



An
Bord
Pleanála

Inspector's Report ABP-303541-19

Type of Appeal	Section 9 Appeal against section 7(3) Notice
Location	Notice of Entry on the Vacant Site Register
Planning Authority	South Dublin County Council
Planning Authority VSL Reg. Ref.	217
Site Owner	Arbeten Ltd.
Planning Authority Decision	Place on Register
Date of Site Visit	27 July 2019
Inspector	Una Crosse

1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by South Dublin County Council in respect of a site located at the Former CB Packaging site, Ninth Lock Road, Clondalkn, Dublin 22. The subject site was entered on the Vacant Site Register on 18th December 2018 on the basis that the site was vacant under Section 5(1)(b) of the Act. The Notice was issued to Arbeten Ltd.

2.0 Site Location and Description

- 2.1. This large site comprises an area of 8.7 hectares located within Clondalkin Village. The site comprises an area of ground along the Ninth Lock Road to the east of the site which is disturbed and which previously accommodated CB Packaging and which has a wide entrance from the public road. The remainder of the site is largely undisturbed greenfield. The site accommodates a single storey dwelling no longer in use and is traversed by overhead power lines including a tower to support same. The site adjoins the existing Mill Centre shopping development and its attendant car park. There is a steel fence separating the site from same. The site is located at the junction of the Ninth Lock Road and the New Nangor Road. Along the New Nangor Road a large hoarding structure defines the site boundary with trees within the site along the boundary. The site is adjoined to the west by existing residential development.

3.0 Statutory Context

3.1. URH ACT

- 3.1.1. The Notice issued under Section 7(3) of the Act states that the PA is of the opinion that the site referenced is a vacant site within the meaning of Section 5(1)(b) and 5(2) of the Act. The Notice is dated 18th December 2018 and is accompanied by a map outlining the extent of the site to which the Notice relates.
- 3.1.2. Section 5(1)(b) of the Urban Regeneration and Housing Act 2015 states that in the case of a site consisting of regeneration land -
 - (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.

3.2. Development Plan Policy – South Dublin County Development Plan 2016-2022

- 3.2.1. The site is zoned TC in the CDP the objective of which is to protect, provide for and/or improve Town Centre facilities.
- 3.2.2. The South Dublin County Council Development Plan 2016-2022 was varied (Variation 1 & 2) on 21st May 2018 with Chapter 11 varied to include Section 11.1.2 which provides that lands zoned Objective REGEN (regeneration), TC (town centre), DC (District Centre), VC (village centre) and LC (local centre) are included for the purposes of Regeneration as defined in the 2015 Act.

4.0 Planning History

- 4.1. **Ref. SD13A/0100** – Permission granted for a retail/commercial development (3099 sq.m gross) including a supermarket, 3 retail units and office fronting the Ninth Lock Road.
- 4.2. **Ref. SD09A/0306 (ABP-PL06S.236791)** – permission granted on appeal for mixed use development with a gfa of 19,361 sq.m comprising office accommodation, discount foodstore, 4 retail units arranged in 2 blocks over a single storey basement car park.
- 4.3. **Ref. SD07A/0377 (ABP-PL06S.228178)** – permission refused on appeal for a mixed use and residential development comprising 322 residential units, 3655 sq.m retail floorspace in 12 retail units, crèche, medical clinic art centre/theatre/community facility and ancillary uses all over basement car park.

5.0 Planning Authority Decision

5.1. Planning Authority Reports

- 5.1.1. An initial site inspection report which is dated 13 November 2018 responds to a series of questions and outlines that the site is a regen site, responds yes to anti-social behaviour, yes to land or structures in a ruinous or neglected condition and yes to the site having adverse effects on the existing amenities or adverse effects on the character of the area. It is stated that it is proposed for entry onto the VSR and photos of the site are attached. A Section 7(1) Notice of Entry dated 1 November 2018 was issued to the owner.
- 5.1.2. A response to same was submitted on behalf of the owner and notes that the site owner acquired the site in 2018 with background to the owner and associated companies outlined including site ownership details. Various site surveys and feasibility studies have been carried out. Scale and location of the site as a single land bank is unprecedented in Dublin outside a SDZ with the scale necessitating significant amount of logistics and project management. Various constraints on site including high voltage power lines requiring a wide wayleave. Development proposals have been formulated and pre-application consultations requested with Council. Project timelines are indicated and considered that placing site on the VSR would hinder its development potential.
- 5.1.3. A second PA report, entitled Register of Vacant Sites Planning Report and which is dated 17th December 2018 refers to inspection dates of 15 September 2016 and 13 November 2018. It outlines the site details, location, planning history, zoning and ownership and the responses to the Section 7(1) Notice received are summarised. It comments that the site is a prominent and substantial brownfield site within the built up area of Clondalkin. The previous facility, CB Packaging has been demolished. It states that there was no evidence of any recent activity on site at the time of the site visit. It states that the submissions received have been considered by the PA and the proposals to progress development are welcomed but that proposals alone are insufficient to determine that a site is no longer vacant or idle with the subject site vacant/idle for a number of years. It is has not been demonstrated to the satisfaction

of the PA that the majority of the site had not been vacant or idle for the preceding 12 months.

