



An
Bord
Pleanála

Inspector's Report ABP-303554-19

Type of Appeal	Section 9 Appeal against section 7(3) Notice.
Location	Lands at Bishop Birch Place/Hebron Road, Kilkenny.
Planning Authority	Kilkenny County Council.
Planning Authority VSL Reg. Ref.	VSR19-13.
Site Owner	Thomas Dermot McPhillips.
Date of Site Visit	19 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 Bishop Birch Place/Hebron Road, 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 appeal site fronts onto Hebron Road along its northern boundary and is elevated over Hebron Road by approximately 2- 3 metres. The western boundary fronts onto Bishop Birch Place. To the south is an Aldi store with warehousing and light industrial units to the south of this. To the north east on the opposite side of Hebron Road is St Kieran's Cemetery which is accessed from directly opposite the appeal site. To the north of the appeal site is O' Loughlin Gaels GAA Club. Approximately 150m to the west of the development beyond the roundabout is Nolan Park GAA Stadium. The general area on Hebron Road is mixed use in character with a number of mature housing estates, a halting site as well as car sales showrooms, tyre outlets, maintenance repairs and services, agri machinery plant sales, engineering firms and other industrial and warehousing uses.
- 2.2. The brownfield site is not well maintained and can be easily accessed from a number of points. Areas of the site have attracted quite a degree of dumping and there is also evidence of fires.

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 – Z3- Hebron Road - To prepare an Urban Design Framework Plan for the Hebron Road as the main entrance corridor to the City.

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. Appeal Site

- 4.1.1. **ABP-302807-18.** Refuse permission for a religious cultural centre comprising as follows: 1 no. two-storey place of worship with architectural features including a dome and a turret over parapet level; 1 no. two-store community building incorporating a community hall with offices and ancillary accommodation on the ground floor and 2 no. two bedroom guest apartments over; 2 no. two storey 4-bedroom semi-detached ancillary residences (1 no. head of community house and 1 no. staff house); a two-storey community building incorporating two class rooms and

a halal shop on the ground floor with a community café over; the utilization of the existing entrance, access road, services and infrastructure connections as permitted and developed under planning permission ref: 08/859 (ABP ref: PL10.232618); provision of additional car and bicycle parking.

- 4.1.2. **PL10 .246365.** Permission refused for a service station, convenience shop and restaurant facilities with all associated site works. July 2016.
- 4.1.3. **PL10.232618 - 08/859** Application for a mixed use commercial scheme (office, leisure, medial, retail, childcare). The Board issued a split decision granting permission for the demolition of the existing buildings on site and the development of a hotel and discount foodstore, and refused permission for the development of the retail warehousing.
- 4.1.4. PA ref **14/29.** Extension of duration of permission 08/859. Granted on 19th March 2014 and permission valid till 12th November 2019.

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. VSR19-13) 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. The site was inspected 26 October 2018. The report is accompanied by photographs and site location map.

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 claims that they are not the legal owner of the site, the legal owner is Menesiah Ltd, of which Mr McPhillips is a director.
- The site is not zoned residential, it is zoned mixed use and residential uses are not permitted as the sole or primary use in this zoning.
- The site is a regeneration site and is neither vacant or idle. It has an extant permission for a mixed use development, 08/859 refers. Site clearance works were carried out and an Aldi supermarket occupies part of the overall site. An application for a petrol filling station on part of the site was refused, partly in relation to the lack of an Urban Design Framework Plan for Hebron Road, ABP reference PL10.246365 refers. An Urban Design Framework has been published October 2017, the 'Hebron Road Urban Design Strategy'. Pre-planning meetings have taken place and permission was granted by the Council for a religious cultural centre that is now on appeal to the Board, ABP-302807-18 refers. Further discussions have taken place with planning officials to determine the best approach for the remainder of the site in the context of the urban design framework plan. The appellant maintains that because of the lack of an Urban Design Framework for the area as required by objective Z3 of the Development Plan, the Council have effectively prevented the development of the site.
- The appellant addresses each point associated with section 6(6) of the 2015 Act, as follows: (a) poor quality buildings were removed from the site to facilitate the Aldi development, the site is in good condition and well maintained; (b) the site and wider Hebron Road area is prone to fly-tipping, but the owner regularly tidies up and maintains the site; (c) the predominantly commercial and industrial character of the area means that housing numbers have not reduced in the area. The site meets none of the criteria outlined by section 6(6) of the Act.
- The boundary of site VSR19-13 fails to follow the boundaries of a wider Priority Development site identified in the 'Hebron Road Urban Design Strategy'.

