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Bord
Pleanála

Inspector's Report ABP-303497-19

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| Type of Appeal | Section 9 Appeal against section 7(3) Notice. |
| Location | Lands at Daly's Hill, Kilkenny. |
| Planning Authority | Kilkenny County Council. |
| Planning Authority VSL Reg. Ref. | VSR19-9. |
| Site Owner | Robertshill Ltd. |
| Date of Site Visit | April 2019. |
| Inspector | Stephen Rhys Thomas. |

1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by Kilkenny County Council, stating their intention to enter the Lands at Daly's Hill, Kilkenny 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 site is located to the west of Kilkenny City. The site adjoins housing at Roberts Hill to the south east, Fatima Place and Rothe Terrace to the east and housing along Circular Road (R695) to the north. The western boundary of the site is undefined, but the Breagagh River is located in this area. The large site is irregular in shape and has an undulating topography. The site is noticeably lower than surrounding housing estates and is characterised by a number of large spoil heaps and clumps of semi-mature tree groupings. The entire site is not divided into smaller paddocks or fields and comprises very rough poor grade grassland. Throughout the site are to found numerous small areas of dumping and litter, particularly close to laneways to the rear of existing houses. A small group of horses were grazing on the overall site.

3.0 Statutory Context

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

- 3.1.1. The Notice issued under Section 7(3) of the Act states that the planning authority is of the opinion that the site referenced is a vacant site. The Notice is dated 31 December 2018 and is accompanied by a map outlining the extent of the site to which the Notice relates.

3.2. Development Plan Policy

- 3.3. The Kilkenny City and Environs Development plan 2014-2020 is the operative development plan. The site is located on lands that are subject to zoning Mixed Use – 'Objective: To consolidate and facilitate the development of inner suburban sites for mixed use development which will allow for commercial and residential uses'.
Zoning Map Objective - Z1- Robertshill Mixed Use Zoning

1. No vehicular connection to be permitted between the Central Access Scheme and Kennyswell Road through the site.
2. Public open space to be provided along the Breagagh River, to form part of the Breagagh Regional Park.
3. Any residential component of the site to be readily accessible from the parklands.
4. An overall Framework Plan of the entire site shall be submitted at planning application stage.
5. Any development on the site must have due regard to the amenities of existing residences.

Objective 3A To promote the redevelopment 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.

The levy may be applied to all identified 'Regeneration' land and 'Residential' land in existing land use zonings. In particular, the areas covered by the following zoning objectives are considered to constitute regeneration land:

- General Business
- Mixed Use
- Business Park

Other regeneration zonings may also be identified in any relevant Local Area Plans.

4.0 **Planning History**

- 4.1. None stated for the subject site.

5.0 Planning Authority Decision

- 5.1. **Planning Authority Notice:** Kilkenny County Council advised the site owner that the subject site (Planning Authority site ref. VSR19-9) had been identified as a vacant site. The notice, issued pursuant to section 7 of the Act and dated 31 December 2018, stated that particulars of the site have been entered on the Vacant Sites Register.
- 5.2. **Register of Vacant Sites Report:** The site is zoned Mixed Use in the Kilkenny City and Environs Development plan 2014-2020, note Variation 4. The site is classified as regeneration land and has been vacant or idle for the last 12 months. The land is in a neglected state and there is evidence of dumping on the site and the character of the area is negatively affected. The site was inspected 10 October 2018. The report is accompanied by photographs and site location map.
- 5.3. **Register of Vacant Sites Submissions Report:** Given the discrepancies in the boundaries of the Folio maps, the Vacant site outline will be amended. A change of ownership will result in a nil levy and owners will be informed of this. The control of horses on the site is the responsibility of the land owner. After a site visit on the 18 December 2018, the condition of the lands remains unchanged. Section 7(3) notice to issue.

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 enter the subject site on the Register. The grounds of the appeal can be summarised as follows:
- The appellant states that though the site may appear vacant it is not idle because a number of administrative measures have taken place to bring the site forward for development. The appellant goes on to define the term 'idle' and considers that the act of preparing the site for development should render the site active.
 - As a relatively recent owner of the site, since June 2018 from NAMA, the owner has been working towards the submission of a Strategic Housing

Development, including the preparation of an EIAR, design proposals, section 247 meetings with the planning authority and so on.