- 5.1.4. In relation to adverse effects it states that given the scale and prominent location to the north of Clondalkin within an existing building up area it is considered that the site being vacant or idle detracts from the amenities of the surrounding area and adversely effect the character of the area. It states that the subject lands show no signs of care or maintenance, particularly in the area of the former CB Packaging site to the north of the Mill Centre. Lands to the east are overgrown and unkempt and considered on this basis that the lands or structures are in a ruinous or neglected condition. It is stated that at the time of the inspection there is evidence of dumping, broken glass and broken fencing on the former CB Packaging site adjacent to the North Lock Road which it is considered demonstrates that anti-social behaviour was taking place. It is stated that there is an existing dwelling at the north-eastern corner which does not appear to be in use. It is stated that having regard to all of the above that it is considered that the subject site being vacant or idle has adverse effects on existing amenities.
- 5.1.5. The recommendation outlines that the site comprises one of the most substantial brownfield sites within the built-up area of Dublin prominently located to the north of Clondlakin centre where public services are available. It is zoned TC in the Plan, has been idle for a number of years and in accordance with Section 5(1)(b) is a vacant site which is suitable for regeneration and should be entered on the Register.

5.2. **Planning Authority Notice**

- 5.3. Planning Authority decided under section 7(3), dated 18 December 2018 to issue a notice stating that the PA is of the opinion that the site is a vacant site within the meaning of Section 5(1)(b) of the Act.

6.0 **The Appeal**

6.1. **Grounds of Appeal**

The appellant's grounds of appeal are summarised as follows:

- Errors in the description of the Notice lands with maps appended to both Notices (Sections 7(1) & 7(3)) including lands not owned by appellant and excluding lands owned by appellant which are not vacant.
- Maps appended to Notices include 2 distinct and sizable areas which are not within the control or ownership of the appellant and are shaded yellow and green on map attached (Appendix 3 of submission) with Notices fundamentally flawed on this basis and entry should be removed;
- Council has excluded lands within appellants ownership from map attached to Notice shaded pink (Appendix 4 of submission) which are contiguous of notice lands and comprise an access route in regular and uninterrupted use and impermissible to ignore the excluded lands with no provision in the Act for Council to cherry pick an isolated portion of contiguous land with a view to strengthening entitled to deliver a notice in accordance with section 11(1);
- Exclusion of land shaded pink represents a procedural flaw and represents a further basis upon which each Notice is invalid and should be removed.
- Neither of the notices provides any detail as to basis of conclusion reached within meaning of Section 5(1) of the Act;
- Section 7(1) requires notices includes reasons for the proposed entry with the appellant required to be provided with detail of the reasons for which the action is being taken.
- Neither of the Notices meet requirements including: do not cite relevant provision of the 2015 Act, no detail on process by which land inspected or examined, unclear as to date appellant expected to pay levy, no detail provided leading to conclusion that site is vacant as per Section 5(1), no indication of specific period of time during which lands were vacant or idle.
- Council should have detailed clearly basis for conclusion on 12 month period;
- Flaws represent fundamental violations of the requirements of S.7(1) which prohibited the appellant exercising full entitlement to make written representations to the Council preventing appellant from ensuring that no portion of lands would be regarded as vacant or idle as of the date of December notice and hindered appellant in seeking to maintain strongest possible appeal;

- December Notice delivered after the deadline of 1 November 2018 prescribed by Section 11(1) of the 2015 Act as amended with original Act providing extremely generous period of time on the Council extended until 1 November 2018 which was ignored by the Council with notice issued on 18 December 2018.
- Council failed to have regard to evidence submitted in response to Section 7(1) Notice with copies of documents submitted to SDCC indicated at Appendix 6 of submission which includes correspondence detailing current status of the lands and progress being made to develop same which includes: lands acquired in June 2016, appellant in regular communication with Council with regard to proposals, extensive preparatory work undertaken including surveys etc, meeting held with Council and other public bodies including ESB and Irish Water;
- Notice nor any other communication indicate level of consideration given to material nor was there any effort to seek clarification or elaboration,
- Functionally illogical that certain divisions of Council would actively engage to develop site and other would conclude site vacant or idle which is a flaw in the Notice;
- Incorrect for Council to determine site was a vacant site for the 12 months prior to date of December Notice as documents submitted in response to Section 7(1) notice include photographs showing works and activity undertaken on the lands, reports including surveys and inspections on the lands, contracts in respect of works on the lands, engineering works undertaken on the lands and insurance details in respect of the lands and therefore not possible for Council to conclude lands vacant or idle.
- Lands have been subject of regular and extensive activity with Council fully aware of and active participant in much of the activity which includes preliminary environmental risk assessments, flood risk assessment, site investigations, topographical ground surveys, aerial drone surveys, clean up and clearance works.