The appeal is supported by a solicitor's letter that states that the title of the lands in question were transferred from Thomas Dermot McPhillips to Menesiah Ltd, dated 7 December 2015.

6.2. Planning Authority Response

The ownership of the site is registered in the Property Registration Authority to Thomas Dermot McPhillips since 23 February 2011 and no issue to this was raised in response to a section 7(1) notice.

In relation to section 6(6) of the Act and the site being vacant has adverse effects on the character of the area, the planning authority considers the following:

- (a) The neglected condition of the site, note image figure 1, submitted.
- (b) There is evidence of dumping, a section 14 notice under the Waste Management Act was served on the site owner (Thomas Dermot McPhillips) in November 2018.
- (c) There has been a decrease of three people in the area, as defined by the Census Small Area Statistics.

The 'Hebron Road Urban Design Strategy', includes an urban form concept map that details a number of priority development/redevelopment sites. VSL sites have been identified to coincide with these priority sites, including the appeal site.

6.3. Further Response

The appellant notes that no response in relation to ownership with reference to the section 7(1) notice was issued by the planning authority, but the matter is now clarified in relation to the appeal.

The owner has made efforts to restrict vehicular access to the site and reduce the opportunities for illegal dumping.

The site is not suited to a multiple house scheme and so it cannot impact upon the population of the area.

The deferral of a decision until 29 April 2019 by the Board, hinders the commencement of development of the site, ABP-302807-18 refers. In addition, a planning application has been lodged for the remainder of the landholding and is due for a decision in May 2019, PA reference P19/152 refers.

The site owner has taken considerable steps to improving the site since its placement on the register in November 2017 and significant steps have been taken to secure planning permissions since the adoption of the framework plan for the area.

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. 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 they are not the owner of the site, but a director of the company that owns the site. The site is not zoned residential and so residential uses are not supported by the Development Plan, in addition the boundary of the vacant site does not accord with the Priority Development Site strategy of the urban design framework for the area. The appellant’s main contention is that the site has a complex planning past and the lack of an Urban Design Masterplan for the area stymied any development of the site. Matters have changed, and development proposals are either on appeal or under consideration at present. In relation to section 6(6) of the 2015 Act, the appellant maintains that ruinous buildings were removed from the site and that the condition and appearance of the site has been improved. The planning authority confirm their assertion that the site is affecting the

character of the area, through the prevalence of fly-tipping and clarify the categorisation of sites in use/occupied but would benefit from redevelopment.

7.4. Time Period – 12 Month Duration

- 7.4.1. The Board may wish to note recent VSL appeals in Kilkenny that relate to procedural issues and specifically to the relevant time period. The 2015 Act (as amended) requires the Board on appeal to look at the past condition of the site and determine if the site was vacant or idle, section 9 states.

(2) On an appeal under this section the burden of showing that the site was not a vacant site for the duration of the 12 months concerned is on the owner of the site.

(3) Where the Board determines that a site was not a vacant site 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 in accordance with section 6 (2) it shall give written notice to the planning authority who shall cancel the entry on the register in respect of that site.

- 7.4.2. The relevant time period for this appeal extends 12 months back from the date on which the site was entered on the register, in this instance 31 December 2018. I note that the planning authority have stated that the site has been vacant for the duration of 12 months and I also note a site inspection date of 26 October 2018.

- 7.4.3. The relevant time period is a very important factor and one upon which the 2015 Act is quite plain in its interpretation, section 6(2) states as follows:

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.

- 7.4.4. All other sections pertinent to this appeal repeatedly refer back to the 12 month period. The planning authority should provide a clear chronology to confirm site visits and provide a definitive assessment of the duration of twelve months. In this instance the planning authority have not adequately accounted for the duration of the twelve month period. From my observations of the site and the records of the planning authority, it is probable that the site has been in the same or similar condition for

some time. In this regard the appellant has stated the initial removal of derelict buildings from the site and the ongoing issues of fly-tipping that have and continue to occur at the site. It is likely that the site has been inactive or idle for the relevant time period, but it is not clear from information presented by the planning authority that the relevant time period has elapsed and the condition of the site cannot be understood without doubt.