- The site is constrained and not supported by road infrastructure. The Council will not permit access to the Kennyswell Road, but want access from the Central Access Scheme, not yet built. A LIHAF road scheme is imminent, Q1 2019. In addition, water services are restricted in the area and may require future upgrades to accommodate development. The Council's own development plan objectives have constrained/prevented development from taking place on the site.

In terms of section 6(6) of the 2015 Act, the appellant states the following:

- There are no ruinous structures on the site and the ongoing maintenance of the site to remove fly-tipping debris shows no lack of neglect.
- There is no evidence of anti-social behaviour having taken place.
- With regard to housing and population in the area (Kilkenny City), population has increased by 8.5% (inter-censal period) and a 4.4% increase in households. The number of vacant houses represents 6.4 % of the total housing stock for Kilkenny. The National Planning Framework projects a population growth scenario for Kilkenny of 1,100 persons per year up to 2026, which would require 407 housing units for the city and county. All of which can be accommodated by the 697 vacant units. The demographic analysis would suggest that there has not been a reduction in the number of people living or amount of houses in the area.
- The site does not affect public infrastructure and amenities within the meaning of section 48 of the 2000 Act. There are no public infrastructure and amenities in the area, in fact the area awaits the delivery of public infrastructure. The Council have not advanced plans for their lands in the vicinity of the site for much of the same reasons as above.
- The character of the site is defined by its adjacency to other agricultural lands in the wider area. Its lack of development does not render it at odds with surrounding development and it is likely that existing residential development

enjoy the proximity of greenfields that have remained undisturbed for many years.

6.2. Planning Authority Response

- The planning authority do not agree with the appellant's own definition of 'idle' in terms of land use.
- A regeneration site is not subject to the requirements of infrastructural serviceability; however, the Council consider that the site is serviced. The planning authority clarify the objective concerning a no-through route from Kennyswell Road to the Western Environs (LIHAF) road scheme. The site could take access directly from the Kennyswell Road (R695).
- The condition of the site is affecting the area by virtue of its neglected condition and evidence of dumping.
- Pre-planning (section 247) meetings have taken place with the appellant, dated 12 February 2019.

6.3. Further Submission - Appellant

The appellant disputes each point made by the planning authority as follows:

- The site is not serviced, access cannot be taken from the LIHAF road, as construction has only just started. In addition, there is limited capacity in the existing water services network. The appellant includes a memo of a meeting with the Michael Murphy Project Manager – Western Environs Infrastructure and Related Projects (December 2018), that outlines the infrastructural scenario for the area in terms of road and water services. An Irish Water pre-connection enquiry is also enclosed.
- With reference to the condition of the site and the lack of perimeter fencing. The appellant thinks that the erection of security fencing would in fact impact the character of the area. The existence of third party horses on the site has not been addressed by the Council, in terms of the Control of Horses Act 1996. The site is maintained by a local building contractor, thus not neglected.

6.4. Further Submission – Planning Authority

- The planning re-affirms their contention that the site can be serviced and include a definition from the NPF concerning regeneration land.
- Access to the site for illegal dumping or grazing of the site by horses by others could be controlled by better perimeter fencing. The lack of adequate fencing leads to activities that adversely affect the character of the area.
- The planning authority have submitted additional and more recent photographs of dumping on the site.

7.0 **Assessment**

- 7.1. 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 on the Kilkenny County Council VSR on the 31 December 2018.
- 7.2. By reference to the planning authority notice, the subject site comprises regeneration land for the purposes of the Vacant Site Levy. The subject site is located in an area zoned Mixed Use – ‘Objective: To consolidate and facilitate the development of inner suburban sites for mixed use development which will allow for commercial and residential uses’ in the current Development Plan. Objective 3A of the plan sets out to promote the redevelopment and renewal of areas identified having regard to the core strategy, that are in need of regeneration. My assessment takes into account the characteristics of the site in the context of Section 5(1)(b) regeneration land.
- 7.3. The appellant states that as recent owners of the site they have worked hard to prepare a planning application for the site, so the site is not idle. The appellant also states that the site is severely constrained by both the planning objectives of the Council and physical factors of a lack of road access and water services. In addition, the site is not ruinous or neglected and is maintained by a local building contractor. No anti-social behaviour is taking place on the site and the existence of the site has not impacted upon the population or number of houses in the area. The planning authority disagree with all of these points bar the population and housing analysis.

