



An
Bord
Pleanála

Inspector's Report

ABP-303750-19

Type of Appeal	Appeal against a Section 18 Demand for Payment
Location	Callan Road, Kilkenny
Planning Authority	Kilkenny County Council
Planning Authority VSL Reg. Ref.	VSR18-13
Site Owner	Hadview Taverns Limited
Planning Authority Decision	Demand for Payment
Date of Site Visit	17 th April 2020
Inspector	Erika Casey

1.0 Introduction

- 1.1. This appeal refers to a Section 15 Notice of Demand for Payment of Vacant Site Levy issued by Kilkenny County Council, stating their demand for a vacant site levy for the year 2018 amounting to €42,000 for a site located at Callan Road, Kilkenny (VSR18-13).
- 1.2. The appeal site has one stated registered owner, Hadview Taverns Ltd.

2.0 Background

- 2.1 The Notice of Proposed Entry on the Vacant Sites Register was issued to Hedview Taverns Limited on the 3rd of November 2017. On the 7th December 2017, the Notice of Entry on the Vacant Sites Register was issued to Hedview Taverns Limited. No appeal was made in respect of the Notice of Entry on the Vacant Sites Register.
- 2.2 A valuation pertaining to the site was issued by Kilkenny County Council on the 22nd of May 2018 under Section 12(4) of the Urban Regeneration and Housing Act 2015. The value of the site was determined to be €1,400,000. A further notice pursuant to Section 11(1) of the Urban Regeneration and Housing Act 2015 was issued on the 29th of May 2018.
- 2.3 A Notice of Demand for Payment of Vacant Site Levy under Section 15 of the Urban Regeneration and Housing Act was issued to Hedview Taverns on the 24th of January 2019 for the value of €42,000. The appellants have appealed the Demand for Payment Notice issued pursuant to Section 15 of the Urban Regeneration and Housing Act.

3.0 Site Location and Description

- 3.1 The subject site with an area of 1.54ha ha is located to the south west of Kilkenny City Centre. It is bound by the Callan Road to northwest and the N76 to the north east. The site itself is greenfield in character and undeveloped. To the south, are further undeveloped lands. To the north, is a housing development known as

College Gardens. Hotel Kilkenny and further residential development is located to the north east.

4.0 Statutory Context

URH ACT

4.1 The Notice issued under Section 7(1) of the Act states that the PA is of the opinion that the site referenced is a vacant site for the following reasons:

1. The site is zoned in the Kilkenny City and Environs Development Plan to accommodate residential development,
2. The site is situated in an area in which there is a need for housing,
3. The site is suitable for the provision of housing, and
4. The site, or the majority of the site, is vacant or idle.

4.2 These provisions relate to Section 5(1(a)) of the Act. Section 5(1)(a) of the Act as amended by Section 63 of the Planning and Development (Amendment) Act 2018 states 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 where there is a need for housing,
- (ii) The site is suitable for the provision of housing and
- (iii) The site, or the majority of the site, is 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.

4.3 The Act defines 'residential' land at Section 3 as follows:

"residential" land means land included by a Planning Authority in its development plan or local area plan in accordance with section 10(2)(a) of the Act 2000 with the objective of zoning for use solely or primarily for residential purposes, and includes any structures on such land."

4.4 Section 18 of the Act states that the owner of a site who receives a demand for payment of a vacant site levy under section 15 may appeal against the demand of the Board in 28 days.

The burden of showing that:

- (a) the site was no longer a vacant site on 1st January in the year concerned, or
- (b) the amount of the levy has been incorrectly calculated in respect of the site by the Planning Authority,

is on the owner of the site.

5.0 Development Plan Policy

5.1 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 objective Phase 1 Residential. It is stated: *“Phase 1 lands are those where the major expansion of green field residential development will take place over the period of the plan.”*

5.2 Objective 3A of the plan states: 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.

6.0 Planning History

Application Reference 16/593

6.1 Permission granted in August 2017 for a development comprising the construction of a residential development comprising 30 no. residential units consisting of 22 no. four

bedroom two-storey detached houses and 8 no. four bedroom two-storey semi-detached houses, the construction of a new vehicular access onto Callan Road to the south-west of the existing gateway which will be closed; the construction of a new foul sewage pumping station and a new stone wall boundary to the Callan Road and all associated site works.

Application Reference 06/256

6.2 Permission granted in September 2006 for a development comprising the construction of 65 no. residential units including 1 no. 6 storey apartment block containing 4 no. 1 bedroom, 24 no. 2 bedroom and 4 no. 3 bedroom apartments (32 no. apartments in total) over a single basement level containing 49 no. car parking spaces. An extension of duration permission was granted under Application Reference 11/364.