6.2. Planning Authority Response

6.2.1. No response received.

7.0 Section 132 Notice & Response

7.1. Content of Notice

- 7.1.1. By Notice issued under Section 132 of the Planning and Development Act 2000 (as amended), dated 1 August 2019, the Board requested that the appellant and the planning authority submit details of the ownership of all folios within the appeal site identified as ID 217 as of 18 December 2018. It was also requested that the response should include the relevant folios including ownership details and accompanying maps for the entire site area identified as ID 217 which is subject of this instant appeal.

7.2. Response from Appellant

- 7.2.1. A response from the appellant was received on 21 August 2019 and outlines, that two areas of the site were not owned by the appellant on the relevant date. It also outlines that two unregistered areas (identified on the map as 6 & 7) and a possessory section (identified on the map as 8) are comprised in Deed of Conveyance and Transfer dated 20 June 2016 and made between a number of mentioned parties with the deed enclosed.

7.3. Response from Planning Authority

- 7.3.1. No response was received from the Planning Authority.

8.0 Assessment

8.1. Matters of Process

Prior to addressing matters related to whether or not the site is vacant or idle for the purposes of the Act, there are a number of procedural issues raised in the appeal which I will address in turn. The first matter relates to land ownership and the second to the date of issuing of the Notice as it relates to Section 11 of the Act.

8.1.1. Land ownership

The appellant states that there are two substantial parts of the site within the boundary of the site which are not within the appellant's control. They also state that

there is an area of ground contiguous to the site which is within the appellants control but which is not included within the boundary of the site. In respect of the latter I would note that it is not incumbent on the PA to include all lands within the appellants control within the site boundary. However in relation to the former, it is incumbent that when a notice is issued in respect of a 'site' as defined for the purposes of the Act that all owners of that said are notified of same and issued with the relevant Notices.

While stating, in the appeal, that the portions of the site coloured green and yellow are not within the ownership or control of the appellant they (the appellants) do not state whose ownership or control they are in at the present time. I would refer the Board to a letter submitted to SDCC in response to the Section 7(1) Notice, dated 28 November 2018 which relates to site ownership. It states that the Propiteer Group own indirectly through its wholly owned subsidiary Arbeten Limited the site at the former CB Packaging Site (ref. ID: 217). It attaches a group structure for the Propriteer Duddy Group and its subsidiaries. It then states that the Group have entered into a contract through its wholly owned subsidiary Moonlightblue Limited to purchase the Mill Shopping Centre and through the same subsidiary the property known as the Bungalow on the Ninth Lock Road. The folio map for same is included and I would note for the Boards information that this is the same area as is coloured yellow in the map at Appendix 3 of the subject appeal which the appellants claim they do not control or own.

To address this matter, as outlined in Section 7 above, I sought confirmation from both the PA and the appellant on the matter by way of a Section 132 Notice dated 1 August 2019. This sought details of the ownership of all folios within the appeal site identified as ID 217 as of 18 December 2018. It also required that the response should include the relevant folios including ownership details and accompanying maps for the entire site area identified as ID 217 which is subject of this instant appeal. A response was received from the appellant on 21 August 2019 which includes a map identifying all of the folios within the site within their ownership, as well as details of unregistered folios and a possessory element. It is clear that there are two areas within the site, annotated in yellow and green, which are not within the appellants ownership and for which details have now been provided.

Furthermore, the PA were informed that the site owner/appellant was not in control of the lands at the bungalow at the time of the response to the Section 7(1) Notice (28 November 2018) but included same within the lands subject of the Section 7(3) Notice without verifying who the owner of this site actually was. I consider that they had two options. Firstly, to serve the notice on the appellant in respect of their lands and the owner of the bungalow in respect of theirs or secondly, wait until the entire landholding within the Notice boundary was in the control of the appellant. In this regard I consider that the Notice should be cancelled on the basis of this procedural error. This would not prevent the PA recommencing the process when they are satisfied that the ownership of the site they intend to place on the Register is wholly within the ownership of the appellant.

8.1.2. Basis for Entry

The appellant contends that the Notices issued in respect of the site do not provide any detail as to the basis upon which the Council has concludes that the lands were vacant within the meaning of Section 5(1). I do not concur with this contention. The Notices issued both clearly reference both Sections 5(1)(b) and 5(2) of the Act. Section 5(1)(b) of the Act relates to regeneration sites which are defined in the Act and which I address in Section 7.3 & 7.4 below. Section 5(2) requires that sites are in excess of 0.05 hectares in area. Therefore I do not agree with the appellant that the notices are flawed in this regard.