7.4. Section 5(1)(b) refers to lands considered to come within the meaning included for Regeneration Land and the tests for such sites are as follows:

(i) the site, or the majority of the site, is vacant or idle, and

(ii) the site being vacant or idle has adverse effects on existing amenities or reduces the amenity provided by existing public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) in the area in which the site is situated or has adverse effects on the character of the area.

7.5. Section 6(6) of the Act provides the parameters by which the planning authority, or the Board on appeal, shall determine whether or not the site being vacant or idle has adverse effects on existing amenities or reduces the amenity provided by existing public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) in the area in which the site is situated or has adverse effects on the character of the area for the purposes of this Part by reference to whether—

(a) land or structures in the area were, or are, in a ruinous or neglected condition,

(b) anti-social behaviour was or is taking place in the area, or

(c) there has been a reduction in the number of habitable houses, or the number of people living, in the area, and whether or not these matters were affected by the existence of such vacant or idle land.

The appellant has comprehensively tackled each aspect of a vacant site in the context of regeneration lands, I intend to do the same in the following sections.

7.6. **Vacant or Idle**

7.6.1. In terms of part (i), that the site, or the majority of the site, is vacant or idle, I note the current and long term condition of the site. Firstly, on the day of my visit I observed that the site was performing no productive role except for the ad hoc grazing of a small number of horses. On that matter, the appellant states their presence is not permitted and wishes their removal. There was also the existence of dumping to the rear of houses, but again not a permitted or productive use. Secondly, the planning authority state that the site has been vacant for the 12 months concerned. Finally, the appellant states that the recent owner of the site has been busy preparing plans for development and carrying out site investigation in advance of submitting a

planning application. The appellant also notes that the present condition of the lands, their greenfield character, that has probably been the case for some considerable time. In my view and taking account the appellant's and planning authority's statements, it is most likely that the site has remained in the same state for some time and most likely longer than the relevant period. I am satisfied that the site was vacant for the relevant period.

- 7.6.2. The appellant has offered an alternate definition of what should be considered in relation to activity that concerns a site's status in terms of the 2015 Act. They consider that the administrative activity taken to prepare documentation in advance of a planning application being lodged should be taken into account. The 2015 Act does not state the types of use that should be considered to lift a site from being vacant or idle. However, section 6(7) of the Act states:

In determining for the purposes of this Part whether a site was vacant or idle for the duration of the 12 months concerned a planning authority, or the Board on appeal, shall not have regard to any unauthorised development or unauthorised use.

- 7.6.3. It is clear that any unauthorised development or unauthorised use should not be considered for the purposes of the Act. In my mind, the Act's references to development and use depends upon a close relationship with the meaning of these words in the Planning and Development Act 2000 (as amended). Consequently, the definitions of 'development' and 'use' are helpful and serve to illustrate how a site should be assessed in terms of the vacant or idle status. I am not satisfied that the design process leading to a planning application or even on-site survey work could be considered as development or use in terms of the 2015 Act. The appellant's case that the site is not vacant or idle because of the exercise of preparing a planning application cannot be considered as meaningful use for the site so as to remove it from the register.

- 7.6.4. The appellant states that the owners acquired the site in June 2018, this is only 6 months prior to the site being entered on the register. This raises an interesting question, not raised by the appellant, in relation to the owner's ability to account for the use of the site over the relevant period. The previous owner has been identified by the appellant as NAMA, but there is no commentary from them on this file. It is

extremely likely that the site has not performed any beneficial use for some time. However, I am not satisfied that the appellant is in a position to account for any uses that may have occurred on the site during the relevant time period and before they acquired the site. Consequently, the site could be removed from the register as not all owners have had an opportunity to state their case in relation to the vacant or idle nature of the site during the 12 month period. However, as I have already outlined above, both the planning authority and the appellant agree that the site is and has been vacant for some time. The disagreement revolves around the definition of idle, which I am satisfied is also the case.