Application Referenced 98/889

6.3 Permission refused in October 1998 for a development comprising of estate development works including access road, open space, services, road entrance and ancillary related works to facilitate 15 no. residential sites and two no. sites for residence/guesthouse use.

7.0 Planning Authority Decision

Planning Authority Reports

7.1 A Vacant Site Report (19.10.2017) was prepared for the site outlining the date of the site visit (14.03.2017), zoning, and the type of site for the purposes of the Act which in this case is 'Residential' land. It is stated that the site is suitable for housing and is located in an area in need of same. Having regard to the above criteria and information, it is considered that the site should be included on the register.

7.2 A further Vacant Site Report was prepared on the 4th of December 2017 in response to a submission made by the landowner. This noted:

- Until the site is actually brought into active use, it remains a vacant site under the legislation.
- It is noted that the land is being used for agricultural purposes; however, the site concerned is not being used for the purpose for which it was zoned.

- The map will be altered to reflect the road improvement scheme along the Callan Road.

8.0 The Appeal

8.1 Grounds of Appeal

8.1.1 An appeal prepared by Jim Brogan on behalf of the landowner was submitted to the Board on the 20th of February 2019. The grounds of appeal can be summarised as follows:

- State that the information entered on the VSR is incorrect as the landowners name is Hadview Taverns Limited whereas, the notice and entry to the VSR states Hedview Taverns Limited. Submit that the Council have not complied with the requirements of the legislation and the entry is invalid.
- Note that a planning application was lodged to the Council in September 2016 seeking permission for 30 residential units. Further information was requested on the application including a site specific flood risk assessment. The preparation of the response to the further information request necessitated an extension on the application. The final decision to grant permission was issued in September 2017. The landowner then entered into further discussions with the OPW regarding the Flood Maps for the area.
- The Council's notice of their intention to enter the site onto the VSR was served 6 weeks after the final grant of permission. The short time frame between the issue of the grant of permission and the entry of the site as a vacant site is unreasonable.
- Note that there were a number of issues that impacted on the development of the site including the provision of a road improvement scheme on the Callan Road and a new footpath along the site frontage. It was also necessary to install new drainage works on the site to reduce risk of flooding in College Garden on the Callan Road. There were also further difficulties arising from the road improvement works on the Callan Road which impacted on the drainage services infrastructure of the site. Currently in consultation with the Council to resolve these issues. The resolution of these problems with the Council has prevented the commencement of works on the lands. The problems have arisen because of the issues generated through the implementation of the road

improvement scheme on the Callan Road. State that the full range of drainage services required to enable the permitted housing development to be developed do not exist. Furthermore, note that it has not been possible to raise the necessary finance to enable construction to commence because of the need to have these matters resolved.

8.2 PA Response

- Note that the owners of the site have been communicated with on numerous occasions and on no occasion was the matter of the landowners name raised. State that the entry on the register was corrected on the 28th of February 2019 and that there are no companies registered with the CRO as Hedview Taverns Limited.
- The site has been zoned for residential use since 2002. The existence of an extant permission has no part to play in the criteria for inclusion as a vacant site.
- Contend that the site is suitable for the provision of housing by reference to Section 6(5) of the Act. The site is zoned for residential use. The Planning Authority considers the site is serviced.
- A road improvement scheme was carried out on the Callan Road 2017. The scheme involved the removal of the existing wall and the provision of a footpath/cycleway and a controlled pedestrian crossing by the Council, which otherwise the developers would have had to carry out or contribute towards.
- The site is served by a surface water network. Improvements to this network are required in order to facilitate the development, as would be the case with most development sites.
- At all stages the Council consulted and responded quickly to any proposals/queries from the land owner's engineers. The site has permission since 2006.

8.3 Further Response

- Note that the Council have acknowledged their non-compliance with the legislation and corrected the register without any formal notification to the land owner. Consider that the notifications relating to the vacant site issued by the Council are invalid.

