to be vacant and idle and has been so for the preceding 12-month period. I would note that the reports prepared by the planning authority refer to site inspections which informed their placing of the site on the register. In relation to the subject site it is stated in the report prepared to support the inclusion of the site on the register (site report No. 2) that the site was inspected on 27 February 2018, 16 April 2018 and on 8th August 2018. Therefore, if the site was inspected for the first time for the purposes of the Vacant Site Levy process on 27 February 2018, notwithstanding the anecdotal evidence, the planning authority cannot categorically state that in respect of the definition of vacant or idle in section 5(1)(a)(iii) of the Act that the site was vacant and idle on 18th October 2017 which would comprise the commencement of the 12-month period.
- 7.3.3. In their response to the appeal the PA reference the 12 month period and reference aerial photography and google street view images to substantiate the 12-month period. The aerial photographs are not dated. Two of the google streetview images are dated one April 2011 which is irrelevant in my opinion and the other May 2017 which the Board may wish to rely upon given it is the same year that the 12 month period commences. However, I do not consider that the intention of the legislation in

establishing the 12-month period sought to rely upon google but rather sought that PA's would establish a clear record of sites in their area and timelines for same by reference to inspections of same. Therefore I do not consider it is appropriate to rely upon a google image and the relevant date for the commencement of the inspection process is the first PA inspection on 27 February 2018.

- 7.3.4. While this may appear to be a tedious approach to the matter at hand, the Act is very clear that the relevant period for consideration is the 12 month period preceding the date of entry. I would therefore suggest that it is incumbent on any planning authority to have details of inspections which can clearly indicate that in their opinion the site was vacant or idle for the 12 months preceding placing the site on the Register. I would therefore suggest that the Notice issued should be cancelled on the basis of these defects in the process and should the PA so wish, and subject to the determination of the Board in respect of other matters raised herein, the process could be recommenced by the planning authority.

7.4. Need for Housing

- 7.4.1. The need for housing in the area is a matter which is addressed in considerable detail in the documentation on file. Firstly, the Act refers at Section 5(1)(a)(i) to the site being situate in an area in which there is a need for housing. 'Area' is not defined by the Act. Section 5(1)(a)(i) is to be determined by reference to Section 6(4) which outlines the matters to be addressed when determining housing need. The PA have prepared a 3 page document attached as Appendix 1 to the Report of the Planning Officer and which is entitled Need for Housing on sites consisting of Residential Land. They address the 4 headings in Section 6(4) of the Act and note that the core strategy identifies a need for 1434 units for Carlow Town and Environs between 2015-2021. In terms of rent, rental prices in Carlow are outlined for 2014-2016 showing a slight year on year increase (data relates to 3-bed semi-detached house). House prices provided are for County Carlow and are specifically stated not to be disaggregated by town. Social housing units per LAP town are outlined with 775 for Carlow. The final criteria is that the number of habitable houses available for purchase or rent is less than 5% of the total number of houses in the area. For Carlow is it stated that daft sale and rental figures indicate 106 units for sale and 12 for rent (Nov. 2017) which is less than 451 with 451, 5% of the number of houses in the area which is stated to be 9,032.

7.4.2. The appellants consider that the assessment of housing need provided by the PA is wholly inadequate in that it does not address the area within which the site is located. The appellants agent provides significant local detail in terms of the Tullow Road of the town where the appellant has undertaken considerable development since receiving permission under Ref. 99/104 for 385 dwellings. I consider that the detail provided in the PA 'report' is limited to the bare minimum of what is required. However, as I note above, 'area' is not defined in the Act and having regard to Section 6(4) of the Act, while limited, the information required is set out. I do however consider that providing a house price figure for County Carlow as a whole is inappropriate given the broad range of settlements and rural housing available in the County. I note that the appellant has submitted that Daft House Price Report for Q4 2018 (PA reports refer to reports from 2015-2017). The 2017 report referred to by the PA refers to the average housing price in Carlow for Q3 2017 as €175,488. The 2018 report submitted by the appellant notes this figure has increased to €189,745. However page 12 of the report outlines the asking prices for 3-bed semi-detached in Carlow which is €137,000. I would note that the PA use the 3-bed semi-detached in their consideration of rent with figures provided for Carlow town but do not use this unit type for house price. In this regard I do not consider that it is appropriate to rely on an average County figure for house prices when the reports relied upon elsewhere by the PA (for rent) also include a figure for 3-bed semi-detached in Carlow particularly when the report provides such a figure. There is a considerable difference between the average house price in the County and the average asking price for a 3-bed semi-detached which will be an urban typology. Therefore I do not consider that the PA have provided sufficient evidence to determine that there is a housing need in the area.

7.5. **Suitability for Housing**

7.5.1. The matter of suitability for housing is not questioned and I note the site has an extant permission and therefore I consider that the matter does not require any further consideration.

7.6. **Vacant or Idle/Purpose**

7.6.1. The site was placed on the Register on 17 October 2018 following the commencement of Section 63 of the 2018 Act which amended Section 5(1)(a)(iii) of

the 2015 Act (19 July 2018). This is not addressed by the PA in their report recommending that a Section 7(3) Notice be issued although it is reflected in the Notice issued which refers to Section 5(1)(a)(iii)(I). To this effect, the definition of vacant or idle for the purposes of residential land comprises two parts (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*”.

- 7.6.2. While as I note above, the PA have not in my opinion provided sufficient evidence to determine a housing need in addition to the procedural issues outlined, the site comprises a large area of ground which was previously disturbed but which does not have a current use per se. The appellants argue that permission granted previously on the site under Ref. 99/104 was previously implemented and this permission has since been amended by Ref. 14/365 and I note a further permission granted to amend same under Ref.18/332. It is clear that development was commenced on the site but it is not clear when this work was undertaken. Notwithstanding, my concerns outlined above in relation to the 12-month period, I consider that insufficient evidence has been provided to determine that the site is not vacant or idle in this regard. In relation to part II of Section 5(1)(a)(iii) that being purpose, I do not consider this part of the Act is relevant as there is no evidence of the site having any reasonable purpose as would be interpreted by reference to the Act.

8.0 Recommendation

- 8.1. I recommend that in accordance with section 9(5) of the Urban Regeneration and Housing Act 2015, the Board should cancel that the site at Chapelstown, Tullow Road, Carlow was vacant or idle for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 17th October 2018 shall be cancelled.

9.0 Reasons and Considerations

Having regard to

- (a) the information submitted to 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 procedural error in respect of the inclusion of lands within the boundary of the proposed vacant site and the failure to issue the Section 7(3) Notice to the owner of same,
- (e) the absence of sufficient evidence to support the contention of the planning authority that the site was vacant and idle for the period of 12 months preceding the date of placing the site on the register, and
- (f) the Board is not satisfied that sufficient evidence has been provided to determine a housing need in the area

the Board considered that it is appropriate that a notice be issued to the planning authority to cancel the entry on the Vacant Sites Register.

Una Crosse
Senior Planning Inspector

April 2019