7.7. Adverse effects amenities/character of the area

- 7.7.1. The first matter is that of the '*land or structures in the area were, or are, in a ruinous or neglected condition*'. There are no buildings on the site, that I could discern and so the question of ruinous condition does not apply. The question of neglect is important for this appeal site as it is the target of fly-tipping and third-party horse grazing. The lack of secure perimeter fencing perhaps encourages the unfortunate activities that continue to occur on the site. The new owners have attempted to address these issues by contracting a local builder to maintain the site and remove dumped material. The owners have also engaged with the Council to remove the unwanted horses. All of this activity leads to the conclusion that the site is being maintained and yet the unfortunate activities persist. The Council's view is that dumping remains a problem and submit photographs from October and December 2018 and March 2019, all show evidence of dumping. On the day of my visit, dumping was also very obvious to the laneways running to the rear of houses along Fatima Place and Robert's Hill.
- 7.7.2. On a procedural point I note that the Council's photographic evidence, which is useful in illustrating the dumped material, commences less than three months before the site was entered on the register. Despite the evidence of illegal dumping having taken place and which undoubtedly continues to take place, the owner has stated that the site is constantly maintained by local contract. I find it difficult to disagree with the appellant that their site is neglected. In addition, the evidence presented by the Council only accounts for the latter part of the relevant period. I have to concede that the site, despite recent evidence of dumping, is neither in a ruinous or neglected condition.

- 7.7.3. In relation to Section 6(6)(b) '*anti-social behaviour was or is taking place in the area*', I note that there was very limited evidence of graffiti on the structures of the appeal site, but there was evidence of litter and dumping, as outlined above. The existence of illegal dumping appears to have been tackled by the owner, by contracting a local builder to continuously remove 'fly-tipped debris'. However, this anti-social behaviour persists as evidenced by the Council's photographs and my own observations. In terms of the 2015 Act, I am satisfied that anti-social behaviour was and is taking place in the area. The site therefore, satisfies section 6(6)(b) of the 2015 Act. In terms of the final consideration Section 6(6)(c), the planning authority have not raised any opposition to the appellant's thesis that population and housing has in fact increased in Kilkenny. I too take the view that, in overall terms the population and housing availability for Kilkenny City as a whole may well have increased. However, I note that individual census small area statistics for other parts of the city may show decline in certain areas.
- 7.7.4. In my view, the site meets the second parameter, that of anti-social behaviour was or is taking place in the area and given the inclusion of 'or' in the Act there is no requirement to meet all three. In these terms, the site should be considered a vacant site for the purposes of the Act.
- 7.7.5. The appellant has gone to considerable lengths to describe how the site is constrained and is not served by public infrastructure and facilities (as defined by section 48 of the 2000 Act). As the planning authority have pointed out these are criteria applicable to residentially zoned sites under section 5(1)(a) of the 2015 Act, this is a correct assumption up to a point. The appellant is entitled to suggest that there are no existing amenities or public infrastructure and facilities in the area to suffer the adverse effects of the vacant site. However, section 5(b)(ii) provides the inclusion of 'or' between infrastructure/amenities 'or' adverse effects on the character of the area. To be clear, it is the existence of anti-social behaviour, that was or is taking place and which adversely effects the character of the area that renders the site a vacant site in conjunction with section 5(1)(b)(i) of the Act.
- 7.8. The site is zoned for a use that includes regeneration. Given the foregoing, I conclude that the majority of the site was vacant or idle in accordance with section 5(1)(b)(ii) and (ii) of the 2015 Act. I am satisfied that the entry of the subject site on the Vacant Sites Register of Kilkenny County Council should be confirmed.

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 confirm the Notice stating that the site at Daly's Hill, Kilkenny, was a vacant site for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 31 December 2018 shall be deemed to take effect from that date.

9.0 Reasons and Considerations

- 9.1. 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 vacant and idle nature of the site and the adverse effects on the character of the area resulting from the anti-social behaviour that was or is taking place in the area, 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
Senior Planning Inspector

23 May 2019