- Repeated references to the grant of permission in 2006 are irrelevant. The subject site was not acquired by the current owners until June 2015. Whilst the 2006 permission had been extended, there was no realistic prospect of it being implemented within the extended deadline. Reiterate the difficulties with progressing the current permission on the site and that a reasonable period of time should have been allowed for its implementation before any decision was made to enter the site on the Vacant Sites Register.
- State that the works undertaken by the Council as part of the road improvement scheme seriously compromised the provision of an essential part of the surface water and foul water drainage services infrastructure for the permitted development. No development can take place as the necessary services to enable it to commence are not available.
- State that at the time the site was entered on the register, CFRAM mapping identified the bulk of the site as being within Flood Zone A or B. Notwithstanding the grant of permission issued by the Council, this mapping was something relating to the physical condition of the land within the site which might affect the provision of housing. The mapping indicated that there were serious flooding issues that might have implications for the development of the subject land for housing and the site. Accordingly, it should not have been entered on the Register.
- Reiterate that it has not been possible to raise the necessary finances to develop the site due to outstanding drainage issues which need to be resolved.

9.0 **Assessment**

9.1 This appeal relates to a Section 15 Demand for Payment. In accordance with the provisions of the legislation there are 2 key criteria to consider:

- (a) the site was no longer a vacant site on 1st January in the year concerned, or
- (b) the amount of the levy has been incorrectly calculated in respect of the site by the Planning Authority.

I will consider each of these in turn.

The site is no longer vacant

- 9.2 The Board should be aware that the provisions of Section 18(2) of the Act does not specify whether the applicant must demonstrate whether the site constitutes a vacant site as per the provisions of Section 5(1) (a) i.e. that the site constituted a vacant site in the first instance when the Section 7(3) Notice was issued or whether they must demonstrate that notwithstanding the Notice issued, that development has taken place on the site and it is no longer vacant as of the 1st of January 2019.
- 9.3 For the purposes of this assessment, I will consider both scenarios.

Is it a Vacant Site

- 9.4 Section 5(1)(a) of the Act sets out the criteria for a vacant site consisting of 'Residential' land. By reference to the Planning Authority notice, the subject site comprises 'Residential' land for the purposes of the Vacant Site Levy. The subject site is located in an area zoned Phase 1 Residential. This assessment takes into account the characteristics of the site in the context of Section 5(1)(a) residential land.

The Need for Housing in an Area

- 9.5 This it to be determined by reference to section 6(4) of the Act
- (a) The housing strategy and the core strategy of the Planning Authority.
 - (b) House Prices and the cost of renting houses in the area.
 - (c) The number of houses qualified for social housing support in accordance with section 20 of the Housing (Miscellaneous Provisions) Act 2009 and that have specified the area as an area of choice for the receipt of such support and any changes to that number since the adoption of the Planning Authority's development plan.
 - (d) Whether the number of habitable houses available for purchase or rent was less than 5% of the total number of houses in the area.
- 9.6 I have reviewed the reports submitted by Kilkenny County Council with respect the subject vacant site. It is stated that the site is situated in an area in which there is a need for housing. I note however, that there is no other information on the file to support this contention in accordance with the criteria set out under section 6(4) of

the Act. Whilst the PA may have prepared more detailed information regarding housing need in the County to support the entry on the vacant site register, this information is not before me and in the absence of same, I cannot determine this issue further. The Board may wish to consider requesting such information from the PA to assist in their determination of this appeal. However, it should be noted, I consider that there is a procedural error with the notice which I will address further below.

Suitability of the Site For Housing

- 9.7 Suitability of the site for housing is to be determined by reference to Section 6(5) of the Act
- (a) the core strategy,
 - (b) whether the site was served by the public infrastructure and facilities (within the meaning of section 48 of the Act 2000) necessary to enable housing to be provided and serviced, and
 - (c) whether there was anything affecting the physical condition of the lands comprising the site which might affect the provision of housing.
- 9.8 Under the Core Strategy, the housing allocation for Kilkenny City is 2,977 persons by 2020. I note the planning history of the site which includes an extant permission for 30 no. units (application reference 16/593). The site is located within the existing urban area and is served by existing infrastructure.
- 9.9 The appellant contends that the development of the site has been delayed due to significant surface water issues that have to be addressed arising from works undertaken by the Council in relation to the improvement of the Callan Road. This is contested by the Council who note that the upgrade of the surface water network would be the case on most development sites. Whilst the difficulties highlighted by the appellants are noted, I would concur with the view of the Council that the nature of the necessary upgrade works to the surface water drainage infrastructure on the site are not such that they would preclude the site being developed for housing or for such housing to be serviced.

9.10 It is also detailed by the appellants that the time the entry to the VSR was made that CFAM mapping identified the site at risk of flooding and that accordingly, the site should not have been entered on the register.