8.1.3. Section 11 date

The appellant references in detail the provisions of Section 11 of the Act and changes to same in the 2018 Act which changed the relevant date from 1 June 2018 to 1 November 2018 and consider that given the Notice was issued on 18 December 2018 some 7 weeks after 1 November 2018 that it is flawed. I do not agree. Section 11 of the Act was included in the first instance to facilitate a reminder process to site owners whose sites were already entered on the Register following the issuing and confirmation by the Board, where relevant of Section 7(3) notices. The Section 11 Notice could therefore only be issued to sites already on the Register. The subject appeal is against the proposed entry on the Register in the first instance and therefore the provisions of Section 11 of the Act are not relevant.

8.2. Assessment of Section 5(1)(b) Tests

8.2.1. While I consider that the Notice should be cancelled for the procedural error in respect of the site ownership, I propose to address the substantive matters of Section 5(1)(b) should the Board have a differing view. 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.

8.2.2. The site must meet both tests and I will address each in turn.

8.3. **Vacant or Idle**

8.3.1. In terms of subsection 5(1)(b)(i), that the site, or the majority of the site, is vacant or idle, the appellants outline in significant detail their contention that the site was not vacant or idle for the 12 months preceding the site being placed on the Register having regard to the works undertaken to ready the site for development. These measures are outlined in paragraph 3.17 of the appeal and include environmental risk assessments, flood risk assessment, topographical ground surveys, aerial drone surveys, trial pits etc. They also outline the engagement with the Planning Section of the Council in respect of pre-application consultation meetings for the proposed development of the site.

8.3.2. While the endeavours to bring forward development on the lands by the appellant are acknowledged, seeking permission and the preliminary investigations and surveys required to inform the process, while a necessary part of the development process, serves to facilitate the granting of permission for the development of the lands rather than the activation of the development. The intention of the legislation is to activate development on sites and the 'works' outlined by the applicant do not comprise the activation of any use on the site. The site does not have any active use as is clear from the site photos attached and therefore I consider that the site can be considered vacant or idle for the purposes of Section 5(1)(b)(i).

8.4. **Adverse Effects**

8.4.1. In order to be considered a vacant site under Section 5(1)(b) a site must also meet the test outlined in Section 5(1)(b)(ii) that being that 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. This test is considered by reference to Section 6(6) of the Act which states that *'a 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.

8.4.2. I would note that the appellant does not address this section of the Act but the PA does address the first two matters in their report dated 17 December 2018. The first matter 6(6)(a) is whether the land or structures in the area were, or are, in a ruinous or neglected condition. The PA state that that the subject lands show no signs of care or maintenance, particularly in the area of the former CB Packaging site to the north of the Mill Centre. Lands to the east are overgrown and unkempt and considered on this basis that the lands or structures are in a ruinous or neglected condition. As I outlined above the appellant does not address the condition of the site and while the hoarding along the New Nangor Road is satisfactory, I would note that from many vantage points within the Mill Centre car park and along the Ninth Lock Road that the site could quite rightly be described as neglected. The PA refer to the existing dwelling at the north-eastern corner which they state does not appear to be in use however I do not consider it could be considered to be neglected or ruinous. However, the overall site, I would agree is in a neglected condition and would comply with Section 6(6)(a).

- 8.4.3. The second matter 6(6)(b) refers to anti-social behaviour which was or is taking place in the area. I would note that the PA states that at the time of the inspection there is evidence of dumping, broken glass and broken fencing on the former CB Packaging site adjacent to the North Lock Road which it is considered demonstrates that anti-social behaviour was taking place. Again I would note that the appellant does not address this matter. While there is some evidence of dumping the matter of anti-social behaviour is difficult to definitively assert. I would note that the site appears well secured.
- 8.4.4. Section 6(c) of the Act is not addressed by either the PA or the appellant therefore I do not intend to address the matter.
- 8.4.5. Leaving the issue of landownership addressed above aside, given that the site is not required to meet each of the three tests, the necessary parameters of Section 6(6) (a) would be met and in this regard the site would comprise a vacant site as defined by Section 5(1)(b).

9.0 Recommendation

- 9.1. I recommend that in accordance with section 9(5) of the Urban Regeneration and Housing Act 2015, the Board should cancel the entry on the register of site (Site ID 217) comprising the Former CB Packaging Site, Ninth Lock Road, Clondalkin, Dublin 22 was vacant or idle for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 18th December 2018 shall be cancelled.

10.0 Reasons and Considerations

- 10.1. 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 inclusion of lands within the boundary of the site to which the Notice relates which was not clearly within the ownership of the appellant the time the Section 7(3)

Notice was issued and the failure to notify the owner of that site as part of the process,

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

August 2019