- 7.4.5. Even though it is likely and probable that the lands have been vacant or idle for the relevant time period I cannot be certain. For this reason alone the site should be removed from the register. This does not preclude the planning authority from recommencing the process and implementing the 2015 Act in terms of allowing the relevant 12 month time period to elapse. Despite this procedural error, I shall continue to assess the appeal in its entirety.

7.5. Vacant or Idle

- 7.5.1. In terms of part (i), that the site, or the majority of the site, is vacant or idle, I note the grounds of appeal on behalf of the site owner that state the lands were cleared of derelict buildings in advance of the construction works associated with the Aldi development. No actual use for the site has been advanced by the appellant other than the claim that the process of seeking planning permission should be seen as a use. I note the appellant's comments in referring to the planning process and frustration at the lack of an urban design masterplan for the area, that in their view has arrested the development of the site. The premise made by the appellant that the site could not be developed because of the lack of an urban design masterplan is not so compelling considering that the Aldi development was permitted and had been constructed before the adoption of the Hebron Road Urban Design Strategy in October 2017. The 2015 Act does not indicate that administrative activity in relation to a site, such as the preparation of a masterplan or obtaining planning permission should be considered to deem a site not vacant or idle. Though the owner may have been frustrated by perceived administrative blockages, I do not consider that the activities listed by the appellant comprise either site works or a permitted and ongoing use of the lands during the relevant period.

7.6. Adverse effects amenities/character of the area

7.6.1. The first matter is that of the '*land or structures in the area were, or are, in a ruinous or neglected condition*'. The adjacent Aldi store and associated car park is well maintained and landscaped, this is in contrast to the condition of the appeal site. On the day of my site visit I observed that the bulk of the site towards the rear and adjacent to the Aldi car park harboured a large amount of litter, domestic refuse, possible builders waste, tyres and burnt out furniture. The front of the site nearest the public road was clear of waste and just appeared a little unkept. The planning authority's impression of the site was similar and raised a level of concern that apparently warranted a section 14 Notice under the Waste Management Act to be served on the owner. It would appear that the owner is making an effort to maintain the site but has and continues to fail, given the presence of so much waste. The site may not be ruinous but it has in the past and continues to show signs of neglect and this is manifested by the large amounts of waste to be found on the site. The site therefore accords with section 6(6)(a) and 6(6)(b) of the 2015 Act, because the lack of a rigorous maintenance regime allows anti-social behaviour to continue to take place in the area.

7.6.2. In terms of the final consideration Section 6(6)(c), the planning authority have stated that there has been a fall in population between the 2011 and 2016 census periods. The population for the Small Area (097063057) fell from 219 to 216 persons. Consequently, there has been a reduction in the number of people living in the area, but how this is attributed to the existence of the site and its condition is unclear. In my view, the site meets the first and second parameter and given the inclusion of 'or' in the Act there is ultimately no requirement to meet all three. The site could be considered vacant or idle for the purposes of the Act. However, as outlined above, I am not satisfied that the site has been entered on the register in an appropriate manner. The landowner has been disadvantaged because the relevant time period of 12 months has not or may not have elapsed. It is this procedural error that in my mind requires the site to be removed from the register.

7.7. Other Matters

7.7.1. With reference to the statements made by the appellant that Thomas Dermot McPhillips is not the legal owner of the site, Menesiah Limited is, of which Thomas Dermot McPhillips is a director. The planning authority highlight that Thomas Dermot McPhillips is recorded as the owner of folio 34677F and the issue was not raised in

earlier submissions. It seems to me that the planning authority have done all they can to alert the relevant person with regard to the inclusion of the site on the register, Thomas Dermot McPhillips, who happens to be a company director of the new owner Menesiah Limited. In any event, an appeal has been made and the placement of the site on the register challenged. In very broad terms the notice has served its purpose and the application of the levy, if applied at all, may be subject to further challenge. If the matter of ownership is in question, then it is for the Council to recommence the process of placing the site on the register from the start once title is confirmed if that is necessary at all. No further action is warranted on this matter with regard to the appeal now before the Board.

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 the Notice stating that the site at Bishop Birch Place/Hebron Road, 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 removed.

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 recorded date of site inspection, (26 October 2018) provided by the Planning Authority in its submitted documentation,
 - (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.

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.

Stephen Rhys Thomas
Senior Planning Inspector

05 July 2019