9.11 I do not concur however, that the identification of potential flood risk on the site would have precluded the future development of the lands for housing. Table 5.1 of the Planning System and Flood Risk Management – Guidelines for Planning Authorities sets out the Justification Test for Development Management. The guidelines detail that where development has to take place in areas at risk of flooding, the risks should be mitigated and managed through the location, layout and design of the development to reduce such risks to an acceptable levels. As noted by the appellant, a site specific flood risk assessment was undertaken in relation to the site which concluded that the site was not at risk of flooding. I do not consider that the identification of the site at the time of entry on CFRAM mapping negated the suitability of the lands for housing.

9.12 The appellant's main contention regarding the suitability of the site for housing is that there is an extant permission on the site and that there were delays in implementing this permission due to circumstances beyond their control.

9.13 Whilst permission has been granted on the site (application reference 16/593), construction activity has not commenced. From the site visit, it is evident that the site remains vacant and idle and no development has commenced on the site. In the matter of a current planning application or indeed an extant planning permission for the site, the Act is clear; the test for inclusion is the past condition of the site from the date of entry on the Register. I refer to Circular Letter PL7/2016, Appendix 3, that states: *"where a vacant site has an extant planning permission associated with it, this should not be a consideration in determining whether to apply the levy."*

Vacant or Idle

9.14 The definition of vacant or idle as it relates to residential land states that the site, or the majority of the site is:

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

- (A) after it became residential land, and
- (B) before, on or after the commencement of section 63 of the Planning and Development (Amendment) Act 2018.

The Site was Vacant or Idle

9.15 From the documentation on the file, I am satisfied that at the time the notice of entry was made, the site was idle. The site was an undeveloped greenfield site. Whilst I note some of the earlier submissions made by the landowner to the PA stated that the lands were in agricultural use, at the time of my site visit, there was no evidence on site to substantiate this claim. There was no evidence of any livestock on the site nor was it in use for any tillage purposes.

12 Month Period

9.16 The Board may wish to note that the entry of a number of sites in Kilkenny onto the Vacant Site Register have been canceled on appeal due 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

9.17 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 the 7th of December 2017. 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 the 14th of March 2017.

9.18 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.”

9.19 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. It is likely at the time the site visit was undertaken by the PA that the site had 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 had elapsed and the condition of the site cannot be fully understood without doubt.

9.20 Even though it is likely and probable that the lands had 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.

The site is no longer vacant as of the 1st of January 2019

9.21 .At the time of my site visit, it was noted that the site remains vacant and idle and no development has commenced.

Levy Calculation

9.22 A Notice of Demand for Payment of Vacant Site Levy under Section 15 of the Urban Regeneration and Housing Act was issued to Hedview Taverns on the 24th of January 2019 for the value of €42,000. The site was valued at €1,400,000.

9.23 The levy rate applicable in this instance is 3%. It is evident, therefore, that the levy calculation has been correctly calculated.

Other Matters

9.24 It is also contended by the appellant that the entry of the site onto the register is invalid as the notices were issued to the incorrect landowner name. The PA highlight that the error was very minor, that the matter was not raised by the landowner, despite the fact that the Council had communicated with them on a number of instances and that the register has now been corrected.

9.25 It seems to me that the Planning Authority have done all they can to alert the relevant landowner with regard to the inclusion of the site on the register. The error is de minimus in nature and I do not believe the rights of the landowner have been prejudiced. In any event, the appellants have appealed the payment of the levy and

in this regard, the notice has served its purpose. No further action is warranted on this matter with regard to the appeal now before the Board.

10.0 Recommendation

10.1 I recommend that in accordance with Section 18 (3) of the Urban Regeneration and Housing Act 2015 (as amended), the Board should cancel the Notice of Demand for Payment of Vacant Site Levy as the site was not a vacant site as of the 1st of January 2019 and was not a vacant site on the 20th of Feb 2019, the date on which the appeal was made. The demand for payment of the vacant site levy under Section 15 of the Urban Regeneration and Housing Act 2015 is, therefore, cancelled. In accordance with Section 18(4) of the Urban Regeneration and Housing Act 2015 (as amended), the Board confirm that the amount of the levy has been correctly calculated in respect of the vacant site.

11.0 Reasons and Considerations

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 Planning Inspector,
- (d) The recorded date of the site inspection, (14.03.2017) provided by the Planning Authority in its submitted documentation and 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,
- (e) The absence of documentation to support the contention that there is a housing need in the area,

the Board is not satisfied that the site was a vacant site on the 1st of January 2019 and was a vacant site on 20th of February 2019, the date on which the appeal was made. The demand for payment of the vacant site levy under Section 15 of the Urban Regeneration and Housing Act 2015 is, therefore, cancelled.

Erika Casey

Senior Planning Inspector

17th April 2020